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 REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

BANA demonstrated in its opening brief ("BANA Br.") that it is entitled to summary judgment dismissing Plaintiffs' breach of contract claim for two independently sufficient reasons: (i) the undisputed facts establish that BANA properly approved and funded Fontainebleau's Advance Requests after receiving the required certifications, and (ii) there is no evidence that BANA was grossly negligent. In their opposition brief ("Pls. Opp."), Plaintiffs fail to meet their obligation to come forward with evidence sufficient to create a genuine factual dispute on either issue, much less both. Accordingly, BANA's motion for summary judgment should be granted.

Plaintiffs' opposition brief is based on a false premise. Their myriad arguments for holding BANA responsible for Fontainebleau's fraud and ultimate failure all incorrectly assume that every action BANA took as Disbursement Agent was subject to a tort-like objective "commercial reasonableness" duty, regardless of the express limitations the Disbursement Agreement places on BANA's obligations. Plaintiffs' sole textual support for this argument is BANA's agreement under Section 9.1 "to exercise commercially reasonable efforts and utilize commercially prudent practices in the performance of its duties hereunder." But both the Disbursement Agreement's structure and terms establish that Section 9.1 does not impose any additional duties on BANA.

BANA's promise to "exercise commercially reasonable efforts" is in Article 9's introductory section, rather than in the sections setting forth the "Duties and Liabilities of the Disbursement Agent Generally" (Section 9.2) and "Particular Duties and Liabilities of the Disbursement Agent" (Section 9.3). Under black-letter New York law, Section 9.3.2's specific provisions limiting BANA's duties—including the directive that it applies "[n]otwithstanding anything else in this Agreement to the contrary"—control over Section 9.1's general discussion of the Disbursement Agent's performance of its duties. Moreover, reading Section 9.1 to restrict BANA's ability to rely on Fontainebleau's certifications would nullify Section 9.3.2 and 9.10's unambiguous provisions and violate the maxim that contracts should not be read so as to render provisions "without force and effect." Section 9.1's general directive only applies to those duties (such as determining that the Advance Requests are complete and genuine) that are not addressed by the contract's more specific, on-point provisions.

Plaintiffs' incorrect premise that BANA's principal contractual obligation is "to exercise commercially reasonable efforts" is the foundation for their many arguments designed to show that Section 9.3.2 does not mean what it says. But Plaintiffs do not dispute that before disbursing any funds to Fontainebleau, BANA received all the documentation, representations, warranties and certifications required under the Disbursement Agreement, including Fontainebleau's certification that all conditions precedent to disbursement had been satisfied. And Plaintiffs acknowledge that Section 9.3.2 permits BANA to rely on Fontainebleau's certification in "approving any Advance Requests." These concessions lead to the inescapable conclusion that BANA did not breach the Disbursement Agreement.

Similarly, Plaintiffs' focus on whether BANA exercised commercially reasonable efforts also results in a faulty (and cursory) gross negligence analysis. Instead of coming forward with admissible evidence that BANA was recklessly indifferent towards or intended to harm them, as they are required to do, Plaintiffs essentially argue that BANA's supposed failure to exercise commercially reasonable efforts was not only an alleged breach of contract, it was grossly negligent. But the law is clear that a mere breach of contract does not constitute gross negligence. And Plaintiffs' claim that BANA's actions were not commercially reasonable—a negligence allegation—does not change the gross negligence standard.

Because Plaintiffs do not have admissible evidence sufficient to raise a genuine dispute on either of BANA's two case-dispositive arguments, they devote their brief to second-guessing BANA's approval of Fontainebleau's Advance Requests with notice of facts that Plaintiffs claim should have alerted BANA that conditions precedent had not been satisfied. (Pls. Opp. at 11–37.) These arguments are inconsistent, of course, with Plaintiffs' acknowledgement that Fontainebleau *deliberately deceived* BANA and the other lenders. But more importantly, these arguments are simply irrelevant given BANA's showing that it fully performed its limited duties as agent and that the record contains no evidence that BANA was grossly negligent. Moreover, as demonstrated in detail below, Plaintiffs cannot establish that BANA actually knew that these conditions precedent had failed.

