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

IN RE:

FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.
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NOTICE OF FILING ON THE PUBLIC RECORD DOCUMENTS PREVIOUSLY FILED UNDER SEAL RELATED TO BANA'S MOTION FOR SUMMARY JUDGMENT

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

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

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

with this Court's October 4, 2013 Order Upon Mandate.

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

BANA previously filed under seal the documents listed below on August 5, 2011, September 27, 2011, and October 17, 2011. In compliance with this Court's Order Approving Joint Proposal, BANA now files the following documents on the public record:[2]

BANA'S MOTION FOR SUMMARY JUDGMENT AND RELATED FILINGS			
No.	**Document**	**Date Filed Under Seal**	**Filing Status**
BANA's Motion for Summary Judgment			
1	BANA's Motion for Summary Judgment and Incorporated Memorandum of Law	August 5, 2011	Publicly filed with redactions (attached)
2	BANA's Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment	August 5, 2011	Publicly filed with redactions (attached)
3	Declaration of Daniel L. Cantor (without exhibits)	August 5, 2011	Publicly filed with redactions (attached)

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

BANA'S MOTION FOR SUMMARY JUDGMENT AND RELATED FILINGS			
No.	**Document**	**Date Filed Under Seal**	**Filing Status**
BANA's Reply to Plaintiffs' Opposition to Motion for Summary Judgment			
4	BANA's Reply Memorandum of Law in Further Support of its Motion for Summary Judgment	September 27, 2011	Publicly filed with redactions (attached)
5	BANA's Reply to Plaintiffs' Response to Defendant's Statement of Undisputed Material Facts and Statement of Additional Material Facts in Opposition to Defendant's Motion for Summary Judgment	September 27, 2011	Publicly filed with redactions (attached)
6	Declaration of Daniel L. Cantor in Support of BANA's Reply Memorandum of Law in Further Support of its Motion for Summary Judgment (without exhibits)	September 27, 2011	Publicly filed with redactions (attached)
BANA's Opposition to Plaintiffs' Request for Judicial Notice			
7	BANA's Opposition to Plaintiffs' Request for Judicial Notice in Support of Term Lender Plaintiffs' Opposition to BANA's Motion for Summary Judgment	September 27, 2011	Publicly filed (attached)
BANA'S Reply to Plaintiffs' Response to BANA's Evidentiary Objections			
8	BANA's Reply to Term Lender Plaintiffs' Response to BANA's Evidentiary Objections	October 17, 2011	Publicly filed with redactions (attached)

Date: Miami, Florida
December 6, 2013

By: /s/ Jamie Zysk Isani
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by transmission of Notice of Electronic Filing generated by CM/ECF on December 6, 2013 on all counsel or parties of record on the Service List below:

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

IN RE:

FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL NO. 2106

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DEFENDANT BANK OF AMERICA, N.A.'S MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

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CONTAINS INFORMATION THAT IS "CONFIDENTIAL" AND "HIGHLY CONFIDENTIAL" UNDER PROTECTIVE ORDER

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STATUTES AND RULES

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DEFENDANT BANK OF AMERICA, N.A.'S MOTION FOR SUMMARY JUDGMENT

Defendant Bank of America, N.A. ("BANA"), hereby moves under Federal Rule of Civil Procedure 56 for summary judgment. The facts and legal arguments upon which this motion is based are set forth in this memorandum of law, the statement of undisputed material facts, and the declarations of Robert W. Barone, Brandon Bolio, Daniel L. Cantor and Jeff Susman filed in support hereof.

PRELIMINARY STATEMENT

BANA is entitled to summary judgment dismissing Plaintiffs' breach of contract claim because the undisputed evidence shows that BANA did not breach its obligations under the governing Disbursement Agreement and Credit Agreement in performing its ministerial duties as Disbursement Agent and Bank Agent. Plaintiffs—[redacted]—assert that BANA should not have approved Fontainebleau's Advance Requests because there were various events that BANA allegedly "knew or should have known" caused the conditions precedent to fail. But Plaintiffs' 20/20 hindsight not only impermissibly seeks to expand BANA's contractual obligations by drafting into the agreements a vague duty to investigate, it turns a blind eye to the massive fraud that Fontainebleau perpetrated on both BANA and Plaintiffs (or their predecessors-in-interest). Indeed, the very same facts that Plaintiffs here claim BANA "knew or should have known" are the foundation for their recently filed action in Nevada state court action asserting that Fontainebleau's officers, directors and affiliates committed fraud and breached their fiduciary duties by knowingly making false and misleading statements in Advance Requests and other disclosures to the Lenders. Plaintiffs' claims fail for three categories of reasons.

First, the undisputed facts establish that BANA approved and funded Advance Requests only after receiving all required documentation, representations, warranties and certifications. Under the clear and unambiguous terms of the Disbursement Agreement and Credit Agreement, those facts bar Plaintiffs' claims. The agreements limit BANA's duties in approving Fontainebleau's Advance Requests to (i) determining whether Fontainebleau, the Contractor, the Construction Consultant and the Architect had submitted "all required documents"; and (ii) reviewing the Advance Requests to ensure that they contained all representations, warranties, and certifications necessary to satisfy the conditions precedent to an Advance. Those agreements

also provided that BANA (i) could rely in performing its duties, "including approving Advance Requests," on the representations, warranties and certifications it received from Fontainebleau and others, and (ii) had no obligation "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." Plaintiffs cannot use Section 9.1 of the Disbursement Agreement—which requires BANA to "exercise commercially reasonable efforts and utilize commercially prudent practices in the performance of its duties hereunder"—to impose a duty to investigate. Section 9.1 simply describes *how* BANA should perform its contractual duties; it does not define those duties. Nor can Section 9.1 nullify the more specific Section 9.3.2 and 9.10 provisions relieving BANA of any duty to investigate.

Second, both the Disbursement Agreement and the Credit Agreement limit BANA's liability as agent to acts of gross negligence, bad faith, fraud, or willful misconduct. Gross negligence is a high standard under New York law, requiring proof that defendant acted with reckless indifference or intent to harm plaintiff. There is no evidence in the factual record indicating that BANA's actions were intended to harm Plaintiffs, or that it recklessly disregarded their rights. To the contrary, BANA conscientiously performed its duties in a challenging financial environment to try to protect all the Lenders' varied interests.

Third, apart from being legally irrelevant, Plaintiffs' allegations that BANA "knew or should have known" that Advance Request conditions precedent were not satisfied fail for the following additional reasons:

- Lehman's September 2008 bankruptcy filing was not, in and of itself, a Default under the Retail Facility Agreement. And even if it were, it would not have prevented BANA from funding an Advance Request because BANA never received the required Default notice.

- BANA did not know that FBR had funded the September 2008 Advance on Lehman's behalf. Immediately before funding the September 2008 Advance, BANA requested and received written and oral assurances from Fontainebleau CFO Jim Freeman that, despite Lehman's bankruptcy, Fontainebleau's representations, warranties and certifications were still correct—including funding by the Retail Lenders. Plaintiffs' allegation that a TriMont employee told a BANA employee that FBR funded for Lehman is not supported by either employees' testimony. And BANA's knowledge of a Merrill Lynch research analyst's email repeating a rumor about FBR funding does not constitute knowledge of the underlying facts.

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- [redacted]

- There is absolutely no evidence that BANA knew of Fontainebleau's deceit in concealing the true anticipated costs to complete the Project. As discussed above, Plaintiffs have acknowledged that Fontainebleau made false and misleading statements about the Project's financing, budget and costs.

- The FDIC's December 2008 repudiation of First National Bank of Nevada's loan commitments did not render *materially* false Fontainebleau's representation that "[t]here is no default or event of default under any of the Financing Agreements." FNBN's unfunded commitments totaled just 0.6% of the $1.85 billion Senior Credit Facility, and when BANA removed them from the In Balance Test, the Project remained "In Balance" by approximately $107.7 million. Thus, no reasonable fact-finder could conclude that FNBN's repudiated commitments rendered Section 4.9.1's representation *materially* false.

- Plaintiffs' argument regarding Guggenheim and Z Capital's March 2009 failure to fund their Delay Draw Term Loan commitments fails for the same reason—those lenders' commitments were not material. Guggenheim and Z Capital's unfunded commitments totaled just $21.67 million, or roughly 1% of the Senior Credit Facility. And their failure to fund had no immediate impact on the Project because BANA collected $327 million in Delay Draw Term Loan commitments in March 2009 against a $138 million Advance Request. Thus, again, Section 4.9.1's representation was not *materially* false.

- Plaintiffs' suggestion that BANA should have rejected the March 2009 Advance Request because Fontainebleau submitted a supplemental Advance Request less than three days before the scheduled March 25, 2009 Advance Date is not supported the Disbursement Agreement's terms. The Disbursement Agreement has no deadline for supplementing an Advance Request. And neither Section 2.4.6 (Advance Confirmation Notice) nor Section 2.5.1 (Stop Funding Notices) refers to the Advance Request being approved three days before the Advance Date. Thus, the supplemental March 2009 Advance Request was not untimely.

THE UNDISPUTED MATERIAL FACTS[1]

I. THE PARTIES

BANA is a nationally chartered bank with its main office in Charlotte, North Carolina. (SOUF ¶ 1.) Plaintiffs are a group of sophisticated financial institutions who were lenders—or in most cases, successors-in-interest to lenders—to Fontainebleau Las Vegas, LLC and Fontainebleau Las Vegas II, LLC (collectively, "Borrowers" or "Fontainebleau"). (SOUF ¶ 5.)

[redacted] (SOUF ¶ 6.) [redacted]

[redacted] (SOUF ¶ 7.)

II. THE PROJECT

This case involves a partially completed hotel and casino development on an approximately 24.4-acre parcel at the Las Vegas Strip's north end (the "Project"). (SOUF ¶ 8.) The Project's developer was the Borrowers' parent, Fontainebleau Resorts, LLC ("Fontainebleau Resorts" or "FBR"). (SOUF ¶ 9.) FBR was led by Jeff Soffer (Chairman) and Glenn Schaeffer (CEO), who together had decades of experience developing major casino, resort and residential projects in Las Vegas and elsewhere. (SOUF ¶¶ 10, 11.) The Project's general contractor was Turnberry West Construction ("TWC" or "Contractor"), a member of the Turnberry group of companies. (SOUF ¶ 12.) The Turnberry group of companies had a 40-year track record building high-end hotels and residential developments across the United States, including several prominent Las Vegas projects. (SOUF ¶ 13.)

III. THE PROJECT'S FINANCING

The Project's initial budget was $2.9 billion, which included approximately $1.7 billion of hard construction costs. (SOUF ¶ 14.) The Project was financed through a combination of debt and equity capital, including $1.85 billion in senior secured debt ("Senior Credit Facility"), equity contributions by Fontainebleau and its affiliates, $675 million in Second Mortgage Notes, and a $315 million loan earmarked for the Project's retail space ("Retail Facility"). (SOUF ¶¶ 15, 16.)

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[1] This statement summarizes the undisputed facts set forth in BANA's Local Rule 7.5 Statement of Undisputed Material Facts ("SOUF") and that are established by the Declarations of Robert W. Barone, Brandon Bolio, Daniel L. Cantor and Jeff Susman, all of which are being filed simultaneously with this memorandum.

A. The Senior Credit Facility

Fontainebleau, BANA, Plaintiffs (or their predecessors-in-interest), and other non-party lenders entered into a June 6, 2007 Credit Agreement creating the Senior Credit Facility, which comprised three senior secured loans: (1) a $700 million term loan (the "Initial Term Loan"); (2) a $350 million delay draw term loan (the "Delay Draw Term Loan"); and (3) an $800 million revolving loan (the "Revolver Loan"). (SOUF ¶ 17.) Plaintiffs own only Initial Term Loan and Delay Draw Term Loan notes. (SOUF ¶ 18.) BANA was a Revolver Loan lender and was Administrative Agent under the Credit Agreement for the Senior Credit Facility lenders (together, "Lenders"). (SOUF ¶¶ 2, 4.)

B. The Retail Facility

The Project's retail space was to be developed by Fontainebleau Las Vegas Retail, LLC (the "Retail Affiliate"), another FBR subsidiary. (SOUF ¶ 19.) FBR specifically designed the retail space's financing to be distinct from the Senior Credit Facility. (SOUF ¶ 21.) Thus, the $315 million Retail Facility was subject to a separate June 6, 2007 agreement between the Retail Affiliate and Lehman Brothers Holdings, Inc. (the "Retail Facility Agreement"). (SOUF ¶ 22.) BANA was not a lender under the Retail Facility Agreement or otherwise a party to that agreement. (SOUF ¶ 23.) But while the Project's resort and retail components each had their own separate credit facilities and construction budgets, the resort budget included $83 million in costs that were to be funded through the Retail Facility ("Shared Costs"). (SOUF ¶¶ 21, 24.) The Shared Costs were used to fund construction of the portions of the Project's retail space that were structurally inseparable from the resort. (SOUF ¶ 25.)

Lehman Brothers Holding, Inc. ("Lehman") signed the Retail Facility Agreement as a lender and as the agent for one or more co-lenders (each a "Retail Co-Lender"). (SOUF ¶ 26.) The Retail Facility was syndicated under a separate confidential agreement, the terms of which were not disclosed to BANA or the Lenders. (SOUF ¶¶ 28, 29.) Indeed, even the identity of the Retail Co-Lenders was confidential and unknown to BANA and the Lenders until the Borrowers revealed the participants in late 2008. (SOUF ¶ 30.) The Retail Facility Agreement permitted Lehman to "delegate all or any portion of its responsibilities under [the Retail Facility Agreement] and the other Loan Documents to the Servicer." (SOUF ¶ 31.) [redacted] (SOUF ¶ 32.)

C. The Disbursement Agreement

The Borrower's access to the construction financing was governed by a June 6, 2007 Master Disbursement Agreement ("Disbursement Agreement"). (SOUF ¶ 34.) Together with the Credit Agreement, the Disbursement Agreement established a two-step funding process for the Senior Credit Facility. No more than once per month, Fontainebleau submitted a Notice of Borrowing that, subject to certain terms and conditions, required Lenders to transfer funds into a designated bank account (the "Bank Proceeds Account"). (SOUF ¶ 35.) Fontainebleau could not withdraw funds directly from the Bank Proceeds Account. (SOUF ¶ 36.) To access funds to pay Project costs (an "Advance"), Fontainebleau was required to submit a monthly Advance Request, the form and contents of which were prescribed by the Disbursement Agreement. (SOUF ¶ 37.)

BANA was appointed as Disbursement Agent under the Disbursement Agreement. (SOUF ¶ 3.) After Fontainebleau submitted an Advance Request, BANA was required to "review the Advance Request and attachments thereto to determine whether all required documentation has been provided." (SOUF ¶ 38.) It was also required to confirm that the Advance Request contained all the representations, warranties, and certifications necessary to satisfy Disbursement Agreement Section 3.3's conditions precedent to an Advance. (SOUF ¶ 39.) Section 3.3 had twenty-four separate multi-part conditions precedent, including:

- "Representations and Warranties. 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."
- "Default. No Default or Event of Default shall have occurred and be continuing."
- "In Balance Requirement. The Project Entities shall have submitted an In Balance Report demonstrating that the In Balance Test is satisfied." The In Balance Test was satisfied when Available Funds equal or exceed the Project's Remaining Costs.
- "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."
- "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."

- "Plans and Specifications. In the case of each Advance from the Bank Proceeds Account made concurrently with or after Exhaustion of the Second Mortgage Proceeds Account, the Construction Consultant shall to the extent set forth in the Construction Consultant Advance Certificate have approved all Plans and Specifications which, as of the date of the relevant Advance Request, constitute Final Plans and Specifications to the extent not theretofore approved."

(SOUF ¶ 41.)

Each Advance Request required Fontainebleau, among other things, to "represent, warrant and certify" that "the conditions set forth in Section[] 3.3 … of the Disbursement Agreement are satisfied as of the Requested Advance Date." (SOUF ¶ 40.) The Advance Request also included multiple specific representations that generally tracked the substance of Section 3.3's conditions precedent. (SOUF ¶¶ 41, 42.) In addition, Fontainebleau certified that each of the seventeen Advance Request attachments "is what it purports to be, is accurate in all material respects, … and reflects the information required by the Disbursement Agreement to be reflected therein." (SOUF ¶ 42.) Each Advance Request also included certifications from the Project architect and the Contractor. Bergman, Walls & Associates Ltd., the Project architect ("BWA" or "Architect") certified, among other things, that "[t]he construction performed on the Project … is in general accordance with the 'Drawings and Specifications.'" (SOUF ¶ 43.) And TWC certified, among other things, that "[t]he Control Estimate ... reflects the costs expected to be incurred by [TWC] to complete the remaining 'Work' … on the Project." (SOUF ¶ 44.)

BANA was assisted in reviewing the Advance Requests by a Construction Consultant appointed under the Disbursement Agreement—Inspection and Valuation International, Inc. ("IVI"). (SOUF ¶ 45.) IVI also performed monthly site visits, reviewed information disclosed by Fontainebleau at the site visits, and summarized its findings in Project Status Reports. (SOUF ¶ 46.) After reviewing an Advance Request, IVI was required to "deliver to the Disbursement Agent … a Construction Consultant Advance Certificate either approving or disapproving the Advance Request." (SOUF ¶ 47.) Specifically, IVI would certify, among other things, that based on its review of "the material and data made available" by the Borrowers, Contractor, Architect and others, as well as other specified information (including its site walk-through and construction observations) that "[t]he Project Entities have properly substantiated, in all material respects, the Project Costs for which payment is requested in the Current Advance Request," and "[t]he Remaining Cost Report attached to the Current Advance Request accurately reflects, in all material respects, the Remaining Costs required to achieve Final Completion." (SOUF ¶ 48.)

As part of its monthly Advance Request, Fontainebleau also requested that the Retail Affiliate advance Shared Costs from the Retail Facility. Lehman delegated to TriMont the responsibility for collecting the Retail Co-Lenders' respective Shared Costs obligations in response to an Advance Request and transferring those funds to BANA, as Disbursement Agent. (SOUF ¶ 33.) Once it received the Retail Co-Lenders' funds, TriMont sent a single wire transfer for the entire requested Shared Cost amount to BANA—it did not identify the specific amounts funded by each Retail Co-Lender. (SOUF ¶ 49.) The Disbursement Agent's receipt of the requested Shared Costs was an Advance Request condition precedent under Section 3.3.23. (SOUF ¶ 50.)

If an Advance Request's conditions precedent were satisfied, BANA (as Disbursement Agent) and Fontainebleau were required to execute an Advance Confirmation Notice. (SOUF ¶ 51.) In the Advance Confirmation Notice, Fontainebleau expressly confirmed "that each of the representations, warranties and certifications made in the Advance Request ... (including the various Appendices attached thereto), ... are true and correct as of the Requested Advance Date and Disbursement Agent is entitled to rely on the foregoing in authorizing and making the Advances herein requested" and "that the [Advance Request] representations, warranties and certifications are correct as of the Requested Advance Date." (SOUF ¶ 52.) The Advance Confirmation Notice instructed the Bank Agent (also BANA) to transfer the requested funds from the Bank Proceeds Account to payment accounts on the Scheduled Advance Date for further disbursement to Fontainebleau. (SOUF ¶ 53.) If the conditions precedent were not satisfied, the Disbursement Agent was required to issue a Stop Funding Notice. (SOUF ¶ 54.) A Stop Funding Notice temporarily suspended the Lenders' obligations to fund loans under the Credit Agreement. (SOUF ¶ 56.) A Stop Funding Notice would also be issued if "the [Funding Agent] notifies the Disbursement Agent that a Default or an Event of Default has occurred and is continuing." (SOUF ¶ 55.)

D. BANA Received The Required Certifications For Each Advance Request That Fontainebleau Submitted During The Relevant Period.

For each Advance Request from September 2008 through March 2009, BANA received all the required Advance certifications from Fontainebleau, TWC, IVI and BWA:

- Fontainebleau certified the satisfaction of all conditions precedent and accuracy of all representations and warranties, including the absence of defaults under the Loan Documents;

- TWC certified and confirmed that the Control Estimate reflected the costs it expected to be incurred to complete the Project;
- BWA certified that the construction performed on the Project to date was in accordance with the Project's plans and specifications; and
- IVI certified that the Remaining Cost Report accompanying the Advance Request accurately reflected the remaining costs required to complete the Project.

(SOUF ¶ 57.)