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ARGUMENT

I. THERE IS NO EVIDENCE THAT BANA BREACHED ITS DUTIES AS DISBURSEMENT AGENT OR BANK AGENT.

BANA has demonstrated that its duties as agent under the Disbursement Agreement and Credit Agreement in approving Advance Requests were limited to: (i) determining whether Fontainebleau, the General Contractor, the Construction Consultant, 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 establish that Disbursement Agreement Section 3.3's conditions precedent to Advance were satisfied. (BANA Br. at 24–26.) BANA has also proved—and Plaintiffs do not dispute—that:

- For each Advance Request, BANA received all required documentation from Fontainebleau, IVI, the Contractor, and the Architect before disbursing any funds. (BANA Br. at 8–9; BANA SOUF ¶ 57.)
- With each Advance Request, Fontainebleau "was required to and did represent and warrant that all conditions precedent to disbursement … had been satisfied." (Pls. Opp. at 20.)
- Disbursement Agreement Section 9.3.2 "provides that the Disbursement Agent 'shall be entitled to rely' upon certificates provided by the Project Entities and 'shall not be required to conduct any independent investigation as to the accuracy, veracity or completeness' of any such certificate." (*Id.* at 6–7.)

Despite these undisputed facts and unambiguous provisions, Plaintiffs claim that BANA could not "disburse loan proceeds where it has information inconsistent with [the] certificates." (*Id.* at 7.) But this is simply another way of saying that Section 9.3.2's protections—which apply "[n]otwithstanding anything else in this Agreement to the contrary"—are somehow narrowed by the Disbursement Agreement's general requirement that BANA's actions be "commercially reasonable." Plaintiffs' attempt to limit BANA's rights under Section 9.3.2 fails because it is inconsistent with (i) the Disbursement Agreement's structure and unambiguous terms, (ii) the case law Plaintiffs cite, and (iii) the extrinsic evidence Plaintiffs improperly ask the Court to consider.

A. The Disbursement Agreement Expressly Permitted BANA to Rely on Fontainebleau's Representations, Certifications, and Statements for the Specific Purpose of Approving Advance Requests.

Plaintiffs start with a straw man argument in attempting to rebut BANA's showing that it properly approved Fontainebleau's Advance Requests after receiving the required certifications.

BANA has never argued that the *only* conditions to disbursement were its "receipt of an Advance Request and associated certificates." (Pls. Opp. at 4.) There is no dispute that Fontainebleau was required to satisfy all twenty-four of Section 3.3's conditions before receiving loan funds—if it had failed to do so, any Lender would have been free to provide BANA with a Default notice, which would have required BANA to issue a Stop Funding Notice. But Fontainebleau's obligation to satisfy the Disbursement Agreement's conditions precedent is irrelevant here. Section 9.3.2 unambiguously limited BANA's duty with respect to those conditions' satisfaction to reviewing the Advance Request documentation, and permitted BANA "in … *approving any Advance Requests* … to rely on certifications from the Project Entities … as to satisfaction of *any* requirements and/or *conditions* imposed by this Agreement" (emphasis added). BANA had no duty to verify *independently* the accuracy of the information Fontainebleau, TWC, IVI, and the architect submitted, or to "investigate any other facts or circumstances to verify compliance by the Project Entities with their obligations hereunder." (Disbursement Agmt. § 9.3.2.) Nor did BANA have any duty "to inquire of any Person whether a Default or an Event of Default has occurred and is continuing." (*Id.* § 9.10.)

Plaintiffs' multiple attempts to circumvent Section 9.3.2's plain meaning are all unavailing. BANA's opening brief demonstrated that Disbursement Agreement Section 9.1's "commercially reasonable" language does not impose any additional obligations on BANA nor does it override Section 9.3.2 and 9.10's more specific provisions. (BANA Br. at 27–28.) Plaintiffs have no response to this argument. (Pls. Opp. at 8.) Rather, they simply repeat the same discredited arguments addressed in BANA's brief. But Section 9.1, contained in Article 9's introductory section, merely describes the general standard applicable to BANA's existing "duties hereunder." Thus, it applies, for example, to BANA's "review [of] the Advance Request and attachments thereto to determine whether all required documentation has been provided" (Section 2.4.4(a)) or its determination that a document submitted by Fontainebleau was "genuine and … signed or presented by the proper party" (Section 9.3.2). In contrast, it does not apply in the face of specific contractual limitations on BANA's obligations, such as those in Sections 9.2 entitled "Duties and Liabilities of the Disbursement Agent Generally" and in Section 9.3 entitled "Particular Duties and Liabilities of the Disbursement Agent." Indeed, it

is well settled that specific provisions control general ones.[1] And Section 9.1's "commercially reasonable" language cannot impose a duty to investigate on BANA that would impermissibly leave Section 9.3.2 and 9.10's unambiguous provisions to the contrary "without force and effect."[2]

Plaintiffs' mistaken belief that Section 9.3.2's provisions are subject to a "commercially reasonable" limitation underlies and, thus, undermines Plaintiffs' other arguments regarding Section 9.3.2. Those arguments also fail for the following additional reasons:

First, Plaintiffs' argument that Section 9.3.2 "did not relieve BofA of its obligation to determine the satisfaction of conditions precedent that were not covered by certificates" (Pls. Opp. at 7) is a *non sequitur* because Plaintiffs do not identify any conditions precedent not covered by certificates. Rather, Fontainebleau was required to certify that *all* "the conditions set forth in Section 3.3 … of the Disbursement Agreement are satisfied" and identify any that were not. (Disbursement Agmt. Ex. C-1.)

Second, even though they acknowledge that BANA has no duty "to investigate the accuracy of [Fontainebleau's] representations," Plaintiffs nevertheless assert that BANA had an obligation not to disburse funds after receiving the required certifications, "until it resolved known inconsistencies." (*See* Pls. Opp. at 7, 8–9 n.26.) This is a distinction without difference. "Resolving a known inconsistency," is indistinguishable from "investigat[ing] the accuracy of [Fontainebleau's] representations" and "verify[ing] compliance by the Project Entities with their [Disbursement Agreement] obligations"—the very things the Disbursement Agreement says BANA need not do. (Disbursement Agmt. § 9.3.2.) Tellingly, Plaintiffs do not explain (i) what a "known inconsistency" is, (ii) how significant an "inconsistency" must be to trigger BANA's

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1 *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."); *Aguirre v. City of New York*, 625 N.Y.S.2d 597, 598 (N.Y. App. Div. 2d Dep't 1995) ("Where there is an inconsistency between a specific provision and a general provision of a contract, the specific provision controls.").

2 *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"); *Corhill Corp. v. S.D. Plants, Inc.*, 176 N.E.2d 37, 38 (N.Y. 1961) ("It is a cardinal rule of construction that a court should not 'adopt an interpretation' which will operate to leave a 'provision of a contract . . . without force and effect.'"); *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

alleged duty to withhold funds, or (iii) what BANA was required to do to "resolve" the alleged inconsistency. Indeed, the parties would have had to negotiate entirely new contract provisions to delineate those requirements.[3] Instead, they mandated that BANA has no duty to investigate or verify. Given the unambiguous terms of Disbursement Agreement Sections 9.3.2 and 9.10 and Credit Agreement Sections 9.3 and 9.4, the Court cannot impose the vague extra-contractual obligations Plaintiffs advocate.[4] (BANA Br. at 24–27.)

Third, Plaintiffs' argument that BANA could not rely on certifications that it has "reason to believe" may not be "trustworthy" (Pls. Opp. at 7) improperly imports the tort concept of "reasonable reliance" into a contract interpretation dispute. As Plaintiffs note, "rely" means to "place faith without reservation; trust." (*Id.* at 7 n.21.) But Section 9.3.2 unambiguously provides that BANA was *permitted* to "trust" and "place faith without reservation" in Fontainebleau's certifications when determining whether the conditions precedent to an Advance were satisfied. Plaintiffs' attempt to redefine "genuine" as "factually correct" (*id.*) also misses the mark. The dictionary defines "genuine" as "actually produced by or proceeding from the alleged source or author"—as in, "the signature is [genuine]."[5] Section 9.3.2 merely required BANA to "reasonabl[y] believe[]" that a certification was authentic, meaning that it came from Fontainebleau (or IVI, TWC, or the Architect) and that the signature was not forged. Plaintiffs' lone authority—a 1960 Buffalo, New York trial court opinion that has never been cited by another court—is inapposite because it addresses only the narrow (and irrelevant) question of what constitutes a "genuine receipt" under the Uniform Warehouse Receipts Act.[6]

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unreasonable, unlawful, or of no effect.").