IV. CONTRACTUAL PROTECTIONS FOR DISBURSEMENT AGENT AND ADMINISTRATIVE AGENT

Both the Disbursement Agreement and the Credit Agreement contain multiple provisions establishing that, consistent with industry practice, the Disbursement Agent and Administrative Agent positions are purely ministerial and do not involve making analytical determinations about the Project or the Borrower's status. The scope of these contractual protections is unsurprising: in exchange for managing the $1.85 billion Senior Credit Facility, the Disbursement Agent and Administrative Agent earned just $40,000 and $125,000 per year, respectively. (SOUF ¶ 58.)

Disbursement Agreement Article 9 sets forth the Disbursement Agent's rights and responsibilities. Section 9.3.2 expressly provides, among other things, that BANA "may rely and shall be protected in acting or refraining from acting upon" certifications and other statements by Fontainebleau and IVI, and that "[n]otwithstanding anything else in this Agreement to the contrary, in … approving any Advance Requests, … [BANA] shall be entitled to rely on certifications from the Project Entities . . . as to satisfaction of any requirements and/or conditions imposed by this Agreement." (SOUF ¶ 59.) Section 9.3.2 also states that BANA "shall not be required to conduct any independent investigation as to the accuracy, veracity or completeness of any such items [in the Advance Request] or to investigate any other facts or circumstances to verify compliance by the Project Entities with their [Disbursement Agreement] obligations." (*Id.*)

Thus, BANA had no obligation to assess independently whether Disbursement Agreement Section 3.3's conditions precedent or Article 4's representations and warranties were satisfied by Fontainebleau before approving an Advance Request. Indeed, if a default occurred under the Disbursement Agreement, it was *Fontainebleau* that was required to "provide to the Disbursement Agent, the Construction Consultant and the Funding Agents written notice of: Any Default or Event of Default of which the Project Entities have knowledge, describing such

Default or Event of Default and any action being taken or proposed to be taken with respect thereto." (SOUF ¶ 60.)

Section 9.10 builds on these protections to limit BANA's duties as Disbursement Agent, providing, among other things, that:

- "... [BANA] shall have no duties or obligations [under the Disbursement Agreement] except as expressly set forth herein, shall be responsible only for the performance of such duties and obligations and shall not be required to take any action otherwise than in accordance with the terms hereof";
- "...nothing in this Agreement, expressed or implied, is intended to or shall be so construed as to impose upon [BANA] any obligations in respect of this Agreement except as expressly set forth herein or therein"; and
- "... [BANA] shall have no duty to inquire of any Person whether a Default or an Event of Default has occurred and is continuing."

(SOUF ¶ 61.)

In addition, Section 9.10's broad exculpatory provision limits BANA's potential liability to bad faith, fraud, gross negligence, or willful misconduct:

> 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. (SOUF ¶ 62.)

The Credit Agreement conferred similarly broad protections to BANA as Administrative Agent, including provisions expressly permitting BANA to rely on representations by Fontainebleau and others, relieving it of any obligation to investigate those representations, placing the burden on Fontainebleau to report defaults, and limiting BANA's liability to gross negligence or worse. (SOUF ¶ 63.)

V. THE EVENTS UNDERLYING PLAINTIFFS' CLAIMS

Plaintiffs identify several events that they claim prevented Fontainebleau from satisfying the Advance Request conditions precedent: (i) Lehman's failure to fund advances required of it under the Retail Facility in September 2008, and between December 2008 and March 2009; (ii) Fontainebleau's failure to disclose all anticipated costs required to complete the Project;

(iii) the FDIC's repudiation of First National Bank of Nevada's commitments; and (iv) two small lenders' failure to fund their Credit Agreement commitments.[2]

A. The Lehman Bankruptcy.

On September 15, 2008, just four days after Fontainebleau submitted its September 2008 Advance Request, Lehman filed for bankruptcy. (SOUF ¶ 64.) As the Retail Facility's lead lender, Lehman's bankruptcy created potential financial problems for the Project. Of immediate concern to Fontainebleau was the nearly $3.8 million in Retail Facility funds it had requested as part of its $103.7 million September 2008 Advance Request. (SOUF ¶ 65.) If the Retail Facility did not fund its entire Advance Request portion, no funds would be disbursed to Fontainebleau from the Bank Proceeds Account, and Fontainebleau might be unable to pay that month's Project construction costs. (SOUF ¶¶ 66-67.)

1. BANA determines that the September 2008 Advance Request's conditions precedent were satisfied.

In the days following Lehman's bankruptcy filing, BANA held a series of calls with Fontainebleau to obtain additional information regarding the Lehman bankruptcy's implications for the September 2008 Advance Request. (SOUF ¶ 68.) Those discussions focused on whether Lehman would fund its portion of the Advance Request and on potential alternative financing arrangements if Lehman did not fund, including funding by the other Retail Facility Lenders or Fontainebleau. (SOUF ¶ 69.) BANA listened to Fontainebleau discuss its options, but did not make any recommendations. (SOUF ¶ 70.) Internally, however, BANA concluded that Fontainebleau funding Lehman's share would not satisfy the Advance Request's conditions precedent. (SOUF ¶ 71.) On the other hand, if the entire requested Shared Costs were received from TriMont, and the Advance Request certifications remained in effect, BANA believed that it was required to honor Fontainebleau's September 2008 Advance Request. (SOUF ¶ 72.)

On September 26, 2008, TriMont sent BANA a single wire transfer for the entire requested Shared Costs. (SOUF ¶ 73.) Later that day, but before disbursing funds to Fontainebleau, BANA received oral and written representations from Fontainebleau CFO Jim Freeman re-affirming the Advance Request's certifications that all conditions precedent to funding—including funding by the Retail Lenders—were satisfied. (SOUF ¶ 74.) In addition to

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[2] *See* Avenue Term Lender Pls.' Responses to Second Set of Interrogatories from Def. Bank of Am., N.A. ("Pls. 2d Interrog. Resp."), at 2, 6-12.

Freeman's assurances, there had been no announcement that Lehman would reject the Retail Facility Agreement in bankruptcy and, thus, BANA believed (correctly) that the agreement was "in full force and effect." (SOUF ¶ 75.) Indeed, based on information from Fontainebleau and BANA's own involvement in other syndicated loans, BANA understood that Lehman was continuing to honor some loan commitments. (SOUF ¶ 76.) Consequently, BANA concluded that the conditions precedent were satisfied and disbursed Fontainebleau's September 2008 Advance Request. (SOUF ¶ 77.)

2. *Fontainebleau conceals that its affiliates funded Lehman's portion of the September 2008 Advance Request.*

Contrary to Jim Freeman's representations to BANA, Lehman's September 2008 Advance Request portion was funded not by Lehman or a Retail Co-Lender, but by Fontainebleau Resorts, which made a $2,526,184 "equity contribution" to "prevent an overall project funding delay and resulting disruption of its Las Vegas project" after Lehman failed to fund its required September 2008 Shared Costs portion. (SOUF ¶ 78.) Fontainebleau actively concealed this fact. Indeed, contemporaneous internal BANA documents reflect BANA's belief that Lehman had funded the September 2008 Shared Costs. (SOUF ¶ 79.) And Freeman testified that he was instructed by counsel not to reveal that FBR had funded for Lehman and, thus, he deliberately misled BANA and the Lenders in written and oral communications during September and October 2008. (SOUF ¶ 80.)

Plaintiffs' allegation that TriMont's Mac Rafeedie informed BANA in a phone call that FBR had funded for Lehman is not supported by Rafeedie's testimony.[3] Rafeedie testified that he could not "recall the exact things that were discussed in that call" and speculated that "consistent with [his] practice," he "could have" told BANA that FBR funded for Lehman; but he also testified that the discussion "could have been just that Lehman's dollars were funded, not necessarily who funded what." (SOUF ¶ 81.) Moreover, Plaintiffs ignore that the BANA participant on the call testified that she did not recall ever having discussed with Rafeedie whether Lehman itself funded in September 2008. (SOUF ¶ 82.)

Fontainebleau's deceptions were not limited to BANA and the Lenders. For example, on October 6, 2008, Freeman told Moody's that "Retail funded its small portion last month." (SOUF ¶ 83.) Freeman did not tell Moody's that FBR had funded for Lehman because "[b]ased

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[3] *See* Expert Report of Shepherd V. Pryor IV, ¶ 48.a (May 23, 2011) ("Pryor Rpt.").

on the discussion that I had, the advice of counsel, I was -- I was not talking to people about the source of funding." (SOUF ¶ 84.) In addition, on at least two occasions, Fontainebleau executives specifically informed BANA that the Retail Lenders (either Lehman or its co-lenders) had funded the September 2008 Advance Request. BANA's Jeff Susman testified that Freeman told him the Retail Lenders had funded the September Shared Costs. (SOUF ¶ 85.) And Fontainebleau CEO Glenn Schaeffer told Bill Newby that Lehman itself had funded in September 2008. (SOUF ¶ 86.)

3. *Fontainebleau provides repeated assurances that the Advance Request conditions precedent are satisfied despite Lehman's bankruptcy.*

The Lehman Bankruptcy also had potential implications for the Project's financing beyond the September 2008 Advance Request because Shared Costs were due each month. But following the September disbursement, Fontainebleau went to great lengths to assuage any concerns that the Lehman bankruptcy would prevent it from satisfying future Advance Request conditions precedent.

For example, Fontainebleau provided numerous written assurances that the Retail Facility remained viable notwithstanding Lehman's bankruptcy. On September 22, 2008, BANA asked Fontainebleau to schedule a call with Lenders to address their Lehman-related questions. (SOUF ¶ 87.) A week later, in anticipation of that call, BANA sent Fontainebleau a list of potential Lender questions, including whether Lehman funded its September 2008 Shared Costs portion, the identity of any entity that funded on Lehman's behalf, and the Lehman bankruptcy's effect on Fontainebleau's ability to complete the Project. (SOUF ¶ 88.) Fontainebleau agreed to the call, but later backed out and instead, on October 7, 2008, sent BANA and the Lenders a memorandum addressing the Retail Facility's status. (SOUF ¶¶ 89-90.) The memorandum assured the Lenders that the August and September Shared Costs had been funded in full. (SOUF ¶ 91.) But the memorandum subtly—and (as discussed above) deliberately—avoided revealing that Lehman had not funded its Shared Costs portion. The memorandum also stated that Fontainebleau was "continuing active discussions with Lehman Brothers to ensure that, regardless of the Lehman bankruptcy filing and related acquisition by Barclay's, there is no slowdown in funding for the project." (SOUF ¶ 92.) Fontainebleau added that it did not "believe there will be any interruption in the retail funding of the project." (SOUF ¶ 93.)

On October 22, 2008, Fontainebleau provided the Lenders a further written update, stating that "Lehman Brothers' commitment to the Retail Facility had not been rejected in

bankruptcy court and remained in full force and effect." (SOUF ¶ 94.) Fontainebleau added that "Lehman Brothers has indicated to us that it has sought the necessary approvals to fund its commitment this month," and it had received assurances from the "co-lenders to the retail facility" that "[i]f Lehman Brothers is not in a position to perform … that they would fund Lehman's portion of the draw." (SOUF ¶ 95.)

On December 5, 2008, FBR issued financial statements for the period ended September 30, 2008 that included disclosures regarding the Retail Facility's status. (SOUF ¶ 96.) FBR represented that "[t]he Company has been working diligently with Lehman Brothers and the co-lenders to ensure that there is no interruption in funding for the retail component." (SOUF ¶ 97.) And FBR's "Equity Contributions" disclosure made no mention of its September 2008 equity contribution on Lehman's behalf. (SOUF ¶ 98.)

Fontainebleau's assurances appeared to be well founded because Lehman actually funded its Shared Costs portion for the October and November Advances. (SOUF ¶ 99.) In addition, each month from October 2008 through March 2009, Fontainebleau submitted Advance Requests containing all of the required certifications, representations and warranties. (SOUF ¶ 57.) And although BANA learned in December 2008 that the Union Labor Life Insurance Company ("ULLICO") would be funding Lehman's Shared Costs portion, that arrangement satisfied Section 3.3.23's condition precedent that "the Retail Agent and the Retail Lenders shall … make any Advances required of them" because ULLICO was a Retail Co-Lender. (SOUF ¶¶ 100-101.) Each month from October 2008 through March 2009, TriMont wired BANA the full requested Shared Costs. (SOUF ¶ 102.)

4. [redacted] (SOUF ¶ 103.) In December 2008, ULLICO entered an agreement with Soffer, FBR and TRLP under which ULLICO would pay Lehman's December 2008 Shared Costs portion, and Soffer, FBR and TRLP would guarantee repayment within ninety days. (SOUF ¶ 104.) [redacted]

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[redacted] (SOUF ¶ 108.)

5. *BANA evaluates Highland's claim that Lehman's bankruptcy was a default under the loan documents.*

On September 26, 2008, Highland Capital Management ("Highland")—an Initial Term Loan and Delay Draw Term Loan Lender—sent BANA an e-mail claiming that

> "[a]s a result of [Lehman]'s bankruptcy filing earlier this month, the financing agreements are no longer in full force and effect, triggering a number of breaches under the Loan Facility - resulting in the following consequences: (i) No disbursements may be made under the Loan Facility; and (ii) The Borrower should be sent a notice of breach immediately to protect the Lenders' rights and ensure that any cure period commence as soon as possible." (SOUF ¶ 110.)

BANA, through its outside counsel Sheppard Mullin Richter & Hampton LLP, told Highland that the Bankruptcy Code specifically provides that "no executory contract may be terminated or modified solely based on the commencement of a Chapter 11 case," and asked Highland to identify any "authority or documents supporting a contrary conclusion." (SOUF ¶ 111.) Following discussions with Highland and further internal analysis, BANA concluded that Lehman's bankruptcy did not provide a basis for rejecting Fontainebleau's September 2008 Advance Request. (SOUF ¶ 112.) BANA provided additional information to Highland in a September 29, 2008 Sheppard Mullin e-mail, explaining that it had been "monitoring all [Lehman] court orders" and was "unaware of a restriction on performance of this agreement." (SOUF ¶ 113.) The e-mail also debunked Highland's claim that Lehman's bankruptcy was an "anticipatory repudiation of the contract." (*Id.*)

On September 30, 2008, Highland sent BANA another e-mail, this time claiming that Lehman's bankruptcy constituted a Material Adverse Effect ("MAE"). (SOUF ¶ 114.) Again, BANA concluded that Highland's claim was incorrect because there was no indication that there would be a Retail Funds shortfall or that Lehman would be unable to honor its obligations under the Retail Facility. (SOUF ¶ 115.)

[redacted]

[redacted] (SOUF ¶ 116.) On October 13, Highland forwarded to BANA a Merrill Lynch research analyst's e-mail that discussed nine different industry developments and, in the only sentence referring to Fontainebleau, stated: "We understand that FBLEAU equity sponsors have funded the amount required from Lehman on the retail credit facility due this month ($4 million)." (SOUF ¶ 117.) The research e-mail did not identify a source or basis for the statement, and it significantly overstated Lehman's Shared Costs portion. (*Id.*) [redacted] (SOUF ¶ 120.) Nonetheless, Highland claimed that this market rumor created "a breach concern under the Disbursement Agreement" and that "Lehman [was] in breach of the [Retail] [A]greement because it failed to fund and thus the agreement [was] not in full force and effect." (SOUF ¶ 118.) BANA evaluated Highland's claim, but rejected it in view of the numerous representations and warranties made by Fontainebleau in the September and October 2008 Advance Requests, the continued receipt of the requested Shared Costs from TriMont, and the other statements by Fontainebleau. (SOUF ¶ 121.)

While BANA ultimately rejected the various Highland assertions on their merits, it had good reason to view Highland's claims skeptically. In September 2008, numerous credible publications reported that certain Highland funds had suffered staggering losses and faced a liquidity crunch. (SOUF ¶ 122.) [redacted] (SOUF ¶ 123.) Highland [redacted], and is no longer a plaintiff. (SOUF ¶ 198.)

6. *Lenders could, and did, seek information about Lehman directly from Fontainebleau.*

If Lenders had questions about Lehman's bankruptcy filing, the Lenders could contact Fontainebleau management directly—as many did. (SOUF ¶ 124.) But there is no evidence that Fontainebleau disclosed to these Lenders that Lehman did not fund its September 2008 Retail Advance portion, or that "equity sponsors" funded for Lehman. [redacted] (SOUF ¶ 125.) [redacted]

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[redacted] (SOUF ¶ 126.) [redacted] (SOUF ¶ 127.) [redacted], Highland never submitted a formal Notice of Default or raised any further concerns with BANA regarding the Lehman bankruptcy. (SOUF ¶ 128.)

B. Fontainebleau's Failure to Disclose Anticipated Project Costs.

Many large-scale development projects experience cost increases during the construction process, and the Fontainebleau Project was no exception. (SOUF ¶ 129.) Throughout the Project's life, BANA—working with and through the Construction Consultant, IVI—pushed Fontainebleau to confirm its cost-related disclosures' accuracy and completeness. In response to BANA's questioning, Fontainebleau provided repeated assurances that the Project's finances remained within the loan documents' limits. Moreover, as required under the Disbursement Agreement, IVI consistently certified Fontainebleau's construction-related disclosures because it lacked evidence that the disclosures were inaccurate. But what BANA, IVI and Plaintiffs did not, and could not, know was that they were the victims of a massive fraud by Fontainebleau and its affiliates that involved falsified reports and fake budgets, all designed to conceal the Project's true construction costs from BANA and the Lenders. Indeed, after uncovering this fraud during discovery in this action, Plaintiffs filed suit against FBR, the Contractor (TWC), Jeff Soffer, Glenn Schaeffer, Jim Freeman and others, asserting claims for fraud and breach of fiduciary duty based on the knowingly false and misleading statements made to BANA and IVI. (SOUF ¶ 130.)

1. *IVI reviewed Fontainebleau's cost disclosures in certifying and approving the Advance Requests.*

As Construction Consultant, IVI prepared monthly Project Status Reports for the Lenders. Each month, the Contractor provided IVI with an Anticipated Cost Report ("ACR")—an estimate of additional costs that might be incurred in the future based, in part, on change orders submitted by subcontractors. In the January 30, 2009 Project Status Report ("PSR 21"), IVI became concerned that Fontainebleau's cost disclosures might not be accurate because it appeared that construction would need to be accelerated to meet the scheduled opening date and that related costs, such as overtime, were not reflected in the latest ACR. PSR 21 stated that although "the Anticipated Cost Report indicates the Project is expected to stay within budget, 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." (SOUF ¶ 134.)

IVI also raised concerns about LEED credit savings. LEED ("Leadership in Energy and Environmental Design") credits reduce construction costs through Nevada sales tax credits on building materials for construction meeting certain sustainability standards. IVI stated that "it appears that the LEED credits are tracking behind projections and the Developer has begun a detailed audit," noting that it would "continue to discuss this with the Developer." (SOUF ¶ 136.)

But the concerns IVI raised in PSR 21 were only "gut" feelings, and IVI had no evidence supporting its suspicions. (SOUF ¶ 137.) Accordingly, IVI issued its monthly Construction Consultant Advance Certificate, in which it affirmed, among other things, that "[t]he undersigned has not discovered any material error in the matters set forth in the Current Advance Request or Current Supporting Certificates." (SOUF ¶ 132.)

2. *Fontainebleau reassured BANA and the Lenders that Anticipated Project Costs remained within budget.*

The Lenders raised questions about PSR 21. For example, on February 12, 2009, JPMorgan Chase—a Revolver Lender—sent BANA a letter noting that "[i]n the Report, IVI makes certain observations … which were not included in prior reports," and asking BANA to provide additional information regarding the Project's budget and the Retail Facility Status. (SOUF ¶ 138.) BANA promptly raised the Lenders' concerns with Fontainebleau. On February 20, 2009, BANA sent Fontainebleau a letter seeking information regarding the issues raised by IVI—including the ACR's accuracy, the existence of actual or potential cost overruns, and LEED credit shortfalls—as well as the Retail Facility's status. (SOUF ¶ 139.)

Fontainebleau responded three days later, emphatically denying that there were "any cost overruns or acceleration costs that are not reflected in the Anticipated Cost Report." (SOUF ¶ 140.) Fontainebleau also stated that "we believe that the full amount of the [LEED] credits reflected in the Budget *will in fact be realized*," and that it was "in the process of engaging auditors to investigate and audit the subcontractors." (*Id.*) And Fontainebleau assured BANA that it was "continuing active discussions with Lehman Brothers and the co-lenders to ensure that funding for the Project will continue on a timely basis," and that the "Retail Facility is in full force and effect, [and] there has not been an interruption in the retail funding of the Project to date." (SOUF ¶ 141.)