3 *Camaiore v. Farance*, 50 A.D.3d 471, 471–72 (N.Y. App. Div. 1st Dep't 2008) ("In adjudicating the rights of parties to a contract, courts may not fashion a new contract under the guise of contract construction. Nor may they imply a condition which the parties chose not to insert in their contract.") (quotations omitted).

4 *See Red Ball Interior Demolition Corp. v. Palmadessa*, 173 F.3d 481, 484 (2d Cir. 1999) ("If a contract is clear, courts must take care not to alter or go beyond the express terms of the agreement, or to impose obligations on the parties that are not mandated by the unambiguous terms of the agreement itself.").

5 MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 486 (10th Ed. 1998); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 948 (1993) ("actually produced by or proceeding from the reputed or alleged source or author; not faked or counterfeit").

6 *See Stanford Seed Co. v. Balfour, Guthrie & Co.*, 27 Misc. 2d 147 (N.Y. Sup. Ct. 1960) (holding that a document was not "genuine" receipt under the Uniform Warehouse Receipts Act because it was not signed by a warehouseman under Oregon law).

Fourth, Plaintiffs' reliance on Section 7.1.3(c) is misplaced (Pls. Opp. at 7–8) because that provision merely identifies one Event of Default under the Disbursement Agreement. And while Fontainebleau was expressly required to provide notice to BANA and the Lenders of "[a]ny Default or Event of Default of which the Project Entities have knowledge" (Disbursement Agmt. § 5.4.1), BANA was deemed not to have knowledge of any Default or Event of Default *unless* it received notice (Credit Agmt. § 9.3), which it never did.[7] (*See* BANA Br. at 32.) Moreover, Section 7.1.3(c) is irrelevant in interpreting Section 9.3.2 because it does not even mention the Disbursement Agent, much less impose any duties on it.

Fifth, Plaintiffs conflate BANA's dual roles as Disbursement Agent under the Disbursement Agreement and Bank Agent under the Credit Agreement. They incorrectly assert that it is "fundamentally inconsistent" with Section 9.3.2 for BANA, as Disbursement Agent, to rely on Fontainebleau's certification that all conditions precedent had been satisfied because two of those conditions—Sections 3.3.21 and 3.3.24—involved facts known to BANA as Bank Agent. (Pls. Opp. at 8.) Plaintiffs' argument ignores that the parties anticipated this situation and addressed it in Disbursement Agreement Section 9.2.5:

> Notwithstanding anything to the contrary in this Agreement, the Disbursement Agent shall not be deemed to have knowledge of any fact known to it *in any capacity other than the capacity of Disbursement Agent or by reason of the fact that the Disbursement Agent is also a Funding Agent or Lender* (emphasis added).

There is nothing contradictory about Section 9.3.2 permitting BANA, as Disbursement Agent, to rely on Fontainebleau's certifications regarding facts of which the Disbursement Agent is deemed to have no knowledge under Section 9.2.5. Moreover, as demonstrated below, Plaintiffs have presented no evidence that BANA—in any capacity—possessed information that it knew to be "inconsistent in a material and adverse manner with the information or other matter disclosed to them … taken as a whole." (*See* Disbursement Agmt. §3.3.21.) Nor do Plaintiffs offer any evidence that BANA failed to receive any requested information from Fontainebleau that was "customary for transactions of this type," let alone identify such information. (*See id.*, § 3.3.24.)