On February 23, 2009, in response to Lender requests, BANA asked Fontainebleau to schedule a Lender call to "permit questions about the Project and [Fontainebleau's] response to

[BANA's February 20] letter." (SOUF ¶ 142.) But Fontainebleau refused, asserting that it had no contractual obligation to do so, objecting to having a call on short notice, and raising concerns that sensitive Project-related information might be leaked to the press by Lenders. (SOUF ¶ 143.)

Despite the assurances in Fontainebleau's February 23 letter, IVI's March 3, 2009 Project Status Report ("PSR 22") repeated its previous concern that there were unreported Project cost increases. (SOUF ¶¶ 144, 145.) But IVI also indicated that the Project remained within budget and, because it still had no facts or evidence to support its hunch, IVI executed the Construction Consultant Advance Certificate for the February 2009 Advance Request. (SOUF ¶ 145-146.)

3. *BANA approved the March 2009 Advance Request only after IVI finally issued a "clean" Construction Consultant Advance Certificate.*

Throughout March 2009, BANA and IVI monitored the Project's costs and continued to press Fontainebleau for cost-related information in response to Lenders' requests. On March 4, 2009, BANA requested that Fontainebleau arrange for a Lender meeting because it was "critical that the Company meet and interact with its Lenders." (SOUF ¶¶ 147, 148.) BANA also sent Fontainebleau a list of Lender information requests concerning Project costs, which mirrored BANA's own previous requests. (SOUF ¶ 148.) In addition, IVI sent Fontainebleau its own information requests regarding the Project budget. On March 5, 2009, IVI asked Fontainebleau for "a submission of the future potential claims being made by the subcontractors against [the Contractor] and any overruns related to the un-bought work" and for an updated ACR "to show the potential exposures to FBLV and a better indication of the current contingency." (SOUF ¶ 149.) On March 10, BANA followed up with a renewed meeting and information request. (SOUF ¶ 150.)

On March 11, 2009, Fontainebleau submitted its March Advance Request. (SOUF ¶ 151.) In the Remaining Cost Report annexed to the Advance Request, Fontainebleau disclosed that it had increased Project costs by approximately $64.8 million. (SOUF ¶ 152.) And at a March 12 meeting with IVI, Fontainebleau disclosed more than $30 million in cost increases. (SOUF ¶ 153-54.) Based on the Advance Request and Fontainebleau's March 11 and 14 disclosures, IVI issued a Construction Consultant Advance Certificate that, for the first time, declared that it had discovered material errors in the Advance Request and supporting documentation. (SOUF ¶ 154.) IVI stated that it believed that "an additional $50,000,000 will be required for Construction Costs," and that "November 1, 2009 is the likely Opening Date,"

instead of October 1, 2009 as originally planned. (SOUF ¶ 155.) A few days later, IVI told BANA that it had been "working with the developer to update their most recent anticipated cost report" and that Fontainebleau had "provided an ACR that they state represents their understanding of the hard cost exposures to the project." (SOUF ¶ 156.) IVI advised that "[w]hile we have not conducted an audit of the information presented (it would take weeks), the information presented appears reasonable at this stage in the project." (*Id.*) IVI added that "[w]hile we believe the developer has done a credible job of projecting the potential costs, it is prudent to include some additional funds for what is not known or expected at this time." (*Id.*)

On March 23, 2009, two days before the scheduled Advance Date, Fontainebleau submitted an unsigned draft supplemental Advance Request reflecting its discussions with IVI. (SOUF ¶ 161) Later that day, after reviewing Fontainebleau's documentation, IVI signed off on Fontainebleau's revisions and issued a Construction Consultant Advance Certificate approving the Advance. (SOUF ¶ 162.) That same evening, after BANA informed Fontainebleau that IVI "signed off on the revised draw with a clean certificate (assuming the attached reports are signed)," Fontainebleau submitted an executed supplemental Advance Request. (SOUF ¶ 163.) BANA made available the supplemental Advance Request to the Lenders the next morning (March 24) along with, among other things, IVI's Certificate and a chart Fontainebleau prepared at the Lenders' request showing the changes to the Remaining Cost Report and In Balance Report. (SOUF ¶ 164.) The supplemental Advance Request represented that the Project was In Balance by $13,785,184. On March 25, 2009, the scheduled Advance Date, Fontainebleau further revised its Advance Request to correct an error in the In Balance Report's debt service commitment portion that increased the margin by which the Project was "In Balance" to $14,084,701. (SOUF ¶ 165.) On March 26, 2009, having received all required documentation, including IVI's Certificate, and after receiving the Retail Shared Costs, BANA transferred the Advance to Fontainebleau. (SOUF ¶ 166.)

4. [redacted]

On April 13, 2009, Fontainebleau notified the Lenders that one or more events had "occurred which reasonably could be expected to cause the In Balance test to fail to be satisfied." (SOUF ¶ 167.) The notice explained that the "Project Entities have learned that (i) the April Advance Request under the Retail Loan may not be fully funded, and (ii) as of today, the Remaining Costs exceed Available Funds." (*Id.*) BANA and IVI immediately contacted

Fontainebleau to seek additional information. (SOUF ¶ 168.) On April 14, 2009, Fontainebleau provided IVI with a schedule of Anticipated Costs dated "as of April 14, 2009" revealing more than $186 million in previously unreported Anticipated Costs. (SOUF ¶ 169.)

[redacted] (SOUF ¶ 170.) [redacted] (SOUF ¶ 171) [redacted] (SOUF ¶ 172.)

Based on the information disclosed by Fontainebleau at the Lender meeting, the Revolver Lenders determined that one or more Events of Default had occurred and terminated the Revolver Loan on April 20, 2009. (SOUF ¶ 173.)

5. *IVI discovers that Fontainebleau falsified the Anticipated Cost Reports.*

After the Revolver Loan was terminated, Fontainebleau and the Lenders attempted to restructure the Senior Credit Facility to enable Fontainebleau to complete the Project. (SOUF ¶ 174.) Toward that end, in May 2009, BANA commissioned IVI to "perform a cost-to-complete review" of the Project's construction costs [redacted]. As part of its analysis, IVI received additional information from Fontainebleau and the Contractor regarding the Project budget, including an April 30, 2009 ACR. (SOUF ¶ 176.) This ACR included $298,053,918 in pending change orders for additional work by subcontractors. (*Id.*) After reviewing the documentation supporting these pending change orders, IVI concluded that Fontainebleau had intentionally concealed costs from IVI, BANA and the Lenders by omitting them from the ACRs: "[i]t is clear from the number and scope of pending items, [that] the claims were made by the subcontractors some time ago, possibly as far back as a year, and were never included on prior ACRs submitted to IVI." (SOUF ¶ 177.)

6. *Fontainebleau and TWC kept two sets of books to conceal cost increases from IVI and BANA.*

The cost-reporting problems IVI identified in May 2009 were confirmed when BANA learned in discovery that Fontainebleau and TWC had made numerous misrepresentations and omissions regarding the Project's true cost. For months, Fontainebleau and TWC concealed that the costs required to complete the Project were hundreds of millions of dollars higher than the construction budget disclosed to BANA and the Lenders. To conceal the truth, Fontainebleau and TWC used two separate sets of books: one for their own internal use that allowed them to keep track of the actual progress, scope and cost of the Project and a second set shown to BANA and IVI, which disclosed only a subset of the actual costs. (SOUF ¶ 178.) For example, Fontainebleau and TWC kept a "bank" ACR that was disclosed to BANA and IVI, and an "internal" ACR that included additional costs. (SOUF ¶ 179.) Before an ACR was provided to BANA and IVI, Fontainebleau edited the ACR to conform with the construction budget that had been disclosed to the Lenders. (SOUF ¶180.) Despite BANA and IVI's repeated questioning, Fontainebleau and TWC failed to disclose massive budget overruns and continued providing falsified financial information and certifications in the Advance Requests, ACRs, presentations and letters provided to BANA and the Lenders.

C. First National Bank of Nevada Repudiates its Commitment.

On July 25, 2008, the First National Bank of Nevada ("FNBN") was closed by the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Company ("FDIC") was appointed as receiver. (SOUF ¶ 181-182.) Despite well-publicized worldwide economic turmoil, FNBN was the only Project Lender, out of hundreds, to fail. In late-December 2008, the FDIC formally repudiated FNBN's unfunded Senior Credit Facility commitments. (SOUF ¶ 183.) Those unfunded commitments were quite small—$1,666,666 under the Delay Draw Loan and $10,000,000 under the Revolver Loan—totaling less than 0.6% of the $1.85 billion Senior Credit Facility. (SOUF ¶ 184.) In response to the FDIC's repudiation, BANA directed Fontainebleau to remove FNBN's unfunded commitments from the In Balance Test's "Available Sources" component. (SOUF ¶ 185.) Even without FNBN's commitments, the Project was still "In Balance" by approximately $107.7 million. (SOUF ¶ 186.)

D. Certain Delay Draw Term Lenders Fail to Fund the March 2009 Advance Request.

On March 2, 2009, Fontainebleau submitted a Notice of Borrowing under the Credit Agreement requesting a Delay Draw Term Loan for the entire $350 million facility and, simultaneously, a $670 million Revolver Loan (which was reduced to $652 million the next day). (SOUF ¶ 187.) On March 3, 2009, BANA notified Fontainebleau that it would not process the Notice of Borrowing because it violated Credit Agreement Section 2.1(c)(iii)'s proviso that "unless the Total Delay Draw Commitments have been fully drawn, the aggregate outstanding principal amount of all Revolving Loans and Swing Line Loans shall not exceed $150,000,000." (SOUF ¶ 188.)

On March 9, 2009, Fontainebleau submitted a revised Notice of Borrowing seeking only the $350 million Delay Draw Loan. (SOUF ¶ 189.) BANA approved the Notice of Borrowing and nearly all of the Delay Draw Term Loan Lenders funded their respective commitments—totaling $326.7 million. (SOUF ¶¶ 190, 191.) But two lenders—Z Capital and Guggenheim—did not immediately fund their collective $21.67 million commitment. (SOUF ¶ 191.) After reaching out to both Z Capital and Guggenheim, BANA decided to continue including the Guggenheim and Z Capital commitments as "Available Funds" for In Balance Test purposes because there was no conclusive evidence that they would not fund. (SOUF ¶ 192.) Indeed, Guggenheim advised BANA that it was "rounding up all the parties" and intended to fund its $10 million commitment—which it did several weeks later. (SOUF ¶ 193.)

On March 11, 2009, Fontainebleau submitted an Advance Request for $137.9 million—far less than the $327 million BANA collected that month from the Delay Draw Term Loan Lenders. (SOUF ¶ 194.) Before approving the March 2009 Advance Request, BANA sent the Lenders a March 23, 2009 letter explaining why it intended to disburse the requested funds. (SOUF ¶ 195.) BANA disclosed to the Lenders that Z Capital and Guggenheim had not yet funded their respective Delay Draw Term Loan commitments and that excluding those amounts "from Available Funds would result in a failure to satisfy the In-Balance test." (*Id.*) But BANA advised the Lenders that it was "willing to include" the unfunded commitment amounts in the In Balance Test's Available Funds component for the March Advance "pending further information about whether these lenders will fund." (*Id.*) BANA invited "any Lender which does not support these interpretations [to] immediately inform [BANA] in writing of their specific

position." (*Id.*) Not a single Lender contacted BANA to dispute its analysis or otherwise direct BANA not to fund the March 2009 Advance Request, which it did. (SOUF ¶ 196.)

ARGUMENT

BANA is entitled to summary judgment dismissing Plaintiffs' breach of contract claim because there is "no genuine issue as to any material fact" concerning BANA's proper performance as Disbursement Agent.[4] To be material, an issue must be "a legal element of the claim under the applicable substantive law which might affect the outcome of the case."[5] And "[a] factual dispute is genuine only if the evidence is such that a reasonable fact finder could return a verdict for the non-moving party."[6] Summary judgment is appropriate here because the undisputed facts demonstrate that (i) BANA performed its duties under the Disbursement and Credit Agreement by approving and funding Fontainebleau Advance Requests only after receiving the required certifications, and had no further duty to investigate; (ii) BANA's actions were not grossly negligent, as the Disbursement Agreement requires to impose liability; and (iii) BANA did not otherwise breach the Disbursement Agreement.

I. BANA PROPERLY APPROVED AND FUNDED FONTAINEBLEAU'S ADVANCE REQUESTS AFTER RECEIVING THE REQUIRED CERTIFICATIONS.

Plaintiffs' claim that BANA breached the Disbursement Agreement by approving Fontainebleau Advance Requests and failing to issue Stop Funding Notices fails as a matter of law. The Disbursement Agreement and Credit Agreement limit BANA's duties in approving and funding Advance Requests to (i) determining whether Fontainebleau, IVI, the Contractor and the Architect had submitted "all required documents" and (ii) reviewing Advance Requests to confirm that Fontainebleau made all representations, warranties, and certifications necessary to

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[4] Fed. R. Civ. P. 56(a); *see also Celotex Corp v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S 242, 248 (1986); *Progress Rail Servs. Corp. v. Hillsbrough Reg'l Transit Auth.*, No. 8:04-CV-200-T-23EAJ, 2005 U.S. Dist. LEXIS 37729, at *7 (M.D. Fla. Apr. 12, 2005.)

[5] *Tomasini v. Mt. Sinai Med. Ctr. of Fla. Inc.*, 315 F. Supp. 2d 1252, 1256 (S.D. Fla. 2004); *see also Anderson*, 477 U.S. at 248 ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.").

[6] *See In re Fontainebleau Las Vegas Holdings, LLC*, 417 B.R. 651, 659 (S.D. Fla. 2009).

establish that Disbursement Agreement Section 3.3's conditions precedent to Advance were satisfied.[7]

Under applicable New York law,[8] a court must enforce a contract provision that is "complete, clear and unambiguous on its face" according to "the plain meaning of its terms."[9] "Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment."[10] Courts applying New York law routinely grant summary judgment dismissing contract claims where the contract is unambiguous and the undisputed facts demonstrate that defendant performed its contractual duties.[11]

Here, the relevant Disbursement Agreement and Credit Agreement provisions are "complete, clear and unambiguous." First, BANA's duties in approving and funding Advance Requests were limited to confirming that it had received the contractually required documents and that the Advance Request conditions precedent were satisfied. (*See* pp. 6-8, *supra*) Second, the agreements permit BANA to rely on the documents it received from Fontainebleau, IVI, the Contractor and the Architect "in performing its duties hereunder, *including approving any Advance Requests*, ... as to satisfaction of any requirements and/or conditions imposed by this

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7 Disbursement Agmt. §§ 2.4.4(a), 2.4.6, 9.3.2; Credit Agmt. §§ 9.3, 9.4.

8 *See In re Fontainebleau Las Vegas Contract Litig.*, 716 F. Supp. 2d 1237, 1248 (S.D. Fla. 2010); *see also* Disbursement Agmt. § 11.6.

9 *Greenfield v. Phillies Records*, 780 N.E.2d 166, 170 (N.Y. 2002).

10 *Am. Express Bank Ltd. v. Uniroyal, Inc.*, 562 N.Y.S.2d 613, 614 (N.Y. App. Div. 1st Dep't 1990); *see also Pharm. Horizons, Inc. v. Sterling Drug, Inc.*, 512 N.Y.S.2d 30, 31 (N.Y. App. Div. 1st Dep't 1987) ("[W]hen, as here, the court can determine the parties' intent by looking at the agreement, the issue is one of law and should be decided by summary judgment."); *HSH Nordbank AG N.Y. Branch v. Street*, No. 10-1684, 2011 U.S. App. LEXIS 9316, at *3 (2d Cir. May 4, 2011) (affirming summary judgment in contract dispute); *Katel Ltd. Liab. Co. v. AT&T Corp.*, 607 F.3d 60, 64 (2d Cir. 2010) (affirming summary judgment where contract was unambiguous).

11 *See, e.g., White v. Cont'l Cas. Co.*, 9 N.Y.3d 264, 268 (N.Y. 2007) (affirming summary judgment where defendant carried out plain meaning of insurance policy); *Katel*, 607 F.3d at 64-65 (affirming summary judgment where defendant complied with telecommunications agreement's unambiguous terms); *Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 472 (2d Cir. 2010) (affirming summary judgment where defendant acted in accordance with indenture's unambiguous terms); *Franconero v. Universal Music Corp.*, No. 02 Civ. 1963, 2011 WL 566794, at *2-3 (S.D.N.Y. Feb. 11, 2011) (granting summary judgment where defendant complied with agreement's unambiguous recording agreement's terms).

Agreement," without "conduct[ing] any independent investigation as to the accuracy, veracity or completeness of any such items or … investigat[ing] *any* other facts or circumstances to verify compliance by the Project Entities with their obligations hereunder."[12]

The undisputed facts demonstrate that BANA performed its contractual duties. There can be no legitimate dispute that for each Advance Request from September 2008 through March 2009, Fontainebleau submitted (i) all documentation required by the Disbursement Agreement and (ii) a certification that all conditions precedent to an Advance were satisfied as of the requested Advance Dates. There is also no dispute that BANA received the required certifications from IVI, the Contractor and the Architect for each Advance Request. And there is likewise no dispute that Fontainebleau unfailingly executed and delivered an Advance Confirmation Notice "confirm[ing] that each of the representations, warranties and certifications made in the Advance Request … [were] correct as of the Requested Advance Date."[13] Having received all the necessary documents, the Disbursement Agreement required BANA to approve Fontainebleau's Advance Requests.[14] BANA thus properly performed its Disbursement Agreement duties, and is entitled to summary judgment.[15]

Plaintiffs' argument that BANA "had a duty to determine the true facts" and "should have known" various circumstances regarding FBR, Fontainebleau, Lehman, and ULLICO,[16] is refuted by Sections 9.3.2 and 9.10 of the Disbursement Agreement, under which BANA had no obligation "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," or "to inquire of any Person whether a Default or an Event of Default has occurred and is continuing."[17] These clear and

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[12] *Id.* § 9.3.2 (emphasis added); *see also* Credit Agmt. § 9.4.

[13] Disbursement Agmt. § 2.4.6; Ex. E.

[14] *See id.* § 2.4.6.

[15] *See, e.g., White*, 9 N.Y.3d at 268 (affirming summary judgment where defendant carried out plain meaning of contract).

[16] *See* Pls. 2d Interrog. Resp., at 6-16; *see also* Pryor Rpt., ¶ 7(e).

[17] Disbursement Agmt. §§ 9.3.2, 9.10; *see also* Credit Agmt. § 9.3 (Bank Agent has no duty to "ascertain or inquire into (i) any statement, warranty or representation made in or in connection with this Agreement or any other Loan Document, (ii) the contents of any certificate, report or other document delivered [under the Credit Agreement or Disbursement

unambiguous provisions must be enforced according to their terms.[18] BANA cannot be held liable for an obligation that is inconsistent with the Disbursement Agreement's terms.[19]

Plaintiffs incorrectly rely on Section 9.1's directive that the Disbursement Agent "exercise commercially reasonable efforts and utilize commercially prudent practices in the performance of its duties hereunder." That provision cannot trump Sections 9.3.2 and 9.10.[20] First, Section 9.1 does not create additional duties, rather, it merely describes the standard applicable to BANA's existing "duties hereunder." Second, contracts should not be read so as to render provisions "without force and effect."[21] Reading Section 9.1 to require BANA to investigate the accuracy of Fontainebleau representations, warranties and certifications, or whether a Default or an Event of Default has occurred, would impermissibly nullify Section 9.3.2 and 9.10's unambiguously contrary provisions. Third, specific provisions control general

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Agreement], (iii) the performance or observance of any of the covenants, agreements or other terms or conditions set forth herein or therein or the occurrence of any Default.").

[18] *See Greenfield*, 780 N.E. at 170.

[19] *See Ruttenberg v. Davidge Data Sys. Corp.*, 626 N.Y.S.2d 174, 178 (N.Y. App. Div. 1st Dep't 1995) (granting defendant summary judgment where plaintiff sought to impose "a right that [the contract] simply does not bestow upon plaintiff" because "[t]his Court will not rewrite the terms of an agreement under the guise of interpretation"); *85th St. Rest. Corp. v. Sanders*, 600 N.Y.S.2d 1, 5 (N.Y. App. Div. 1st Dep't 1993) (holding court should "not rewrite the terms of an agreement under the guise of interpretation" on a motion for summary judgment).