Sixth, Plaintiffs' tortured reading of Section 9.10 does not alter Section 9.3.2's plain meaning. (*See* Pls. Opp. at 9.) Contrary to Plaintiffs' suggestion, Section 9.10's expansive list

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[7] Plaintiffs' argument that Section 9.3 only applies to "Defaults"—and not "defaults"—(Pls. Opp. at 22) ignores that "defaults" are themselves "defined Defaults" under the Credit and

of losses for which, absent gross negligence, BANA will not be liable (including losses caused by false representations) cannot be transformed into an exception to BANA's right to rely on certifications under Section 9.3.2.

B. Plaintiffs' Authorities Are Inapposite.

The cases Plaintiffs cite (Pls. Opp. at 7–9) do not support their assertion that BANA's straightforward reading of the Disbursement and Credit Agreements' clear and unambiguous terms is somehow contrary to New York law. None of those cases involved the unequivocal protective language found in Section 9.3.2:

- *Merrill Lynch & Co. v. Allegheny Energy, Inc.* and *JP Morgan Chase Bank v. Winnick* both merely addressed the standard for proving a fraud claim's justifiable reliance element, a tort concept that is irrelevant to the contract issue here.[8]
- In *Bank Brussels Lambert v. Chase Manhattan Bank, N.A.*, the loan agreement required Chase "to satisfy itself that the materials it received [from the borrower] conformed in form *and substance*" to what the loan agreement required.[9] The court relied on the phrase "in substance," absent from the contract here: "if Chase knew, or was grossly negligent in not knowing, that the materials it delivered prior to and at closing were materially inaccurate, it cannot argue that those materials were satisfactory in 'substance.'"[10] In contrast, Section 9.3.2 unambiguously provides that BANA "shall not be required … to investigate any other facts or circumstances to verify compliance by the Project Entities with their obligations." The contract in *Bank Brussels* contained no such language.
- In *Chase Manhattan Bank v. Motorola, Inc.*, the court prohibited a loan *guarantor* from relying on a borrower's financial certification that the guarantor knew or should have known was false. Unlike here, there was no contractual provision permitting the guarantor to rely on the borrower's certification, while the agreement explicitly authorized the lenders' agent to rely on such a certificate even if the agent knew it to be inaccurate.[11]
- *BNP Paribas Mortg. Corp. v. Bank of America, N.A.* and *LaSalle Bank, N.A. v. Citicorp Real Estate, Inc.* are inapposite because they were both Rule 12(b)(6) decisions that dealt

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Disbursement Agreements. (*See id.* at 22 n.117.)

8 *Merrill Lynch & Co.*, 500 F.3d 171, 181–82 (2d Cir. 2007) (holding "sophisticated business entities" failed to meet "burden in showing justifiable reliance"); *JPMorgan Chase Bank*, 350 F. Supp. 2d 393, 413 (S.D.N.Y. 2004) (denying motion to dismiss where defendants could not show that plaintiffs' reliance was unjustified).

9 *Bank Brussels Lambert*, 1996 U.S. Dist. LEXIS 15631, at *19 (S.D.N.Y. Oct. 23, 1996) (emphasis added) (quotations omitted).

10 *Id.* at *21 (emphasis added).

11 *Chase Manhattan Bank*, 184 F. Supp. 2d 384, 394–95 (S.D.N.Y. 2002).

with very different types of agreements—an indenture and a pooling and servicing agreement—that had provisions not found in the Disbursement Agreement.[12]

C. Plaintiffs' Extrinsic Evidence Cannot Modify BANA's Disbursement Agent Duties.

Plaintiffs' argument that industry standards somehow support their "commercially reasonable" argument (Pls. Opp. at 11) is merely a truncated version of an argument from their own summary judgment motion, relying on precisely the same out-of-context quotations from expert and lay witnesses and a leading industry treatise. As demonstrated in BANA's opposition to Plaintiffs' motion, expert and lay testimony and treatises are inadmissible parol evidence that cannot alter the Disbursement and Credit Agreements' unambiguous terms, and cannot be used to manufacture an ambiguity. Moreover, Plaintiffs mischaracterize the testimony and the treatise, which both fully support BANA's position that Section 9.3.2 controls over Section 9.1's generalized "commercially reasonable" language. Thus, Plaintiffs' extrinsic evidence fails to create a genuine issue of fact regarding the scope of BANA's Disbursement Agent duties. (*See* Def. BANA's Opp. to Term Lender Pls. Mot. for Partial Summ. J. at 20–24.)