[20] *See* Pls. 2d Interrog. Resp., at 9; Pryor Rpt. ¶¶ 30-31; Am. Compl. ¶ 122.

[21] *See Excess Ins. Co. Ltd. v. Factory Mut. Ins. Co.*, 822 N.E.2d 768, 771-72 (N.Y. 2004) (rejecting interpretation of contract provision that "would render [another provision] a nullity"); *Century-Maxim Const. Corp. v. One Bryant Park, LLC.*, 2009 N.Y. Slip. Op. 50858U, 2009 WL 1218895 at *11 (N.Y. Sup. Ct. Apr. 7, 2009) ("[T]he rules of construction of contracts require the court to adopt an interpretation which gives meaning to every provision of a contract or, in the negative, no provision of a contract should be left without force and effect.") (internal quotation marks and brackets omitted) (granting motion to dismiss); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 203(a) ("[A]n interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect."); *id.* cmt. b ("Where an integrated agreement has been negotiated with care and in detail and has been expertly drafted for the particular transaction, an interpretation *is very strongly negated* if it would *render some provision superfluous*." (Emphasis added).)

ones.[22] Section 9.1 is a general provision broadly discussing the Disbursement Agent's performance of its duties, while Sections 9.3.2 and 9.10 contain more specific provisions limiting those duties. Accordingly, Sections 9.3.2 and 9.10's specific provisions eliminating any duty to investigate control over Section 9.1's generalized discussion.[23]

II. THERE IS NO EVIDENCE THAT BANA WAS GROSSLY NEGLIGENT.

BANA is entitled to summary judgment for the additional and independently sufficient reason that there is no evidence that BANA was grossly negligent in performing its agent duties. Under both the Disbursement Agreement and the Credit Agreement, BANA has no liability other than for its own gross negligence, bad faith, fraud or willful misconduct.[24] Those provisions are fully enforceable under established New York law.[25]

In the commercial context, the gross negligence standard under New York law is high: it requires conduct that "evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing."[26] A similarly high standard applies to willful misconduct, requiring

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[22] *Muzak Corp. v. Hotel Taft Corp.*, 133 N.E.2d 688, 690 (N.Y. 1956) ("Even if there was an inconsistency between a specific provision and a general provision of a contract (we find none), the specific provision controls."); *Peak Partners, LP v. Republic Bank*, 191 Fed. App'x 118, 124 n.8 (3d Cir. 2006) (New York law) ("Under New York rules of contact interpretation, where a contract employs contradictory language, specific provisions control over general provisions and it should be interpreted in a way which reconciles all its provisions if possible.") (internal quotation marks omitted).

[23] *Chem. Bank v. Stahl*, 637 N.Y.S.2d 65, 66 (N.Y. App. Div. 1st Dep't 1996) (affirming dismissal because contract's "specific provisions that defendant had no obligation to remove the Atrium were controlling over any inconsistent general provisions regarding compliance with, *e.g.*, zoning regulations"); *see also Peak Partners*, 191 Fed. App'x at 124-25 (to the extent general provision permitting trustee to be held liable for negligent acts created "a general duty not to be negligent, that duty is limited . . . by [the trustee's] right to rely on any document believed by it to be genuine" "without the need to investigate any fact or matter stated in the document") (affirming summary judgment) (internal quotation marks omitted).

[24] Disbursement Agmt. § 9.10; Credit Agmt. § 9.3.

[25] *Metro. Life Ins. Co. v. Noble Lowndes Int'l, Inc.*, 643 N.E.2d 504, 509 (N.Y. 1994) (enforcing contract provision "limiting defendant's liability for consequential damages to injuries to plaintiff caused by intentional misrepresentations, willful acts and gross negligence" because it "represents the parties' Agreement on the allocation of the risk of economic loss in the event that the contemplated transaction is not fully executed, which the courts should honor.").

[26] *Curley v. AMR Corp.*, 153 F.3d 5, 12 (2d Cir. 1998) (internal quotation marks omitted) (New York law); *Colnaghi, U.S.A., Ltd. v. Jewelers Prot. Servs.*, 611 N.E.2d 282, 284 (N.Y. 1993)

Plaintiffs to show more than simply that BANA knew it was breaching the contract.[27] "Willful misconduct" refers to "conduct which is tortious in nature, i.e., wrongful conduct in which defendant *willfully intends to inflict harm on plaintiff at least in part through the means of breaching the contract between the parties.*"[28] Courts routinely grant summary judgment enforcing exculpatory provisions like those here where there is no evidence from which a reasonable fact-finder could conclude that defendant acted with reckless indifference or intent to harm plaintiff.[29]

There is no evidence in the record that BANA intended to harm Plaintiffs, or that it recklessly disregarded their rights. To the contrary, the undisputed facts demonstrate that BANA

("'[G]ross negligence' differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing."); *Berger v. Bd. of Regents of the State of N.Y.*, 577 N.Y.S.2d 500, 503 (N.Y. App. Div. 3d Dep't 1991) ("In order to support a finding of gross negligence, the conduct must be 'egregious.'").

[27] *See Global Crossing Telecomm., Inc. v. CCT Commc'n, Inc. (In re CCT Commc'n)*, Adv. Proc. No. 07-1942, 2011 WL 3023501, at *5 (Bankr. S.D.N.Y. July 22, 2011) ("[W]illful misconduct does not include the voluntary and intentional failure or refusal to perform a contract for economic reasons.").

[28] *Metro. Life*, 643 N.E.2d at 507 (emphasis added); *see also Global Crossing*, 2011 WL 3023501, at *5 ("'Willful misconduct' in this context requires tortious intent, such as fraud, malice, a dishonest purpose or bad faith.").

[29] *Colnaghi*, 611 N.E.2d at 283–84 (granting summary judgment where plaintiff lacked evidence demonstrating gross negligence); *David Gutter Furs v. Jewelers Prot. Servs., Ltd.*, 594 N.E.2d 924, 924-25 (N.Y. 1992) (granting summary judgment because "[t]aken together, these allegations do not raise an issue of fact whether the defendant performed its duties with reckless indifference to plaintiffs rights."); *Stuart Rudnick, Inc. v. Jewelers Prot. Servs.*, 598 N.Y.S.2d 235, 236 (N.Y. App. Div. 1st Dep't 1993) (granting summary judgment enforcing exculpatory provision where no evidence of "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing"); *Alitalia Linee Aeree Italiane v. Airline Tariff Publ'g Co.*, 580 F. Supp. 2d 285, 294 (S.D.N.Y. 2008) (granting summary judgment because "no reasonable jury could conclude that [defendant[acted in conduct akin to intentional wrongdoing or reckless indifference"); *Net2Globe Int'l, Inc. v. Time Warner Telecom of N.Y.*, 273 F. Supp. 2d 436, 450 (S.D.N.Y. 2003) ("While issues of malice, willfulness, and gross negligence often present questions of fact, courts have sustained limitation of liability provisions in the context of a summary judgment motion when the surrounding facts compel such a result."); *Global Crossing*, 2011 WL 3023501, at *13 (granting summary judgment for defendants on gross negligence or willful misconduct where "nothing in the record supports the contention that [defendant] acted our of malice toward [plaintiff], or for the purpose of inflicting harm.").

took its role as agent seriously and carefully performed its duties under the Disbursement and Credit Agreements. Among other things, BANA closely reviewed each Advance Request to ensure it contained all documents, certifications, representations and warranties required to approve the Advance Request. (SOUF ¶ 39.) In each instance, Fontainebleau, IVI, the Contractor, and the Architect certified to BANA that all conditions precedent to disbursement were satisfied, no default had occurred, and the information concerning the Project's status, design and budget was correct and sufficient to complete the Project. (SOUF ¶ 57) When issues arose concerning Lehman or Project costs, BANA consulted (i) internally, (ii) with counsel, (iii) with IVI, and (iv) with Fontainebleau. (SOUF ¶¶ 68-71, 74, 111, 112, 121, 139, 142, 147, 148, 156, 168, 169.) BANA was responsive to questions from Lenders, and pushed Fontainebleau to provide additional information to IVI and the Lenders concerning both Lehman and the Project. (SOUF ¶¶ 87-89, 110-114, [redacted] 117, 121, 138, 139, 142, 147, 148, 150, 164.) And unbeknownst to BANA, Fontainebleau was misrepresenting the Project's finances and prospects.

The undisputed facts also show that when BANA took action, or decided not to do so, it gave proper consideration to the Lenders' rights and interests. For example, in addressing FNBN's commitment repudiation, BANA adopted a solution—removing FNBN's commitment from the In Balance Test—that was consistent with all parties' reasonable commercial expectations:

- Initial Term Loan Lenders, who funded at closing, would not have expected that the Project could collapse simply because a single small lender (0.6% of the Senior Credit Facility) was seized by the FDIC;
- Lenders who had not yet funded wanted to be sure that, before doing so, there were sufficient funds to complete construction, which the revised In Balance Test would reflect; and
- Fontainebleau's reasonable expectation was that a single lender's failure to fund would not relieve the other Lenders of their obligations.[30] Thus, BANA's solution also avoided potential costly litigation for the Lenders.

BANA's decision regarding FNBN was shared with the Lenders via Intralinks, and no Lender protested. Nor did any Lender object when BANA announced its intention to include Z Capital and Guggenheim's unfunded commitments in the In Balance test for the March 2009

[30] See Credit Agmt. § 2.23(g).

Advance Request. BANA's decision to disclose and invite comment on its intended course of action in each instance is the hallmark of good faith and the antithesis of gross negligence or recklessness.

Thus, because there is no evidence that BANA was grossly negligent, the Court should enforce the Disbursement Agreement's exculpatory provisions and dismiss the contract breach claim against BANA.[31]

III. PLAINTIFFS' BREACH ALLEGATIONS ARE FACTUALLY BASELESS AND LEGALLY DEFICIENT.

Plaintiffs assert that there were several events that, notwithstanding Fontainebleau's repeated certifications to the contrary, BANA allegedly "knew or should have known" caused the Advance Request conditions precedent to fail. As demonstrated above, those claims fail because (i) BANA performed its limited ministerial duties as agent and had no duty to investigate; and (ii) there is no evidence that BANA was grossly negligent. And as demonstrated below, each of those claims is also independently meritless under the undisputed facts and governing agreements.

A. The Lehman Bankruptcy Was Not a Retail Facility Agreement Default.

Plaintiffs claim that Lehman's September 2008 bankruptcy filing, in and of itself, was a Default under the Retail Facility that prevented BANA from funding any Advance Requests and required it to issue a Stop Funding Notice.[32] Plaintiffs are factually incorrect because while Lehman's bankruptcy filing made it a "Defaulting Lender" under the Retail Facility Agreement—a designation that came with certain consequences—that filing was *not* a Default.[33] But in any event, under the Credit Agreement, BANA is "deemed not to have any knowledge of any Default unless and until notice describing such Default is given to [BANA] by Borrowers, a Lender or the issuing Lender."[34] BANA never received any notice from Fontainebleau, the Retail Co-Lenders, TriMont, or the Lenders that there was a Default under the Retail Facility Agreement.

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[31] *See Net2Globe Int'l*, 273 F. Supp. 2d at 450 (enforcing exculpatory provision and granting summary judgment for defendant where plaintiff lacked any evidence of gross negligence or willful misconduct).

[32] Pryor Rpt. ¶ 55.

[33] Retail Agmt. § 1 at 7, 8, 15.

[34] Credit Agmt. § 9.3.

Plaintiffs cannot rely on Highland's September-October e-mails to BANA because none qualifies as a "notice."[35] Highland's September 26, 2008 e-mail simply asserted that Lehman's bankruptcy triggered "a number of breaches under the Loan Facility," but did not identify the claimed breaches, much less any Event of Default as defined in the loan documents. And while this e-mail also claimed that Lehman's bankruptcy rendered the Retail Facility "no longer in full force and effect," BANA concluded that Highland's assertion was erroneous as a matter of bankruptcy law—and BANA's conclusion was confirmed by, among other things, Lehman's funding of the October and November 2008 Advances. (SOUF ¶¶ 99, 110-112.) BANA similarly rejected Highland's baseless assertion that Lehman's bankruptcy had caused a Material Adverse Effect. (SOUF ¶¶ 114-115.) And Highland's remaining e-mails do not assert Defaults, rather they raise "questions and concerns" and seek additional information from Fontainebleau. (SOUF ¶¶ [redacted] 119.) A request for information was not a notice of default upon which BANA could issue a Stop Funding Notice. Thus, Plaintiffs' assertion that Lehman's bankruptcy precluded BANA from approving Advance Requests fails as a matter of law.

B. BANA Did Not Know that FBR Funded for Lehman in September.

Plaintiffs claim that BANA breached the Disbursement Agreement by approving Advance Requests even though it allegedly knew that FBR had funded Lehman's September 2008 Retail Advance—which it asserts was a Default, an Event of Default and caused numerous conditions precedent to fail.[36] But as detailed above, there is no support for Plaintiffs' allegation that BANA knew that Lehman did not fund. Immediately before funding the September 2008 Advance, BANA requested and received written and oral assurances from Fontainebleau CFO Jim Freeman that even though Lehman had filed for bankruptcy, Fontainebleau's representations, warranties and certifications remained correct. (SOUF ¶ 74) Plaintiffs' assertion that TriMont told BANA that FBR funded for Lehman is based entirely on inadmissible speculation by TriMont's Rafeedie, which cannot create an issue of material fact.[37] Nor can

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[35] *See* Pls. 2d Interrog. Resp., at 21.

[36] *See* Pls. 2d Interrog. Resp., at 6-9.

[37] *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005) ("[U]nsupported speculation ... does not meet a party's burden of producing some defense to a summary judgment motion. Speculation does not create a genuine issue of fact; instead, it creates a false issue, the demolition of which is a primary goal of summary judgment.") (internal quotation marks omitted); *see also Gerard v. Bd. of Regents of State of Ga.*, 324 Fed. App'x.

Plaintiffs establish BANA's knowledge based on Highland forwarding a Merrill Lynch research analyst's e-mail reporting the analyst's "understand[ing]" that "equity sponsors" had funded Lehman's September Advance Request portion.[38] The e-mail did not identify a source or basis for the statement, and its credibility was suspect because it significantly overstated Lehman's September Shared Costs portion. The e-mail simply repeated an unsubstantiated market rumor—[redacted]. (SOUF ¶¶ 117, [redacted]) No reasonable fact-finder could conclude based purely on this rumor, buried in a long email, that BANA knew that FBR had funded for Lehman.

C. ULLICO Permissibly Funded For Lehman.

Plaintiffs argue that ULLICO's decision to fund Lehman's December 2008 [redacted] Shared Costs portions should have prevented BANA from approving those Advance Requests because ULLICO's funding somehow failed to satisfy Disbursement Agreement Section 3.3.23's condition precedent that "[i]n 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."[39] But Plaintiffs ignore that ULLICO was a Retail Lender and that Lehman had delegated to ULLICO the Retail Agent's duty to deliver the Shared Costs to BANA.[40] Therefore, "the Retail Agent and the Retail Lenders" made the required Advances—*i.e.*, the funds came only from Retail Lenders. Plaintiffs' assertion that Section 3.3.23 requires *each* Retail Lender to fund a specific portion of the Advance is inconsistent with the condition's terms. And it makes no sense, because BANA had no ability to determine the amount of each individual Retail Co-Lenders' required contribution.[41] It is undisputed that the Retail Facility was syndicated under a confidential process, and that BANA and the Lenders did not know the Retail Co-Lenders'

818, 826-27 (11th Cir. 2009) (affirming summary judgment because witness's "speculation" about what facts defendant was aware of "does not create a genuine issue of material fact").

[38] *See* Pls. Interrog. Resp., at 7-10; Pryor Rpt. ¶¶ 48-49.

[39] Pryor Rpt. ¶ 55.

[40] Retail Agmt. § 9.3.

[41] *Lipper Holdings, LLC v. Trident Holdings, LLC*, 766 N.Y.S.2d 561, 562 (N.Y. App. Div. 1st Dep't 2003) ("A contract should not be interpreted to produce a result that is absurd, commercially unreasonable, or contrary to the reasonable expectations of the parties.").

identities or commitment amounts. Thus, Section 3.3.23 should be read as simply requiring that the total Shared Costs be received from the Retail Co-Lenders as a group.

Plaintiffs also suggest that ULLICO's funding for Lehman was an independent Default under the Retail Facility (and not just a condition precedent failure under Section 3.3.23).[42] But as discussed above, the Credit Agreement provides that BANA is not deemed to have knowledge of a Default unless and until it receives a formal notice (*see* pp. at 9-10, *supra*), and BANA indisputably never received a Notice of Default concerning ULLICO's funding. Moreover, there is not a shred of evidence supporting Plaintiffs' allegation that BANA knew that Soffer, FBR and TRLP agreed to repay ULLICO's funding for Lehman.

D. BANA Did Not Know that Fontainebleau Concealed the Anticipated Costs to Complete the Project.

Plaintiffs' allegation that BANA "knew … that the Borrowers were concealing change orders and failing to provide budgets and other required reports for the Project that accurately reflected the anticipated costs to complete construction" is baseless.[43] No evidence even suggests that BANA or IVI knew of Fontainebleau's deception. To the contrary, it is undisputed, as detailed above, that Fontainebleau went to great lengths to conceal the budget overruns from both BANA and IVI. BANA and IVI were victims of the same misrepresentations and omissions underlying Plaintiffs' own Nevada fraud claim against Fontainebleau officers, directors and affiliates.[44]

E. The FDIC's Repudiation of FNBN's Commitment was not an Advance Request Condition Precedent Failure.

Plaintiffs assert that the FDIC's December 2008 repudiation of FNBN's loan commitments prevented Fontainebleau from satisfying Disbursement Agreement Section 3.3.2's condition that "[e]ach representation and warranty . . . set forth in Article 4 . . . shall be true and correct in all material respects as if made on such date" because Section 4.9.1's representation that "[t]here is no default or event of default under any of the Financing Agreements" was

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[42] *See* Pryor Rpt. at ¶ 55.

[43] *See* Pls. 2d Interrog. Resp., at 10.

[44] *See generally* Cantor Decl. ¶ 29 (Brigade Compl. for Misrepresentation, Breach of Fiduciary Duty, Negligence and Conspiracy, *Brigade Leveraged Capital Structures Fund, Ltd., et al v. Fontainebleau Resorts, LLC, et al.* (Clark. Co. Nev. 2011) (No. A-11-637835-B) (Mar. 25, 2011)).

false.[45] But Plaintiffs ignore that Section 3.3.2 only requires the representations to be true in all "material respects." No reasonable fact-finder could conclude that FNBN's repudiated commitments rendered Section 4.9.1's representation *materially* false, because (i) FNBN's unfunded Delay Draw Term Loan and Revolver commitments totaled just 0.6% of the $1.85 billion Senior Credit Facility; and (ii) FNBN's commitments were so insignificant that when BANA removed them from the In Balance Test, the Project remained "In Balance" by approximately $107.7 million.[46] Therefore, Section 4.9.1's representation was correct in all material respects and Section 3.3.2's condition precedent was satisfied.

F. Guggenheim and Z Capital's March 2009 Failure to Fund was not an Advance Request Condition Precedent Failure.

Plaintiffs repeat their erroneous argument regarding Section 3.3.2 with respect to Guggenheim and Z Capital's March 2009 failure to fund their Delay Draw Term Loan commitments, claiming that BANA should not have approved the March 2009 Advance Request as a result.[47] But as with FNBN, those lenders' commitments were not material because (i) Guggenheim and Z Capital's unfunded commitments totaled just $21.67 million, or roughly 1% of the Senior Credit Facility (SOUF ¶ 191); (ii) their failure to fund had no immediate impact because BANA collected $327 million in Delay Draw Term Loan commitments in March 2009 against a $138 million Advance Request (SOUF ¶ 194); and (iii) BANA contacted Guggenheim in March 2009 and was told that Guggenheim expected to fund its $10 million commitment within a few weeks—which it did (SOUF ¶ 193).

Moreover, Plaintiffs—or their predecessors-in-interest—never objected to the March 2009 Advance despite Guggenheim and Z Capital's failure to fund. As detailed above, BANA posted a letter on Intralinks informing Lenders that it intended to include Guggenheim and Z

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[45] *See* Pls. 2d Interrog. Resp., at 13, 18; Pryor Rpt. ¶ 90.

[46] *See ECA & Local 134 IBEW Joint Pension Trust of Chicago. v. JP Morgan Chase Co.*, 553 F.3d 187, 204 (2d Cir. 2009) (affirming complaint's dismissal because false statements impacting only 0.3% of assets were immaterial as a matter of law); *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 547 (8th Cir. 1997) (affirming complaint's dismissal because false statements impacting only 1.7% of assets were "immaterial as a matter of law"); *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 715 (3d Cir. 1996) (affirming complaint's dismissal because false statements impacting only 0.54% of net income were immaterial as a matter of law).

[47] *See* Pls. 2d Interrog. Resp., at 14; Pryor Rpt. ¶ 99.

Capital's unfunded commitments in the In Balance Test's Available Funds component for the March 2009 Advance. (SOUF ¶ 195) BANA requested that any Lender that did not agree with BANA's interpretation or believed that the Advance Request should not be approved notify BANA. (*Id.*) Not a single Lender notified BANA that it disagreed with BANA's analysis or communicated to BANA that it should not fund the March 2009 Advance Request. Thus, even if there had been a condition precedent failure here, BANA indisputably was not indifferent to Plaintiffs' rights or intentionally trying to inflict harm on them.

G. The Supplemental March 2009 Advance Request Was Not Untimely.

Plaintiffs' suggestion that BANA should have rejected the March 2009 Advance Request because Fontainebleau submitted the supplemental Advance Request less than three days before the scheduled March 25, 2009 Advance Date is not supported the Disbursement Agreement's terms.[48] Contrary to Plaintiffs' assertion, the Disbursement Agreement has no deadline for supplementing an Advance Request. Disbursement Agreement Section 2.4.5 permits Fontainebleau "with the approval of the Disbursement Agent and the Construction Consultant, [to] revise and resubmit" Advance Request at any time "prior to the Scheduled Advance Date." And while BANA is to "use reasonable diligence to review and approve such supplemental Advance Request" three days before the Scheduled Advance Date (*id.*), that simply means that BANA had to make reasonable efforts under the circumstances—it does not create a hard deadline. Indeed, if BANA had denied the March 2009 Advance simply because Fontainebleau, apparently working to address IVI's cost concerns, had submitted a supplemental Advance Request on March 25 correcting a $300,000 understatement of the In Balance amount, that would have been contrary to Section 2.4.5's requirement that BANA "consider [Fontainebleau's] submission in good faith." Moreover, neither Section 2.4.6 (Advance Confirmation Notice) nor Section 2.5.1 (Stop Funding Notices) refers to the Advance Request being approved three days before the Advance Date. Thus, the supplemental March 2009 Advance Request was not untimely.

[48] *See* Pls. 2d Interrog. Resp., at 29; Pryor Rpt. ¶ 110(c)(1).

CONCLUSION

BANA and Plaintiffs were both victims of Fontainebleau's wide-ranging fraud, which included, among other things, (i) failing to disclose that FBR funded Lehman's September 2008 Shared Costs portion; (ii) falsifying Anticipated Cost Reports to conceal massive construction cost overruns, and (iii) [redacted]. But Plaintiffs (many of whom invested only in this litigation's outcome, not the Project itself) now claim that BANA "knew or should have known" these and other facts—opportunistically seeking damages from BANA for not uncovering Fontainebleau's deception, while simultaneously pursuing fraud and breach of fiduciary duty claims against Fontainebleau in another forum based on the very same facts. As demonstrated above, Plaintiffs' cynical gambit fails to establish a breach of contract claim for three independently sufficient reasons. *First*, the undisputed facts show that BANA fully performed its ministerial Disbursement Agent and Bank Agent duties by approving and funding Advance Requests only after receiving all required documentation, representations, warranties, and certifications from Fontainebleau and others. The Disbursement Agreement and Credit Agreement unambiguously permitted BANA to rely on those certifications and, contrary to Plaintiffs' assertion, imposed no obligation on BANA to confirm or investigate the certifications' accuracy. *Second*, BANA can only be held liable as agent for acts of gross negligence, bad faith, fraud or willful misconduct—a high standard under New York law requiring proof of reckless indifference or intent to harm Plaintiffs. But there is absolutely no evidence that BANA sought to harm Plaintiffs or recklessly disregarded their rights. To the contrary, the factual record is replete with evidence of BANA's good faith efforts to perform its agent duties. *Third*, Plaintiffs' allegations that BANA "knew or should have known" that various events caused the Advance Request conditions precedent to fail are independently meritless because they are inconsistent with the undisputed facts and the governing agreements' unambiguous terms. Accordingly, BANA is entitled to summary judgment dismissing Plaintiffs' breach of contract claim.

Dated: August 5, 2011

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I, Asher L. Rivner, hereby certify that on August 5, 2011, I served by electronic means pursuant to an agreement between the parties a true and correct copy of the foregoing Defendant Bank of America, N.A.'s Motion for Summary Judgment and Incorporated Memorandum of Law upon the below-listed counsel of record and that the original and a paper copy of the foregoing document will be filed with the Clerk of Court under seal.

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Asher L. Rivner

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

IN RE:

FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.
_____/

DEFENDANT BANK OF AMERICA, N.A.'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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CONTAINS INFORMATION THAT IS "CONFIDENTIAL" AND "HIGHLY CONFIDENTIAL" UNDER PROTECTIVE ORDER

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Pursuant to Local Rule 7.5(c), defendant Bank of America, N.A. ("BANA") submits this statement of material facts as to which there can be no dispute:

I. THE PARTIES

1. BANA is a nationally chartered bank with its main office in Charlotte, North Carolina. (*See* Cantor Decl. Ex. 90 at ¶ 120.)

2. BANA acted as Administrative Agent under the Credit Agreement for the Senior Secured Facility lenders. (Credit Agmt., § 9.1.[1])

3. BANA acted as Disbursement Agent under the Master Disbursement Agreement. (Disbursement Agmt. Ex. A.[2])

4. BANA was a Revolver Loan lender to Fontainebleau Las Vegas, LLC and Fontainebleau Las Vegas II, LLC (collectively, the "Borrowers" or "Fontainebleau") under the Credit Agreement. (*See* Cantor Decl. Ex. 90 at ¶ 120.)

5. Plaintiffs are a group of sophisticated financial institutions who were lenders—or in most cases, successors-in-interest to lenders—to Fontainebleau under the Credit Agreement. (*See* Cantor Decl. Ex. 25 at ¶¶ 113, 117).

6. [redacted]

[1] All references to the "Credit Agreement" or "Credit Agmt." are to the Credit Agreement dated as of June 6, 2007 attached as Exhibit 2 to the Declaration of Daniel L. Cantor ("Cantor Decl.").

[2] Unless otherwise specified, all references to the "Disbursement Agreement" or "Disbursement Agmt." are to the Master Disbursement Agreement dated as of June 6, 2007 attached as Exhibit 1 to the Cantor Declaration.

[redacted]

7. [redacted]

II. THE PROJECT

8. The Fontainebleau Las Vegas is a partially completed resort and casino development on an approximately 24.4 acre parcel at the Las Vegas Strip's north end (the "Project"). (*See* Cantor Decl. Ex. 83.)

9. The Project's developer was the Borrowers' parent, Fontainebleau Resorts, LLC ("Fontainebleau Resorts" or "FBR"). (Cantor Decl. Ex. 34 at 23, 34.)

10. FBR Chairman Jeff Soffer was a developer with years of experience developing major residential and commercial projects across the United States. (Cantor Decl. Ex. 34 at 55-57, 79.)

11. FBR's Chief Executive Officer and President, Glenn Schaeffer, had overseen numerous major Las Vegas development projects. (Cantor Decl. Ex. 34 at 58-59, 79-80.)

12. The Project's general contractor was Turnberry West Construction ("TWC" or "Contractor"), a member of the Turnberry group of companies. (Cantor Decl. Ex. 34 at 57.)

13. The Turnberry group of companies had a 40-year track record building high-end hotels and residential developments across the United States, including several prominent Las Vegas projects. (Cantor Decl. Ex. 34 at 57-58.)

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III. THE PROJECT'S FINANCING

14. The Project's initial budget was $2.9 billion, which included approximately $1.7 billion of hard construction costs. (*See* Bolio Decl. ¶ 6, Ex. 2 (Disbursement Agmt., Ex. C-1).[3])

15. The largest individual financing component for the Project's resort component was a $1.85 billion senior secured debt facility ("Senior Credit Facility"). (*See* Disbursement Agmt., Recital B.)

16. Additional financing sources included equity contributions by Fontainebleau and its affiliates, $675 million in Second Mortgage Notes, and a $315 million loan earmarked for the Project's retail space ("Retail Facility"). (*Id.*)

A. The Senior Credit Facility

17. Fontainebleau, BANA, Plaintiffs (or their predecessors-in-interest), and other non-party lenders entered into a June 6, 2007 Credit Agreement creating the Senior Credit Facility which comprised three senior secured loans: (1) a $700 million term loan (the "Initial Term Loan"); (2) a $350 million delay draw term loan (the "Delay Draw Term Loan"); and (3) an $800 million revolving loan (the "Revolver Loan"). (Credit Agmt. §§ 1.1, 2.1.)

18. Plaintiffs own only Initial Term Loan and Delay Draw Term Loan notes. (See Cantor Decl. Ex. 25 (Second Am. Term Lender Compl., *Avenue CLO Fund, LTD., et al. vs. Bank of America, N.A., et. al.*, Case No. 09-CV-01047-KJD-PAL (S.D. Fla.) (filed Jan. 15, 2010) [D.E. 15] at ¶ 117).)

B. The Retail Facility

19. The Project's retail space was to be developed by Fontainebleau Las Vegas Retail, LLC (the "Retail Affiliate"), an FBR subsidiary. (*See* Cantor Decl. Ex. 34 at 28.)

20. The Project's resort and retail components each had their own separate credit facilities and construction budgets. (*See* Cantor Decl. Ex. 23 (Susman Dep. at 173:18-174:3); *see also* Disbursement Agmt., Recital C.)

21. FBR specifically designed the retail space's financing to be separate and distinct from the Senior Credit Facility. (*See* Cantor Decl. Ex. 23 (Susman Dep. at 173:18-174:3).)

22. The $315 million Retail Facility was subject to a separate June 6, 2007 agreement between the Retail Affiliate and Lehman Brothers Holdings, Inc. (the "Retail Facility Agreement"). (*See* Cantor Decl. Ex. 35 (Retail Agmt.[4]).)

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[3] All references to the "Bolio Decl." are to the Declaration of Brandon Bolio.

23. BANA was not a party to the Retail Co-Lender Agreement or the Retail Facility Agreement. BANA did not receive a copy of the Retail Co-Lender Agreement. (*See* Retail Agmt.; *see also* Susman Decl. ¶ 9.[5])

24. The resort budget included $83 million in costs that were to be funded through the Retail Facility ("Shared Costs"). (*See* Disbursement Agmt., Recital C.)

25. The Shared Costs were used to fund construction of portions of the Project's retail space that were structurally inseparable from the resort. (Susman Decl. ¶ 12.)

26. Lehman Brothers Holding, Inc. ("Lehman") signed the Retail Facility Agreement as a lender and as the agent for one or more co-lenders (each a "Retail Co-Lender"). (*See* Retail Agmt. at 1.)

27. The Retail Facility Agreement permitted Lehman to syndicate some or all of the Retail Facility to other lenders. (*See* Retail Agmt. § 9.7.2.)

28. The Retail Facility was syndicated under a separate confidential agreement among the Retail Co-Lenders (the "Retail Co-Lending Agreement"). (*See* Cantor Decl. Ex. 85 [Dep Ex. 9].)

29. The terms under which the Retail Facility was syndicated to the Retail Co-Lenders were not disclosed to BANA. (Susman Decl. ¶¶ 8, 9.)

30. The identity of the Retail Co-Lenders was unknown to BANA until the Borrowers revealed the participants in late 2008. (Susman Decl. ¶ 10.)

31. The Retail Facility Agreement permitted Lehman to "delegate all or any portion of its responsibilities under [the Retail Facility Agreement] and the other Loan Documents to the Servicer." (*See* Retail Agmt. § 9.3.)

32. Lehman designated TriMont Real Estate Advisors, Inc. ("TriMont") as the Servicer for the Retail Facility. (Cantor Decl. Ex. [redacted].)

33. Lehman delegated to TriMont the responsibility for collecting the Retail Co-Lenders' respective Shared Costs obligations in response to an Advance Request and transferring those funds to BANA, as Disbursement Agent. (*See* Cantor Decl. Ex. 5 (Rafeedie Dep. at 18:22-19:8).)

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[4] All references to the "Retail Agreement" or "Retail Agmt." are to the Retail Facility Agreement dated as of June 6, 2007 attached as Exhibit 35 to the Cantor Declaration.

[5] All references to the "Susman Decl." are to the Declaration of Jeff Susman.

C. The Disbursement Agreement

34. The Borrower's access to the construction financing was governed by a June 6, 2007 Master Disbursement Agreement ("Disbursement Agreement"). (*See generally* Cantor Decl. Ex. 6 (Yunker Dep. at 20:3-21:5).)

35. No more than once per month, Fontainebleau submitted a Notice of Borrowing that, subject to certain terms and conditions, would require Lenders to transfer funds into a designated bank account (the "Bank Proceeds Account"). (*See* Credit Agmt. §§ 2.1(c), 2.4(c).)

36. Fontainebleau could not withdraw funds directly from the Bank Proceeds Account. (*See* Disbursement Agmt. §§ 2.2.2, 2.3(d).)

37. To access funds to pay Project costs (an "Advance"), Fontainebleau was required to submit a monthly Advance Request, the form and contents of which were prescribed by the Disbursement Agreement. (*See* Disbursement Agmt. §§ 2.1.2, 2.4, 2.4.1.)

38. After Fontainebleau submitted an Advance Request, BANA was required to "review the Advance Request and attachments thereto to determine whether all required documentation has been provided." (*See* Disbursement Agmt., § 2.4.4(a).)

39. BANA was required to confirm that each Advance Request contained all the representations, warranties, and certifications necessary to satisfy Disbursement Agreement Section 3.3's conditions precedent to an Advance. (*See* Disbursement Agmt. § 2.4.6.)

40. Each Advance Request required Fontainebleau, among other things, to "represent, warrant and certify" that "the conditions set forth in Section 3.3 ... of the Disbursement Agreement are satisfied as of the Requested Advance Date." (*See* Disbursement Agmt. § 2.4.1; Bolio Decl. ¶ 6, Ex. 2 (Disbursement Agmt. Ex. C-1 at 1, 8).)

41. Section 3.3 had twenty-four separate multi-part conditions precedent, including:

- "Representations and Warranties. 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." (*See* Disbursement Agmt. § 3.3.2.)

- "Default. No Default or Event of Default shall have occurred and be continuing." (*Id.* § 3.3.3.)

- "Consultant Certificates and Reports. Delivery to each of the applicable Funding Agents and the Disbursement Agent, of (a) the Construction Consultant Advance Certificate approving the corresponding Advance Request, and (b) the Architect's Advance Certificate with respect to the Advance, and (c) the General Contractor Advance Certificate with respect to the Advance." (*Id.* § 3.3.5.)

- "In Balance Requirement. The Project Entities shall have submitted an In Balance Report demonstrating that the In Balance Test is satisfied." (*Id.* § 3.3.8.) The In Balance Test was satisfied when Available Funds equal or exceed the Project's Remaining Costs." (*Id.* Ex. A.)

- "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." (*Id.* § 3.3.11.)

- "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." (*Id.* § 3.3.23.)

- "Plans and Specifications. In the case of each Advance from the Bank Proceeds Account made concurrently with or after Exhaustion of the Second Mortgage Proceeds Account, the Construction Consultant shall to the extent set forth in the Construction Consultant Advance Certificate have approved all Plans and Specifications which, as of the date of the relevant Advance Request, constitute Final Plans and Specifications to the extent not theretofore approved." (*Id.* § 3.3.19.)

42. Each Advance Request required Fontainebleau, among other things, to "represent, warrant and certify" that "the conditions set forth in Section[] 3.3 … of the Disbursement Agreement are satisfied as of the Requested Advance Date." (*See* Bolio Decl. ¶ 6, Ex. 2 (Disbursement Agmt. Ex. C-1, at 8).) The Advance Request also included multiple specific representations that generally tracked the substance of Section 3.3's conditions precedent. (*Id.* at 5-8.) In addition, Fontainebleau certified that each of the seventeen Advance Request attachments "is what it purports to be, is accurate in all material respects, … and reflects the information required by the Disbursement Agreement to be reflected therein." (*Id.* at 1.)

43. Each Advance Request included certifications from the Project architect Bergman, Walls & Associates Ltd. ("BWA" or "Architect"), which certified, among other things, that "[t]he construction performed on the Project … is in general accordance with the 'Drawings and Specifications.'" (*See* Bolio Decl. ¶ 8, Ex. 4 (Disbursement Agmt. Ex. C-3).)

44. Each Advance Request included certifications from TWC, which certified, among other things, that "[t]he Control Estimate ... reflects the costs expected to be incurred by [TWC] to complete the remaining 'Work' … on the Project." (*See* Bolio Decl. ¶ 7, Ex. 3 (Disbursement Agmt. Ex. C-4).)

45. Inspection and Valuation International, Inc. ("IVI")—who was appointed Construction Consultant under the Disbursement Agreement—reviewed the Advance Requests. (Cantor Decl. Ex. 22 (Barone Dep. at 7:18-23; 14:16-15:6).)

46. IVI performed monthly site visits, reviewed information disclosed by Fontainebleau at the site visits, and summarized its findings in Project Status Reports. (Cantor Decl. Ex. 22 (Barone Dep. at 9:6-9:17).)

47. After reviewing an Advance Request, IVI was required to "deliver to the Disbursement Agent … a Construction Consultant Advance Certificate" either approving or disapproving the Advance Request. (*See* Disbursement Agmt. § 2.4.4(b).)

48. By signing the Construction Consultant Advance Certificate, IVI certified, among other things, that based on its review of "the material and data made available" by the Borrowers, Contractor, Architect and others, as well as the relevant invoices, Plans and specifications, its site walk-through and construction observations, and all prior Advance Requests and supporting documentation:

- "The Project Entities have properly substantiated, in all material respects, the Project Costs for which payment is requested in the Current Advance Request";
- "The Remaining Cost Report attached to the Current Advance Request accurately reflect, in all material respects, the Remaining Costs required to achieve Final Completion segregated by each Line Item Category";
- "The Unallocated Contingency Balance is substantially as set forth in the Detailed Remaining Cost Report attached to the Current Advance Request and does not equal or exceed the Required Minimum Contingency";
- "The Opening Date is likely to occur on or before the Scheduled Opening Date set forth in the Current Advance Request and the Completion Date is likely to occur within 180 days thereafter";
- "The Advances requested in the Current Advance Request are, in our reasonable judgment, generally appropriate in light of the percentage of construction completed and the amount of Unincorporated Materials"; and
- "The undersigned has not discovered any material error in the matters set forth in the Current Advance Request or Current Supporting Certificates."

(*See* Bolio Decl. ¶ 10, Ex. 5 (Disbursement Agmt. Ex. C-2).)

49. After receiving the Retail Co-Lenders' funds, TriMont sent a single wire transfer for the entire requested Shared Cost amount to BANA—it did not identify the specific amounts

funded by each Retail Co-Lender. (*See* Cantor Decl. Ex. 5 (Rafeedie Dep. at 40:22-41:9); Cantor Decl. Ex. 23 (Susman Dep. at 204:9-10).)

50. The Disbursement Agent's receipt of the requested Shared Costs was an Advance Request condition precedent under Disbursement Agreement Section 3.3.23. (*See* Disbursement Agmt. § 3.3.23.)

51. If an Advance Request's conditions precedent were satisfied, BANA (as Disbursement Agent) and Fontainebleau were required to execute an Advance Confirmation Notice. (*See* Disbursement Agmt. § 2.4.6.)

52. In the Advance Confirmation Notice, Fontainebleau expressly confirmed "that each of the representations, warranties and certifications made in the Advance Request ... (including the various Appendices attached thereto), ... are true and correct as of the Requested Advance Date and Disbursement Agent is entitled to rely on the foregoing in authorizing and making the Advances herein requested" and "that the [Advance Request] representations, warranties and certifications are correct as of the Requested Advance Date." (*See* Bolio Decl. ¶ 14, Ex. 20 (Disbursement Agmt. Ex. E).)

53. The Advance Confirmation Notice instructed the Bank Agent—BANA in its capacity as Administrative Agent—to transfer the requested funds from the Bank Proceeds Account to payment accounts on the Scheduled Advance Date for further disbursement to Fontainebleau. (*See* Disbursement Agmt. § 2.4.6.)

54. If the conditions precedent were not satisfied, the Disbursement Agent was required to issue a Stop Funding Notice. (*See* Disbursement Agmt. § 2.5.1.)

55. A Stop Funding Notice would be issued if "the [Funding Agent] notifies the Disbursement Agent that a Default or an Event of Default has occurred and is continuing." (*See* Disbursement Agmt. § 2.5.1.)

56. A Stop Funding Notice temporarily suspended the Lenders' obligations to fund loans under the Credit Agreement. (*See* Disbursement Agmt. § 2.5.2.)

57. For each Advance Request from September 2008 through March 2009, BANA received all the required advance certifications from Fontainebleau, TWC, IVI and BWA:

- Fontainebleau certified the satisfaction of all conditions precedent and accuracy of all representations and warranties, including the absence of defaults under the Loan Documents. (*See* Bolio Decl. ¶ 13, Exs. 7-19);

- TWC certified and confirmed that the Control Estimate reflected the costs it expected to be incurred to complete the Project. (*Id.*);
- BWA certified that the construction performed on the Project to date was in accordance with the Project's plans and specifications. (*Id.*); and
- IVI certified that the Remaining Cost Report accompanying the Advance Request accurately reflected the remaining costs required to complete the Project. (*See* Bolio Decl. ¶ 15, Exs. 21-28.)

IV. CONTRACTUAL PROTECTIONS FOR THE DISBURSEMENT AGENT AND ADMINISTRATIVE AGENT

58. In exchange for managing the $1.85 billion Senior Credit Facility, the Disbursement Agent and Administrative Agent earned just $40,000 and $125,000 per year, respectively. (*See* Bolio Decl. ¶ 12, Ex. 6; Cantor Decl. Ex. 17 (Naval Dep. at 17:17-18:25).)

59. Disbursement Agreement Article 9 sets forth the Disbursement Agent's rights and responsibilities. Section 9.3.2 expressly provides, among other things, that BANA "may rely and shall be protected in acting or refraining from acting upon" certifications and other statements by Fontainebleau and IVI, and that "[n]otwithstanding anything else in this Agreement to the contrary, in … approving any Advance Requests, … [BANA] "shall be entitled to rely on certifications from the Project Entities . . . as to satisfaction of any requirements and/or conditions imposed by this Agreement." Section 9.3.2 also states that BANA "shall not be required to conduct any independent investigation as to the accuracy, veracity or completeness of any such items [in the Advance Request] or to investigate any other facts or circumstances to verify compliance by the Project Entities with their [Disbursement Agreement] obligations." (Disbursement Agmt. § 9.3.2.)

60. If a default occurred under the Disbursement Agreement, Fontainebleau was required to "provide to the Disbursement Agent, the Construction Consultant and the Funding Agents written notice of: Any Default or Event of Default of which the Project Entities have knowledge, describing such Default or Event of Default and any action being taken or proposed to be taken with respect thereto." (Disbursement Agmt. § 5.4.1.)

61. Section 9.10 limits BANA's duties as Disbursement Agent, providing, among other things, that:

- "… [BANA] shall have no duties or obligations [under the Disbursement Agreement] except as expressly set forth herein, shall be responsible only for the performance of such duties and obligations and shall not be required to take any action otherwise than in accordance with the terms hereof";

- "...nothing in this Agreement, expressed or implied, is intended to or shall be so construed as to impose upon [BANA] any obligations in respect of this Agreement except as expressly set forth herein or therein"; and
- "... [BANA] shall have no duty to inquire of any Person whether a Default or an Event of Default has occurred and is continuing."

(Disbursement Agmt. § 9.10.)

62. Section 9.10 limits BANA's potential liability to bad faith, fraud, gross negligence or willful misconduct:

> 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. (*Id.* § 9.10.)

63. The Credit Agreement contained similar provisions to the Disbursement Agreement that expressly permitted BANA, as Administrative Agent, to rely on representations by Fontainebleau and others, did not require BANA to investigate those representations, placed the burden on Fontainebleau to report defaults, and limited BANA's liability to gross negligence or worse. (Credit Agmt. §§ 6.7, 9.3, 9.4.)

V. THE EVENTS UNDERLYING PLAINTIFFS' CLAIMS

A. The Lehman Bankruptcy

64. Lehman filed for bankruptcy on September 15, 2008. (*See* Cantor Decl. Ex. 91.)

65. Fontainebleau requested nearly $3.8 million in Retail Facility funds as part of its $103.7 million September 2008 Advance Request. (*See* Bolio Decl. ¶ 13, Ex. 7.)

66. If the Retail Facility did not fund its entire portion of the Advance Request, no funds would be disbursed to Fontainebleau from the Bank Proceeds Account, and could cause Fontainebleau to be unable to pay that month's Project construction costs. (Disbursement Agmt. § 3.3.23.)

67. It was understood that Fontainebleau's failure to remain timely in paying subcontractors could adversely impact the Project. (*See* Susman Decl. ¶ 21.)

1. *BANA determines that the September 2008 Advance Request's conditions precedent were satisfied.*

68. In the days following Lehman's bankruptcy filing, BANA held a series of calls with Fontainebleau to obtain additional information regarding the Lehman bankruptcy's implications for the September 2008 Advance Request. (*See* Cantor Decl. Ex. 6 (Yunker Dep. at 24:19-25:6).)

69. The calls that BANA held with Fontainebleau after Lehman's bankruptcy filing focused on whether Lehman would fund its portion of the Advance Request and on potential alternative financing arrangements if Lehman did not fund, including funding by the other Retail Facility Lenders or Fontainebleau. (Cantor Decl. Ex. 6 (Yunker Dep. at 81:13-83:14).)

70. During the phone calls with Fontainebleau after Lehman's bankruptcy filing, BANA listened to Fontainebleau discuss its financing options if Lehman did not fund, but did not make any recommendations. (Cantor Decl. Ex. 6 (Yunker Dep. at 25:8-12).)

71. Internally, BANA concluded that Fontainebleau funding Lehman's share would not satisfy the Advance Request's Conditions Precedent. (Cantor Decl. Ex. 6 (Yunker Dep. at 96:11-20).)

72. BANA believed that it was required to honor Fontainebleau's September 2008 Advance Request if the entire requested Shared Costs were received from TriMont, and the Advance Request certifications remained in effect. (Cantor Decl. Exs. 23, 10 (Susman Dep. at 173:22-174:3; Howard Dep. at 80:21-81:8).)

73. On September 26, 2008, TriMont sent BANA a single wire transfer for the entire Retail Shared Costs requested amount. (Cantor Decl. Ex. 38 [Dep. Ex. 241]; *see also* Cantor Decl. Ex. 12 (Brown Dep. at 78:20-79:5).)

74. On September 26, 2008, before disbursing funds to Fontainebleau, BANA received representations from Fontainebleau CFO Jim Freeman re-affirming the Advance Request's certifications that all conditions precedent to funding—including funding by the Retail Lenders—were satisfied. (Cantor Decl. Ex. 39 [Dep. Ex. 75]; *see also* Cantor Decl. Exs. 6, 13 (Yunker Dep. at 143:23-145:2; Freeman Dep. at 215:18-217:14).)

75. As of September 26, 2008, Lehman had not announced that it would reject the Retail Facility Agreement as a result of its bankruptcy and, thus, BANA had no reason to believe that agreement was invalid. (Susman Decl. ¶ 19.)

76. Based on information from Fontainebleau and BANA's own involvement in other syndicated loans, BANA understood in September 2008 and thereafter that Lehman was continuing to honor some loan commitments. (Cantor Decl. Ex. 23 (Susman Dep. at 176:21-177:12); *see also* Susman Decl. ¶ 20.)

77. BANA concluded that the Lehman bankruptcy did not provide a basis for rejecting Fontainebleau's September 2008 Advance Request and disbursed the funds. (Susman Decl. ¶ 16.)

2. *Fontainebleau conceals that its affiliates funded Lehman's portion of the September 2008 Advance Request.*

78. Lehman's portion of the September 2008 Advance Request was funded by Fontainebleau Resorts, which made a $2,526,184 "equity contribution" to "prevent an overall project funding delay and resulting disruption of its Las Vegas project" after Lehman failed to fund its required September 2008 Retail Shared Costs portion. (Cantor Decl. Ex. 40 [Dep. Ex. 14].)

79. Internal BANA documents reflect BANA's belief in 2008 that Lehman funded in September 2008. (*See*, *e.g.*, Cantor Decl. Ex. 56 [Dep. Ex. 905].)

80. Jim Freeman was instructed by Fontainebleau's counsel not to reveal that Fontainebleau Resorts had funded for Lehman. (Cantor Decl. Ex. 13 (Freeman Dep. at 227:8-20; 237:5-11).)

81. Mac Rafeedie testified that he could not "recall the exact things that were discussed in that call" with BANA but that "consistent with [his] practice," he "could have" told BANA that FBR funded for Lehman; but he also testified that the discussion "could have been just that Lehman's dollars were funded, not necessarily who funded what." (Cantor Decl. Ex. 5 (Rafeedie Dep. at 57:13-58:19).)

82. BANA's Jeanne Brown testified that she did not recall ever having discussed with Mac Rafeedie whether Lehman itself funded in September 2008. (Cantor Decl. Ex. 12 (Brown Dep. at 57:1-8; 64:17-65:3; 66:15-24).)

83. On October 6, 2008, Jim Freeman told Moody's that "Retail funded its small portion last month." (*See* Cantor Decl. Ex. 44 [Dep. Ex. 283].)

84. Jim Freeman did not tell Moody's that FBR had funded for Lehman in September because "[b]ased on the discussion that I had, the advice of counsel, I was -- I was not talking to people about the source of funding." (*See* Cantor Decl. Ex. 13 (Freeman Dep. at 250:10-12).)

85. Jim Freeman told BANA's Jeff Susman that Retail Lenders had funded the September 2008 Shared Costs. (Cantor Decl. Ex. 23 (Susman Dep. at 193:20-194:4).)

86. Fontainebleau's CEO Glenn Schaeffer told Bill Newby that Lehman itself had funded in September 2008. (Cantor Decl. Ex. 3 (Newby Dep. at 64:11-65:3).)

3. *Fontainebleau provides repeated assurances that the Advance Request conditions precedent are satisfied despite Lehman's bankruptcy.*

87. On September 22, 2008, BANA asked Fontainebleau to schedule a call with Lenders to address their Lehman-related questions. (Cantor Decl. Ex. 37 [Dep. Ex. 901].)

88. In anticipation of the Lender call, BANA sent Fontainebleau a list of potential Lender questions, including whether Lehman funded its September 2008 Shared Costs portion, the identity of any entity that funded on Lehman's behalf, and the Lehman bankruptcy's effect on Fontainebleau's ability to complete the Project. (Cantor Decl. Ex. 42 [Dep. Ex. 76].)

89. Fontainebleau agreed to participate in the Lender call that BANA requested but later backed out. (*See* Cantor Decl. Ex. 43 [Dep. Ex. 205].)

90. On October 7, 2008, Fontainebleau sent BANA and the Lenders a memorandum addressing the Retail Facility's status. (Cantor Decl. Ex. 47 [Dep. Ex. 77].)

91. The October 7, 2008 memorandum assured the Lenders that the August and September Shared Costs had been funded in full. (*Id.*)

92. The October 7, 2008 memorandum stated that Fontainebleau was "continuing active discussions with Lehman Brothers to ensure that, regardless of the Lehman bankruptcy filing and related acquisition by Barclay's, there is no slowdown in funding for the project." (*Id.*)

93. The October 7, 2008 memorandum stated that Fontainebleau did not "believe there will be any interruption in the retail funding of the project." (*Id.*)

94. On October 22, 2008, Fontainebleau provided the Lenders with another update, stating that "Lehman Brothers' commitment to the Retail Facility had not been rejected in bankruptcy court and remained in full force and effect." (Cantor Decl. Ex. 51 [Dep. Ex. 285].)

95. Fontainebleau's October 22, 2008 update stated that "Lehman Brothers has indicated to us that that it has sought the necessary approvals to fund its commitment this month," and it had received assurances from the "co-lenders to the retail facility" that "[i]f Lehman Brothers is not in a position to perform … that they would fund Lehman's portion of the draw." (*Id.*)

96. On December 5, 2008, FBR issued financial statements for the period ended September 30, 2008 that included disclosures regarding the Retail Facility's status. (Cantor Decl. Ex. 54 [Dep. Ex. 286].)

97. FBR's financial statements represented that "[t]he Company has been working diligently with Lehman Brothers and the co-lenders to ensure that there is no interruption in funding for the retail component." (*Id.*)

98. The FBR financial statements' "Equity Contributions" disclosure made no mention of its September 2008 equity contribution on Lehman's behalf. (*Id.* at FBR01281007.)

99. Lehman funded its Shared Costs portion for the October and November Advances. (*See* Cantor Decl. Exs. 5, [redacted] (Rafeedie Dep. 63:13-21, 66:3-23; [redacted])

100. In December 2008, BANA learned that Union Labor Life Insurance Company ("ULLICO") would fund Lehman's Shared Costs portion. (Cantor Decl. Ex. 23 (Susman Dep. at 269:24-270:19); Cantor Decl. Ex. 56 [Dep. Ex. 905].)

101. ULLICO was a Retail Co-Lender under the Retail Co-Lending Agreement. (Cantor Decl. Ex. 4 (Kolben Dep. at 10:17-11:16); *see also* Cantor Decl. Ex. 85 [Dep Ex. 9].)

102. Each month from October 2008 through March 2009, TriMont wired BANA the full requested Shared Costs. (Bolio Decl. ¶ 16, Ex. 29-34.)

4. [redacted]

103. [redacted]

104. In December 2008, ULLICO entered an agreement with Soffer, FBR and TRLP under which ULLICO would pay Lehman's December 2008 Retail Advance portion, and Soffer, FBR and TRLP would guaranty repayment within ninety days. (*See* Cantor Decl. Ex. 55 [Dep. Ex. 24].)

105. [redacted] (*See* Cantor Decl. Exs. 58, 60, 78 [Dep. Exs. 30, 36, 42].)

106. [redacted] (*See id.*)

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107. [redacted]

(Cantor Decl. Ex. 4 (Kolben Dep. at 95:16-96:18).)

108. There is no evidence that the guaranties were ever disclosed to BANA or the Lenders.

5. *BANA evaluates Highland's claim that Lehman's bankruptcy was a default under the loan documents.*

109. Funds managed by Highland Capital Management ("Highland") were Initial Term Loan and Delay Draw Term Loan Lenders. (*See* Cantor Decl. Ex. 25 (Second Amended Complaint for Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, and Declaratory Relief (Jan. 15, 2010) at ¶¶ 38-40, 117).

110. On September 26, 2008, Highland sent BANA an e-mail claiming that

> "[a]s a result of [Lehman]'s bankruptcy filing earlier this month, the financing agreements are no longer in full force and effect, triggering a number of breaches under the Loan Facility - resulting in the following consequences: (i) No disbursements may be made under the Loan Facility; and (ii) The Borrower should be sent a notice of breach immediately to protect the Lenders' rights and ensure that any cure period commence as soon as possible."

(Cantor Decl. Ex. 41 [Dep. Ex. 455].)

111. BANA, through its outside counsel Sheppard Mullin Richter & Hampton LLP, told Highland that the Bankruptcy Code specifically provides that "no executory contract may be terminated or modified solely based on the commencement of a Chapter 11 case," and asked Highland to identify any "authority or documents supporting a contrary conclusion." (Cantor Decl. Ex. 49 [Dep. Ex. 904].)

112. Following communications with Highland and further internal analysis, BANA concluded that Lehman's bankruptcy did not provide a basis for rejecting Fontainebleau's September 2008 Advance Request. (Susman Decl. ¶ 16.)

113. BANA provided additional information to Highland in a September 29, 2008 Sheppard Mullin e-mail, explaining that it had been "monitoring all [Lehman] court orders" and was "unaware of a restriction on performance of this agreement." (Susman Decl. ¶ 22, Ex. 5.) The e-mail also rejected Highland's suggestion that Lehman's bankruptcy was an "anticipatory repudiation of the contract." (*Id.*)

114. On September 30, 2008, Highland sent BANA another e-mail, this time claiming that Lehman's bankruptcy constituted a Material Adverse Effect ("MAE"). (Susman Decl. ¶ 23, Ex. 5.)

115. BANA concluded that Highland's September 30, 2008 claim was incorrect because there was no indication that there would be a shortfall in Retail Funds, or that Lehman would be unable to honor its obligations under the Retail Facility. (Susman Decl. ¶ 23.)

116. [redacted] (Cantor Decl. Ex. 45 [Dep. Ex. 458].) [redacted] (*Id.*)

117. On October 13, Highland forwarded to BANA a Merrill Lynch research analyst's e-mail that discussed nine industry developments and, in the only sentence referring to Fontainebleau, stated: "We understand that FBLEAU equity sponsors have funded the amount required from Lehman on the retail credit facility due this month ($4 million)." (Cantor Decl. Ex. 50 [Dep. Ex. 459].) The Merrill Lynch research e-mail that Highland forwarded to BANA did not identify a source or basis for the statement, and it overstated Lehman's Shared Costs portion. (*Id.*)

118. Highland claimed that the market rumor created "a breach concern under the Disbursement Agreement" and that "Lehman [was] in breach of the [Retail] [A]greement because it failed to fund and thus the agreement [was] not in full force and effect." (*Id.*)

119. In its October 13, 2008 e-mail, Highland also requested that because of these concerns, BANA "confirm" certain matters concerning the Retail Facility, including: (i) "wiring confirmations from the Retail Lenders or funding certificates from the Retail Lenders to confirm that funding is made by the Retail lenders (rather than other sources)" and (ii) a legal opinion from the "borrower's legal counsel . . . that the Lehman funding agreement is in full force and effect." (*Id.*) Highland cited no provision of any agreement requiring such information be provided to the agent or the lenders. (*Id.*)

120. [redacted] (Cantor Decl. Ex. 16 (Rourke Dep. at 103:6-16).)

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121. BANA evaluated Highland's claim, but rejected it in view of the numerous representations and warranties made by Fontainebleau in the September and October 2008 Advance Requests, the continued receipt of the requested Shared Costs from TriMont, and the other statements by Fontainebleau. (Susman Decl. ¶ 24.)

122. In September 2008, numerous credible publications reported that certain Highland funds had suffered staggering losses and faced a liquidity crunch. (Cantor Decl. Ex. 24 (P. Paulden, Highland Shuts Funds Amid 'Unprecedented' Disruption, BLOOMBERG (Oct. 16, 2008)).)

123. [redacted] (Cantor Decl. Ex. 16 (Rourke Dep. at 70:24-72:2).)

6. *Lenders could, and did, seek information about Lehman directly from Fontainebleau.*

124. Many Lenders contacted Fontainebleau management directly in the fall of 2008 to raise questions, among other things, about the Lehman bankruptcy's implications for the Project. (Cantor Decl. Exs. 36, 46, 48, 53 [Dep. Exs. 278, 281, 280, 282].)

125. [redacted] (Cantor Decl. Ex. 16 (Rourke Dep. at 46:25-47:22).)

126. [redacted] (Cantor Decl. Ex. 16 (Rourke Dep. at 126:2-127:2).)

127. [redacted] (Cantor Decl. Ex. 16 (Rourke Dep. at 137:8-12); Cantor Decl. Ex. 52 [Dep. Ex. 465].)

128. There is no evidence that Highland ever submitted a formal Notice of Default or raised any further concerns with BANA regarding Lehman's bankruptcy.

B. Fontainebleau's Failure to Disclose Anticipated Project Costs.

129. Many large-scale development projects experience cost increases during the construction process, and the Fontainebleau Project was no exception. (*See* Barone Decl. ¶ 11.[6])

130. After uncovering Fontainebleau's fraud during discovery in this action, Plaintiffs filed suit against FBR, the Contractor (TWC), Jeff Soffer, Glenn Schaeffer, Jim Freeman and others, asserting claims for fraud and breach of fiduciary duty based on the knowingly false and misleading statements made to BANA and IVI. (Cantor Decl. Ex. 27.)

1. IVI reviewed Fontainebleau's cost disclosures in certifying and approving the Advance Requests.

131. Each month, the Contractor provided IVI with an Anticipated Cost Report ("ACR")—an estimate of additional costs that might be incurred in the future based, in part, on change orders submitted by subcontractors. (Cantor Decl. Ex. 22 (Barone Dep. at 16:6-20); *see also* Barone Decl. ¶ 13.)

132. On January 13, 2009, IVI issued its Construction Consultant Advance Certificate for the January 2009 Advance, in which it affirmed, among other things, that "[t]he undersigned has not discovered any material error in the matters set forth in the Current Advance Request or Current Supporting Certificates." (Barone Decl. ¶ 15, Ex. 3; Bolio Decl. ¶ 15, Ex. 25.)

133. In its January 30, 2009 Project Status Report ("PSR 21"), IVI stated that it was concerned that Fontainebleau's cost disclosures might not be accurate because it appeared that work on the Project would need to be accelerated to meet the scheduled opening date and that related costs, such as overtime, were not reflected in the latest ACR. (Cantor Decl. Ex. 59 at 22 [Dep. Ex. 809].)

134. PSR 21 stated that although "the Anticipated Cost Report indicates the Project is expected to stay within budget, 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." (*Id.* at 7.)

135. LEED ("Leadership in Energy and Environmental Design") credits reduce construction costs through Nevada state sales tax credits on building materials for new construction meeting certain sustainability standards. (*See* Cantor Decl. Ex. 84 [Dep. Ex. 808] at ¶ 10).)

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[6] All references to the "Barone Decl." are to the Declaration of Robert W. Barone.

136. PSR 21 stated that "it appears that the LEED credits are tracking behind projections and the Developer has begun a detailed audit," noting that it would "continue to discuss this with the Developer." (Cantor Decl. Ex. 59 [Dep. Ex. 809].

137. The concerns IVI raised in PSR 21 were only "gut" feelings, and IVI had no evidence supporting its suspicions. (Barone Decl. ¶ 17.)

2. *Fontainebleau reassured BANA and the Lenders that Anticipated Project Costs remained within budget.*

138. On February 12, 2009, JPMorgan Chase—a Revolver Lender—sent BANA a letter noting that the "[i]n the Report, IVI makes certain observations … which were not included in prior reports," and asking BANA to provide additional information regarding the Project's budget and the Retail Facility Status. (Cantor Decl. Ex. 61 [Dep. Ex. 810].)

139. On February 20, 2009, BANA sent a letter to Fontainebleau seeking information regarding the issues raised by IVI—including the ACR's accuracy, the existence of actual or potential cost overruns, and LEED credit shortfalls—as well as the Retail Facility's status. (Cantor Decl. Ex. 62 [Dep. Ex. 498].)

140. Fontainebleau responded to BANA's letter on February 23, 2009, denying that there were "any cost overruns or acceleration costs that are not reflected in the Anticipated Cost Report" and stating that "[i]f all of these anticipated costs materialized and there were no offsetting cost savings, the In Balance test would continue to be satisfied" and that "we believe that the full amount of the [LEED] credits reflected in the Budget *will in fact be realized*," and that it was "in the process of engaging auditors to investigate and audit the subcontractors." (*See* Cantor Decl. Ex. 63 [Dep. Ex. 811].)

141. Fontainebleau's February 23, 2009 letter assured BANA that it was "continuing active discussions with Lehman Brothers and the co-lenders to ensure that funding for the Project will continue on a timely basis," and that the "Retail Facility is in full force and effect, [and] there has not been an interruption in the retail funding of the Project to date." (*Id.*)

142. On February 23, 2009, in response to Lender requests, BANA asked Fontainebleau to schedule a Lender call to "permit questions about the Project and [Fontainebleau's] response to [BANA's February 20] letter." (*See* Bolio Decl. ¶ 17, Ex. 35.)

143. In a February 24, 2009 letter, Fontainebleau refused BANA's request to schedule a Lender call, asserting that it was under no contractual obligation to do so, objecting to having a

call on short notice, and raising concerns that sensitive Project-related information might be leaked to the press by Lenders. (*See* Cantor Decl. Ex. 64 [Dep. Ex. 210].)

144. IVI sent BANA Project Status Report No. 22 ("PSR 22") on March 3, 2009. (Cantor Decl. Ex. 66 [Dep. Ex. 600].)

145. IVI's PSR 22 repeated its previous concern that there were unreported Project cost increases but also indicated that the Project remained within budget. (*Id.* at 23.)

146. Because IVI still had no facts or evidence to support its hunch, it executed the Construction Consultant Advance Certificate for the February 2009 Advance Request. (Barone Decl. ¶ 20, Ex. 6.)

3. *BANA approved the March 2009 Advance Request only after IVI finally issued a "clean" Construction Consultant Advance Certificate.*

147. On March 4, 2009, BANA requested that Fontainebleau arrange a Lender meeting because it was "critical that the Company meet and interact with its Lenders." (Cantor Decl. Ex. 68 [Dep. Ex. 814].)

148. BANA's March 4, 2009 letter included a list of Lender information requests concerning Project costs, which mirrored BANA's own previous requests. (*Id.*)

149. On March 5, 2009, IVI asked Fontainebleau for "a submission of the future potential claims being made by the subcontractors against [the Contractor] and any overruns related to the un-bought work" and for an updated ACR "to show the potential exposures to FBLV and a better indication of the current contingency." (Cantor Decl. Ex. 69 [Dep. Ex. 604].)

150. On March 10, BANA sent Fontainebleau another meeting and information request. (*See* Cantor Decl. Ex. 71 [Dep. Ex. 819].)

151. On March 11, 2009, Fontainebleau submitted its March Advance Request. (*See* Bolio Decl. ¶ 18, Ex. 16.)

152. In the Remaining Cost Report annexed to the March 11, 2009 Advance Request, Fontainebleau disclosed that it had increased construction costs by approximately $64.8 million. (*Id.*)

153. On March 12, 2009 IVI's Robert Barone met with Deven Kumar in Las Vegas and Kumar informed Barone that the Project was $35 million over budget. (*See* Barone Decl. ¶ 24.)

154. Based on the March 11, 2009 Advance Request and Fontainebleau's March 12 disclosures, IVI issued a Construction Consultant Advance Certificate on March 19, 2009 that,

for the first time, declared that IVI had discovered material errors in the Advance Request and supporting documentation. (Cantor Decl. Ex. 73 [Dep. Ex. 610]; Barone Decl. ¶ 25, Ex. 9.)

155. IVI's March 19, 2009 Construction Consultant Advance Certificate stated that IVI believed "an additional $50,000,000 will be required for Construction Costs," and that "November 1, 2009 is the likely Opening Date," instead of October 1, 2009 as originally planned. (*See* Cantor Decl. Ex. 73 [Dep. Ex. 610]; Barone Decl. ¶ 25, Ex. 9.)

156. A few days after IVI issued its March 19, 2009 Construction Consultant Advance Certificate, IVI told BANA that it had been "working with the developer to update their most recent anticipated cost report" and that Fontainebleau had "provided an ACR that they state represents their understanding of the hard cost exposures to the project." (See Cantor Decl. Ex. 75 [Dep. Ex. 611].) In that e-mail, IVI advised BANA that "[w]hile we have not conducted an audit of the information presented (it would take weeks), the information presented appears reasonable at this stage in the project." (*Id.*) The e-mail further stated that "[w]hile we believe the developer has done a credible job of projecting the potential costs, it is prudent to include some additional funds for what is not known or expected at this time." (*Id.*)

157. On March 20, 2009, Fontainebleau held a Lender meeting in Las Vegas where it delivered a presentation updating the Lenders on the Project's construction budget and other issues relating to the Project's financial condition. (*See* Cantor Decl. Ex. 74 [Dep. Ex. 97].)

158. During the March 20, 2009 Lender meeting, Fontainebleau presented a slideshow to the attendees. (*Id.*)

159. Fontainebleau's March 20, 2009 Lender Presentation stated, among other things, that Fontainebleau had retained KPMG to conduct a LEED credit audit. (*Id.* at BGD 000353.)

160. Fontainebleau's March 20, 2009 Lender Presentation provided an update on the Project's status. (*See* Cantor Decl. Ex. 74 [Dep. Ex. 97].)

161. On March 23, 2009, Fontainebleau submitted an unsigned draft supplemental Advance Request reflecting its discussions with IVI. (*See* Bolio Decl. ¶ 20, Ex. 38.)

162. On March 23, 2009, after reviewing Fontainebleau's documentation, IVI signed off on Fontainebleau's revisions and issued a Construction Consultant Advance Certificate approving the Advance. (Bolio Decl. ¶ 21, Ex. 39; Barone Decl. ¶ 29, Ex. 13.)

163. On March 23, 2009, after BANA informed Fontainebleau that IVI "signed off on the revised draw with a clean certification (assuming the attached reports are signed),"

Fontainebleau submitted an executed supplemental Advance Request. (*See* Bolio Decl. ¶ 22, Ex. 18; *see also* Barone Decl. ¶ 30, Ex. 14.)

164. BANA made available the supplemental Advance Request to the Lenders the next morning (March 24) along with, among other things, IVI's Certificate and a chart Fontainebleau prepared at the Lenders' request showing the changes to the Remaining Cost Report and In Balance Report. (*See* Bolio Decl. ¶ 23, Ex. 40.) The supplemental Advance Request represented that the Project was In Balance by $13,785,184. (*See* Bolio Decl. ¶ 22, Ex. 18.)

165. On March 25, 2009, the scheduled Advance Date, Fontainebleau further revised the Advance Request to correct an error in the In Balance Report's debt service commitment portion that increased the margin by which the Project was "In Balance" to $14,084,701. (Bolio Decl. ¶ 24, Ex. 41.)

166. On March 26, 2009, having received all required documentation, including IVI's Certificate, and after receiving the Retail Shared Costs, BANA transferred the Advance to Fontainebleau. (*See* Bolio Decl. ¶ 25.)

4. [redacted]

167. On April 13, 2009, Fontainebleau notified the Lenders that one or more events had "occurred which reasonably could be expected to cause the In Balance test to fail to be satisfied." (Cantor Decl. Ex. 79 [Dep. Ex. 410].) The notice explained that the "Project Entities have learned that (i) the April Advance Request under the Retail Loan may not be fully funded, and (ii) as of today, the Remaining Costs exceed Available Funds." (*Id.*)

168. Upon receiving the April 13, 2009 notice from Fontainebleau, BANA and IVI immediately contacted Fontainebleau to obtain additional information. (Cantor Decl. Ex. 19 (Yu Dep. at 237:19-25).)

169. On April 14, 2009, Fontainebleau provided IVI with a schedule of Anticipated Costs dated "as of April 14, 2009" revealing more than $186 million in previously unreported Anticipated Costs. (Cantor Decl. Ex. 80 [Dep. Ex. 613]).)

170. On April 17, 2009, Fontainebleau held a Lender meeting to discuss sudden construction cost increases. (Cantor Decl. Ex. 19 (Yu Dep. at 236:22-237:11).)

171. [redacted]

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[redacted] (Cantor Decl. Ex. 81 at 13, 20 [Dep. Ex. 268]); *see also* Cantor Decl. Ex. 13 (Freeman Dep. at 202:3-6); Cantor Decl. Ex. 19 (Yu Dep. at 240:16-24).)

172. [redacted] (Cantor Decl. Ex. 19 (Yu Dep. at 245:1-14); *see also* Cantor Decl. Ex. 81 [Dep. Ex. 268] at JPM_FB00001734.)

173. Based on the information disclosed by Fontainebleau at the Lender meeting, the Revolver Lenders determined that one or more Events of Default had occurred and terminated the Revolver Loan on April 20, 2009. (*See* Cantor Decl. Ex. 82 [Dep. Ex. 827].)

5. *IVI discovers that Fontainebleau falsified the Anticipated Cost Reports.*

174. After the Revolver Loan was terminated, Fontainebleau and the Lenders attempted to restructure the Senior Credit Facility to enable Fontainebleau to complete the Project. (*See* Cantor Decl. Ex. 19 (Yu Dep. at 247:7-15).)

175. In May 2009, BANA commissioned IVI to "perform a cost-to-complete review" of the Project's construction costs [redacted] (*See* Cantor Decl. Ex. 19 (Yu Dep. at 248:3-6).)

176. As part of IVI's cost-to-complete review, IVI received additional information from Fontainebleau and the Contractor regarding the Project budget, including an April 30, 2009 ACR. (*See* Cantor Decl. Ex. 83 [Dep. Ex. 298].) The April 30, 2009 ACR included $298,053,918 in pending change orders for additional work by subcontractors. (*Id.*)

177. After reviewing the documentation supporting the pending change orders in the April 30, 2009 ACR, IVI concluded "[i]t is clear from the number and scope of pending items, [that] the claims were made by the subcontractors some time ago, possibly as far back as a year, and were never included on prior ACRs submitted to IVI." (*Id.* at 20.)

178. To conceal that the costs required to complete the Project were hundreds of millions dollar higher than the construction budget disclosed to BANA and the Lenders, Fontainebleau and TWC used two separate sets of books: one for their own internal use, which allowed them to keep track of the actual progress, scope and cost of the Project,; and a second set shown to BANA and IVI, which disclosed only a subset of the actual costs. (*See* Cantor Decl. Ex. 18 (Ambridge Dep. at 73:15-74:7; *see also* Ambridge Dep. at 78:3-24).)

179. Fontainebleau and TWC kept a "bank" ACR that was disclosed to BANA and IVI, and an "internal" ACR that included additional costs. (*See* Cantor Decl. Ex. 18 (Ambridge Dep. at 73:9-75:14).)

180. Before an ACR was provided to BANA and IVI, Fontainebleau edited the "internal" ACRs to conform with the construction budget that had been disclosed to the Lenders. (*See* Cantor Decl. Ex. 18 (Ambridge Dep. at 128:23-129:11; 235:16-236:2; 238:20-239:11).)

C. The FDIC's Repudiation of FNBN's Commitment was not an Advance Request Condition Precedent Failure.

181. On July 25, 2008, the First National Bank of Nevada ("FNBN") was closed by the Office of the Comptroller of the Currency. (Cantor Decl. Ex. 87 [Dep. Ex. 888].)

182. The Federal Deposit Insurance Company ("FDIC") was appointed as receiver. (*Id.*)

183. In late-December 2008, the FDIC formally repudiated FNBN's unfunded Senior Credit Facility commitments. (Cantor Decl. Ex. 57 [Dep. Ex. 486].)

184. FNBN's unfunded commitments were $1,666,666 under the Delay Draw Loan and $10,000,000 under the Revolver Loan. (*Id.*)

185. In response to the FDIC's repudiation, BANA directed Fontainebleau to remove FNBN's unfunded commitments from the In Balance Test's "Available Sources" component. (*Id.*)

186. Even without FNBN's unfunded commitments, the Project was still "In Balance" by approximately $107.7 million. (Bolio Decl. ¶ 13, Ex. 13.)

D. Certain Delay Draw Term Lenders Fail to Fund the March 2009 Advance Request.

187. On March 2, 2009, Fontainebleau submitted a Notice of Borrowing under the Credit Agreement requesting a Delay Draw Term Loan for the entire $350 million facility and, simultaneously, a $670 million Revolver Loan (which was reduced to $652 million the next day). (Cantor Decl. Ex. 65 [Dep. Ex. 288].)

188. On March 3, 2009, BANA notified Fontainebleau that it would not process the Notice of Borrowing because it violated Credit Agreement Section 2.1(c)(iii)'s proviso that "unless the Total Delay Draw Commitments have been fully drawn, the aggregate outstanding principal amount of all Revolving Loans and Swing Line Loans shall not exceed $150,000,000." (Cantor Decl. Ex 67 [Dep. Ex. 813]; *see also* Cantor Decl. Ex. 26 (Am. MDL Order No. 18

Granting in Part and Denying in Part Mot. to Dismiss) (Gold, J.) (S.D. Fla.) (Jun. 1, 2010) [DE 55] at 6-7.)

189. On March 9, 2009, Fontainebleau submitted a revised Notice of Borrowing seeking only the $350 million Delay Draw Loan. (Cantor Decl. Ex. 70 [Dep. Ex. 816].)

190. BANA approved Fontainebleau's revised March Notice of Borrowing and nearly all of the Delay Draw Term Loan Lenders funded their respective commitments—totaling $326.7 million. (Cantor Decl. Ex. 76 [Dep. Ex. 104].)

191. Two lenders—Z Capital and Guggenheim—did not immediately fund their collective $21.67 million commitment. (Cantor Decl. Ex. 19 (Yu Dep. at 168:21-169:14).)

192. After reaching out to both Z Capital and Guggenheim, BANA decided to continue including the Guggenheim and Z Capital commitments as "Available Funds" for In Balance Test purposes because there was no conclusive evidence that they would not fund. (Cantor Decl. Ex. 19 (Yu Dep. 259:4-7).)

193. Guggenheim advised BANA that it was "rounding up all the parties" and intended to fund its $10 million commitment—which it did several weeks later. (Cantor Decl. Ex. 19 (Yu Dep. at 228:15-229:4); Cantor Decl. Ex. 19 (Yu Dep. at 168:13-169:14).)

194. On March 11, 2009, Fontainebleau submitted an Advance Request for $137.9 million—far less than the $327 million BANA collected that month from the Delay Draw Term Loan Lenders. (Bolio Decl. ¶ 18, Ex. 16.)

195. Before approving the March 2009 Advance Request, BANA sent the Lenders a March 23, 2009 letter explaining why it intended to disburse the requested funds. BANA disclosed to the Lenders that Z Capital and Guggenheim had not yet funded their respective Delay Draw Term Loan commitments and that excluding those amounts "from Available Funds would result in a failure to satisfy the In-Balance test [sic]." BANA advised the Lenders that it was "willing to include" the unfunded commitment amounts in the In Balance Test's Available Funds component for the March Advance "pending further information about whether these lenders will fund." BANA invited "any Lender which does not support these interpretations [to] immediately inform [BANA] in writing of their specific position." (Cantor Decl. Ex. 76 [Dep. Ex. 104].)

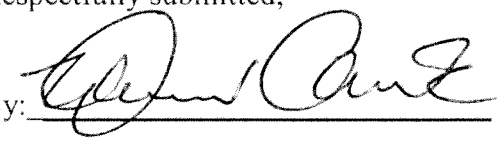
196. There is no evidence that any Lender contacted BANA to dispute its analysis in the March 23, 2009 letter or otherwise direct BANA not to fund the March 2009 Advance Request.

197. BANA funded the March 2009 Advance Request. (Bolio Decl. ¶ 25.)

198. Highland [redacted] and is no longer a plaintiff. (*See* Cantor Decl. Ex. [redacted]; *see also* Order Dismissing Parties Without Prejudice Pursuant to Notice of Voluntary Dismissal [DE 65]; Directing Clerk to Take Action (May 3, 2010) [D.E. 68].)

Dated: August 5, 2011

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I, Asher L. Rivner, hereby certify that on August 5, 2011, I served by electronic means pursuant to an agreement between the parties a true and correct copy of the foregoing Defendant Bank of America, N.A.'s Statement of Undisputed Material Facts in Support of its Motion For Summary Judgment upon the below-listed counsel of record and that the original and a paper copy of the foregoing document will be filed with the Clerk of Court under seal.

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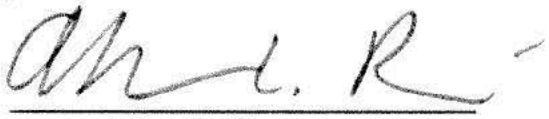

Asher L. Rivner

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

IN RE:

FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.
_____/

DECLARATION OF DANIEL L. CANTOR

I, Daniel L. Cantor, hereby declare as follows:

1. I am a member of the law firm of O'Melveny & Myers LLP, counsel for defendant Bank of America, N.A. ("BANA"), and I am familiar with the facts and circumstances in this action.

2. I make this declaration in support of BANA's Motion for Summary Judgment.

3. Attached as Exhibit 1 is a true and correct copy of Deposition Exhibit 72, the Master Disbursement Agreement dated June 6, 2007, produced in this lawsuit by BANA as BANA_FB00204948-5092.

4. Attached as Exhibit 2 is a true and correct copy of Deposition Exhibit 658, the Credit Agreement dated June 6, 2007, produced in this lawsuit by BANA as BANA_FB00342012-385.

5. Attached as Exhibit 3 is a true and correct copy of excerpts from the transcript of the February 17, 2011 William S. Newby deposition.

6. Attached as Exhibit 4 is a true and correct copy of excerpts from the transcript of the February 22, 2011 Herbert Kolben deposition.

7. Attached as Exhibit 5 is a true and correct copy of excerpts from the transcript of the February 24, 2011 McLendon P. Rafeedie deposition.

8. Attached as Exhibit 6 is a true and correct copy of excerpts from the transcript of the March 1, 2011 Bret Yunker deposition.

CONTAINS "CONFIDENTIAL" AND "HIGHLY CONFIDENTIAL" INFORMATION AND DOCUMENTS UNDER PROTECTIVE ORDER

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9. Attached as Exhibit 7 is a true and correct copy of excerpts from the transcript of the March 8, 2011 Scott Macklin deposition.

10. Attached as Exhibit 8 is a true and correct copy of excerpts from the transcript of the March 10, 2011 Mitchell Sussman deposition.

11. Attached as Exhibit 9 is a true and correct copy of excerpts from the transcript of the March 11, 2011 Roger Schmitz deposition.

12. Attached as Exhibit 10 is a true and correct copy of excerpts from the transcript of the March 11, 2011 David Howard deposition.

13. Attached as Exhibit 11 is a true and correct copy of excerpts from the transcript of the March 18, 2011 Chaney Sheffield deposition.

14. Attached as Exhibit 12 is a true and correct copy of excerpts from the transcript of the March 20, 2011 Jeanne Brown deposition.

15. Attached as Exhibit 13 is a true and correct copy of excerpts from the transcript of the March 23, 2011 Jim Freeman deposition.

16. Attached as Exhibit 14 is a true and correct copy of excerpts from the transcript of the March 23, 2011 Stephen Blauner deposition.

17. Attached as Exhibit 15 is a true and correct copy of excerpts from the transcript of the March 25, 2011 Michael Scott deposition.

18. Attached as Exhibit 16 is a true and correct copy of excerpts from the transcript of the March 29, 2011 Kevin Rourke deposition.

19. Attached as Exhibit 17 is a true and correct copy of excerpts from the transcript of the April 1, 2011 Ronaldo Naval deposition.

20. Attached as Exhibit 18 is a true and correct copy of excerpts from the transcript of the April 4, 2011 Robert Ambridge deposition.

21. Attached as Exhibit 19 is a true and correct copy of excerpts from the transcript of the April 7, 2011 Henry Yu deposition.

22. Attached as Exhibit 20 is a true and correct copy of excerpts from the transcript of the April 7, 2011 Todd Miranowski deposition.

23. Attached as Exhibit 21 is a true and correct copy of excerpts from the transcript of the April 8, 2011 David Corleto deposition.

24. Attached as Exhibit 22 is a true and correct copy of excerpts from the transcript of the April 11, 2011 Robert Barone deposition.

25. Attached as Exhibit 23 is a true and correct copy of excerpts from the transcript of the April 28, 2011 Jeff Susman deposition.

26. Attached as Exhibit 24 is a true and correct copy of Pierre Paulden, *Highland Shuts Funds Amid 'Unprecedented' Disruption*, Bloomberg (Oct. 16, 2008), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=agiw6VSt2goI (last visited Aug. 4, 2011).

27. Attached as Exhibit 25 is a true and correct copy of the Second Amended Complaint for Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, and Declaratory Relief, dated January 15, 2010 [DE 15], filed in the matter of *In re: Fontainebleau Las Vegas Contract Litigation*, Case No. 09-MD-02106-CIV-GOLD/BANDSTRA (S.D. Fla.).

28. Attached as Exhibit 26 is a true and correct copy of Amended MDL Order Number Eighteen; Granting in Part and Denying in Part Motions to Dismiss [DE 35]; [DE 36]; Requiring Answer to Complaints; Vacating Final Judgment [DE 80], entered on May 28, 2010 in the matter of *In re: Fontainebleau Las Vegas Contract Litigation*, Case No. 09-MD-02106-CIV-GOLD/BANDSTRA (S.D. Fla.).

29. Attached as Exhibit 27 is a true and correct copy of the Complaint and Jury Demand for Fraud, Breach of Fiduciary Duty, Negligence and Conspiracy filed in the District Court of Clark County, Nevada on or about March 25, 2011 in *Brigade Leveraged Capital Structures Fund, Ltd., et al v. Fontainebleau Resorts, LLC, et al*, No. A-11-637835-B.

30. Attached as Exhibit 28 is a true and correct copy of the Expert Report of Shepherd G. Pryor IV, dated May 23, 2011.

31. Attached as Exhibit 29 is a true and correct copy of the Avenue Term Lender Plaintiffs' Amended Responses to Second Set of Interrogatories From Defendant Bank of America, N.A., dated June 6, 2011.

32. Attached as Exhibit 30 is a true and correct copy of [redacted], produced in this lawsuit by plaintiff Monarch Master Funding, Ltd. as MON 000044-45.

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33. Attached as Exhibit 31 is a true and correct copy of [redacted], produced in this lawsuit by plaintiff Venor Capital Master Fund Ltd. as VEN 000803-06.

34. Attached as Exhibit 32 is a true and correct copy of [redacted], produced in this lawsuit by plaintiff SPCP Group, LLC as SPT 000179-81.

35. Attached as Exhibit 33 is a true and correct copy of [redacted], produced in this lawsuit by plaintiffs Brigade Leveraged Capital Structures Fund, Ltd. and Battalion CLO 2007-I Ltd. as BGD 004016-18.

36. Attached as Exhibit 34 is a true and correct copy of Deposition Exhibit 4, the March 2007 Offering Memorandum, produced in this lawsuit by BANA as BANA_FB00291925-2018.

37. Attached as Exhibit 35 is a true and correct copy of Deposition Exhibit 8, the Retail Facility Agreement dated June 6, 2007, produced in this lawsuit by Union Labor Life Insurance Company as ULL-FLVR0002046-207.

38. Attached as Exhibit 36 is a true and correct copy of Deposition Exhibit 278, a September 18, 2008 e-mail from Albert Kotite to Glenn Schaeffer and Jim Freeman and copied to Carole Parker, produced in this lawsuit by Fontainebleau as FBR00151117-18.

39. Attached as Exhibit 37 is a true and correct copy of Deposition Exhibit 901, a September 22, 2008 e-mail from Ronaldo Naval to Jim Freeman and Whitney Thier, copied to David Howard, Bill Scott and Jeff Susman, produced in this lawsuit by BANA as BANA_FB00401793-95.

40. Attached as Exhibit 38 is a true and correct copy of Deposition Exhibit 241, a September 26, 2008 e-mail from Jeff Susman to Jon Varnell, Bret Yunker, Kyle Bender, David Howard and Peter Fuad, produced in this lawsuit by BANA as BANA_FB00462092.

41. Attached as Exhibit 39 is a true and correct copy of Deposition Exhibit 75, a September 26, 2008 e-mail from Jim Freeman to Jeff Susman, copied to Whitney Thier and Bill Scott, produced in this lawsuit by BANA as BANA_FB00884060.

42. Attached as Exhibit 40 is a true and correct copy of Deposition Exhibit 14, a September 26, 2008 e-mail from Albert Kotite to McLendon Rafeedie, forwarding FBR's letter to "Retail Co-Lenders" Union Labor Life Insurance Company, National City Bank and Sumitomo Mitsui Trust Company, produced in this lawsuit by TriMont Real Estate Advisors as TRIM 028440-41.

43. Attached as Exhibit 41 is a true and correct copy of Deposition Exhibit 455, a September 26, 2008 e-mail from Andrei Dorenbaum to Jeff Susman and copied to Andrei Dorenbaum, Brad Means, Carl Moore and Kevin Rourke, produced in this lawsuit by BANA as BANA_FB00422664-65.

44. Attached as Exhibit 42 is a true and correct copy of Deposition Exhibit 76, a September 30, 2008 letter from Ronaldo Naval to Jim Freeman, produced in this lawsuit by BANA as BANA_FB00402019-20.

45. Attached as Exhibit 43 is a true and correct copy of Deposition Exhibit 205, an October 3, 2008 e-mail from David Howard to Charles Blanton and Robyn Roof, copied to Jeff Susman, produced in this lawsuit by BANA as BANA_FB00735299-301.

46. Attached as Exhibit 44 is a true and correct copy of Deposition Exhibit 283, an October 6, 2008 e-mail from Jim Freeman to Margaret Holloway, produced in this lawsuit by Fontainebleau as FBR01287548.

47. Attached as Exhibit 45 is a true and correct copy of Deposition Exhibit 458, [redacted], produced in this lawsuit by plaintiff Highland Capital Management, L.P. as Highland010419-20.

48. Attached as Exhibit 46 is a true and correct copy of Deposition Exhibit 281, an October 6, 2008 e-mail from Jim Freeman to Ryan Falconer, produced in this lawsuit by Fontainebleau as FBR01284009.

49. Attached as Exhibit 47 is a true and correct copy of Deposition Exhibit 77, an October 7, 2008 memorandum from Jim Freeman to the "Las Vegas Bank Group," produced in this lawsuit by BANA as BANA_FB00358870.

50. Attached as Exhibit 48 is a true and correct copy of Deposition Exhibit 280, an October 9, 2008 e-mail from Jim Freeman to James Freeland, produced in this lawsuit by Fontainebleau as FBR01274590-92.

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51. Attached as Exhibit 49 is a true and correct copy of Deposition Exhibit 904, an October 10, 2008 e-mail from David Howard to Jeff Susman, produced in this lawsuit by BANA as BANA_FB00869927-30.

52. Attached as Exhibit 50 is a true and correct copy of Deposition Exhibit 459, an October 13, 2008 e-mail from Andrei Dorenbaum to Bill Scott and copied to Brad Means and Kevin Rourke, produced in this lawsuit by Sheppard Mullin Richter & Hampton LLP as SMRH00016771-73.

53. Attached as Exhibit 51 is a true and correct copy of Deposition Exhibit 285, an October 22, 2008 e-mail from Jim Freeman to Jeff Susman, copied to Bill Scott, Jon Varnell and David Howard, forwarding an October 22, 2008 memorandum to the "Las Vegas Bank Group," produced in this lawsuit by BANA as BANA_FB00400510-11.

54. Attached as Exhibit 52 is a true and correct copy of Deposition Exhibit 465, an October 23, 2008 e-mail from Jim Freeman to Whitney Thier, produced in this lawsuit by Fontainebleau as FBR01266769.

55. Attached as Exhibit 53 is a true and correct copy of Deposition Exhibit 282, a November 7, 2008 e-mail from Jim Freeman to Vivian Smith, produced in this lawsuit by Fontainebleau as FBR01282119.

56. Attached as Exhibit 54 is a true and correct copy of Deposition Exhibit 286, a December 5, 2008 e-mail from Jim Freeman to Cory Davis forwarding financial statements, produced in this lawsuit by Fontainebleau as FBR01280952-1008.

57. Attached as Exhibit 55 is a true and correct copy of Deposition Exhibit 24, the Guaranty Agreement between Fontainebleau and ULLICO, dated December 29, 2008, produced in this lawsuit by Union Labor Life Insurance Company as ULL-FLVR0004483-88.

58. Attached as Exhibit 56 is a true and correct copy of Deposition Exhibit 905, a December 30, 2008 e-mail from Jeff Susman to Phillip Lynch and Douglas Keyston, produced in this lawsuit by BANA as BANA_FB00798940-41.

59. Attached as Exhibit 57 is a true and correct copy of Deposition Exhibit 486, a January 2, 2009 e-mail from Bill Scott to Jim Freeman and others, produced in this lawsuit by BANA as BANA_FB00334820-24.

60. Attached as Exhibit 58 is a true and correct copy of Deposition Exhibit 30[redacted], produced in this lawsuit by Union Labor Life Insurance Company as ULL-FLVR0004249-53.

61. Attached as Exhibit 59 is a true and correct copy of Deposition Exhibit 809, IVI's Project Status Report No. 21 dated January 30, 2009, produced in this lawsuit by BANA as BANA_FB00215227-73.

62. Attached as Exhibit 60 is a true and correct copy of Deposition Exhibit 36[redacted], produced in this lawsuit by Union Labor Life Insurance Company as ULL-FLVR0007582.002960-63.

63. Attached as Exhibit 61 is a true and correct copy of Deposition Exhibit 810, a February 12, 2009 letter from Marc E. Constantino to Donna Kimbrough, produced in this lawsuit by BANA as BANA_FB00810764-65.

64. Attached as Exhibit 62 is a true and correct copy of Deposition Exhibit 498, a February 20, 2009 letter from Maurice Washington to Jim Freeman, produced in this lawsuit by BANA as BANA_FB00376889-91.

65. Attached as Exhibit 63 is a true and correct copy of Deposition Exhibit 811, a February 23, 2009 letter from Jim Freeman to Maurice Washington.

66. Attached as Exhibit 64 is a true and correct copy of Deposition Exhibit 210, a February 23, 2009 e-mail from Jim Freeman to Ronaldo Naval, copied to David Howard, Jon Varnell, Brian Corum and Brandon Bolio, produced in this lawsuit by BANA as BANA_FB00283993-96.

67. Attached as Exhibit 65 is a true and correct copy of Deposition Exhibit 288, a March 2, 2009 e-mail from Jim Freeman to Anna Finn and others, produced in this lawsuit by Fontainebleau as FBR01291242.

68. Attached as Exhibit 66 is a true and correct copy of Deposition Exhibit 600, IVI's Project Status Report No. 22 dated March 3, 2009, produced in this lawsuit by BANA as BANA_FB00235206-73.

69. Attached as Exhibit 67 is a true and correct copy of Deposition Exhibit 813, a March 3, 2009 e-mail from Ronaldo Naval to Jim Freeman and others attaching a March 3, 2009 letter, produced in this lawsuit by BANA as BANA_FB00810800.

70. Attached as Exhibit 68 is a true and correct copy of Deposition Exhibit 814, a March 4, 2009 letter from Henry Yu to Jim Freeman, produced in this lawsuit by BANA as BANA_FB00810803-05.

71. Attached as Exhibit 69 is a true and correct copy of Deposition Exhibit 604, a March 5, 2009 letter from Robert Barone to Deven Kumar, copied to Paul Bonvicino and Brandon Bolio, produced in this lawsuit by BANA as BANA_FB00897758-59.

72. Attached as Exhibit 70 is a true and correct copy of Deposition Exhibit 816, a March 9, 2009 letter from Jim Freeman to Henry Yu, produced in this lawsuit by plaintiff Genesis CLO 2007-1 Ltd. as ORE 004010-13.

73. Attached as Exhibit 71 is a true and correct copy of Deposition Exhibit 819, a March 10, 2009 letter from Henry Yu to Jim Freeman, produced in this lawsuit by BANA as BANA_FB00810815-18.

74. Attached as Exhibit 72 is a true and correct copy of Deposition Exhibit 608, a March 16, 2009 e-mail from Robert Barone to Brandon Bolio, produced in this lawsuit by Sheppard Mullin Richter & Hampton LLP as SMRH00134814.

75. Attached as Exhibit 73 is a true and correct copy of Deposition Exhibit 610, a March 19, 2009 e-mail from Brandon Bolio to Henry Yu and others, produced in this lawsuit by BANA as BANA_FB00216536-40.

76. Attached as Exhibit 74 is a true and correct copy of Deposition Exhibit 97, a March 20, 2009 Fontainebleau Lender Update, produced in this lawsuit by plaintiffs Brigade Leveraged Capital Structures Fund, Ltd. and Battalion CLO 2007-I Ltd. as BGD 000331-57.

77. Attached as Exhibit 75 is a true and correct copy of Deposition Exhibit 611, a March 22, 2009 e-mail from Robert Barone to Bill Scott and others, produced in this lawsuit by Sheppard Mullin Richter & Hampton LLP as SMRH00105442-44.

78. Attached as Exhibit 76 is a true and correct copy of Deposition Exhibit 104, a March 23, 2009 letter from Henry Yu to the Fontainebleau Las Vegas Lenders.

79. Attached as Exhibit 77 is a true and correct copy of Deposition Exhibit 348, a March 24, 2009 e-mail from Robert Wilson to PPR Ops forwarding an Intralinks Notice, produced in this lawsuit by the ING Plaintiffs as ING 000187-88.

80. Attached as Exhibit 78 is a true and correct copy of Deposition Exhibit 42, the Third Amendment to Guaranty Agreement, dated March 25, 2009, produced in this lawsuit by Union Labor Life Insurance Company as ULL-FLVR0004468-73.

81. Attached as Exhibit 79 is a true and correct copy of Deposition Exhibit 410, an April 13, 2009 e-mail from Carole Parker forwarding a message from Whitney Thier, produced in this lawsuit by Fontainebleau as FBR00635701-05.

82. Attached as Exhibit 80 is a true and correct copy of Deposition Exhibit 613, an April 14, 2009 e-mail from Robert Barone to Brandon Bolio and others, produced in this lawsuit by Sheppard Mullin Richter & Hampton LLP as SMRH00105581-85.

83. Attached as Exhibit 81 is a true and correct copy of Deposition Exhibit 268, [redacted], produced in this lawsuit by defendant J.P. Morgan Chase Bank, N.A. as JPM_FB 00001711-48.

84. Attached as Exhibit 82 is a true and correct copy of Deposition Exhibit 827, an April 20, 2009 letter from Ronaldo Naval to Jim Freeman, produced in this lawsuit by Sheppard Mullin Richter & Hampton LLP as SMRH00135086-88.

85. Attached as Exhibit 83 is a true and correct copy of Deposition Exhibit 298, a Cost-to-Complete Review dated May 15, 2009, produced in this lawsuit by BANA as BANA_FB00808826-955.

86. Attached as Exhibit 84 is a true and correct copy of Deposition Exhibit 808, a copy of the Declaration of Henry Yu dated July 1, 2009 in *Fontainebleau Las Vegas LLC v. Bank of America, N.A., et al.*, Adv. No. 09-01621-AP-AJC (S.D. Fla.).

87. Attached as Exhibit 85 is a true and correct copy of Deposition Exhibit 9, a copy of the Co-Lending Agreement, dated September 24, 2007.

88. Attached as Exhibit 86 is a true and correct copy of excerpts from the transcript of the March 30, 2011 Brandon Bolio deposition.

89. Attached as Exhibit 87 is a true and correct copy of Deposition Exhibit 888, an August 5, 2008 e-mail from Brandon Bolio to Bill Scott and others, produced in this lawsuit by BANA as BANA_FB00873653-54.

90. Attached as Exhibit 88 is a true and correct copy of the Order Dismissing Parties Without Prejudice Pursuant to Notice of Voluntary Dismissal [DE 65]; Directing Clerk to Take

Acton [DE 68], entered on May 3, 2010 in the matter of *In re: Fontainebleau Las Vegas Contract Litigation*, Case No. 09-MD-02106-CIV-GOLD/BANDSTRA (S.D. Fla.).

91. Attached as Exhibit 89 is a true and correct copy of Innee Tong and Joe Bel Bruno, *Lehman Brothers Files for Chapter 11 Protection*, ASSOCIATED PRESS, September 16, 2008, downloaded from LexisNexis.

92. Attached as Exhibit 90 is a true and correct copy of the Answer of Defendant Bank of America, N.A., dated June 18, 2010 [DE 88], filed in the matter of *In re: Fontainebleau Las Vegas Contract Litigation*, Case No. 09-MD-02106-CIV-GOLD/ BANDSTRA (S.D. Fla.).

93. I declare under penalty of perjury and 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge, information, and belief.

Date: August 4, 2011
New York, New York

DANIEL L. CANTOR

FILED UNDER SEAL

CERTIFICATE OF SERVICE

I, Asher L. Rivner, hereby certify that on August 5, 2011, I served by electronic means pursuant to an agreement between the parties a true and correct copy of the foregoing Declaration of Daniel L. Cantor, and the attached exhibits thereto, upon the below-listed counsel of record and that the original and a paper copy of these documents will be filed with the Clerk of Court under seal.

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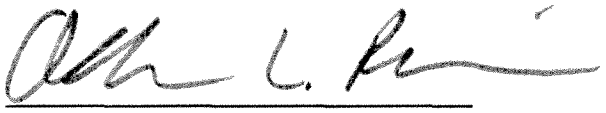

Asher L. Rivner