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

Plaintiffs acknowledge, as they must, that their breach of contract claim fails if they cannot meet their burden of proving that BANA was grossly negligent in performing its agent duties. (Pls. Opp. at 37.) In its opening brief, BANA demonstrated that 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. (BANA Br. at 28–31.) To the contrary, BANA presented evidence establishing that it took its role as agent seriously and carefully performed its duties under the Disbursement and Credit Agreements by, among other things, (i) closely reviewing each Advance Request to ensure it contained the certifications and representations necessary to establish that the conditions precedent to disbursement were satisfied, and (ii) discussing key issues internally, as well as with the Lenders, Fontainebleau, IVI and outside counsel.[13] (BANA

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[12] *BNP Paribas Mortg. Corp.*, 2011 U.S. Dist. LEXIS 31362, at **41–55 (S.D.N.Y. Mar. 23, 2011) (addressing provision requiring indenture trustee to take action if it had "actual knowledge" of a default); *LaSalle Bank, N.A.*, 2002 U.S. Dist. LEXIS 23323, at **12–13 (S.D.N.Y. Dec. 5, 2002) (addressing provision requiring loan seller to represent and warrant that it employed practices that were "legal and prudent" and "met customary standards utilized by prudent . . . servicers.").

[13] Contrary to Plaintiffs' suggestion (Pls. Opp. at 38 n.214), even in the absence of an "advice

Br. at 28–31.) Plaintiffs were therefore required to respond with admissible evidence that BANA was recklessly indifferent towards or intended to harm them.[14] They have not done so, and therefore cannot defeat BANA's summary judgment motion.

Indeed, Plaintiffs' two-page gross negligence argument cites no evidence at all, offering only a conclusory legal argument and citing a single inapposite case. Plaintiffs' naked assertion that BANA "fail[ed] to 'exercise even slight diligence'" in disbursing funds to Fontainebleau (Pls. Opp. at 38) lacks factual support and is belied by the copious testimonial and documentary evidence discussed above, and cited in BANA's Statement of Undisputed Facts, detailing the steps BANA took before advancing funds to the Borrowers. And Plaintiffs' allegation that BANA "elected to disregard the knowledge it had and the warnings it had received" (*id.*) simply restates their baseless breach of contract argument that it was not commercially reasonable for BANA to disburse funds in the face of alleged "known inconsistencies." As demonstrated above (*see supra* at 4–5), BANA's decision to disburse funds is subject to Section 9.3.2's provisions, not Section 9.1's "commercially reasonable" language. But even if Plaintiffs could establish a Disbursement Agreement breach based on a "commercial reasonableness" standard, that negligence-based assertion would not be evidence of gross negligence.[15] New York law requires that Plaintiffs do more than just prove there was a Disbursement Agreement breach—even one that was knowing and intentional—Plaintiffs must show reckless indifference towards or an intent to harm Plaintiffs.[16]

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of counsel" defense, a party's consultation with counsel can be evidence of good faith. *CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F. Supp. 2d 450, 474 n.27 (S.D.N.Y. 2010) (a party does not "assert[] an 'advice of counsel' defense … by referring to the fact of its communication with counsel in the context of demonstrating its good faith … [because] [t]he focus of [the] 'good faith' defense is on the nature of the inquiry … not the substance of the legal advice that was eventually provided.").

[14] *Int'l Stamp Art, Inc. v. United States Postal Serv.*, 456 F.3d 1270, 1274 (11th Cir. 2006) ("Once the moving party has properly supported its motion for summary judgment, the burden shifts to the non-moving party to come forward with specific facts showing that there is a genuine issue for trial.") (quotation omitted).

[15] *Manhattan Med. Diagnostic & Rehab., P.C. v. Wachovia, Nat'l Bank, N.A.*, 2006 WL 3026294, at *1 (N.Y. Sup. Ct. 2006) (equating a failure to act "in a commercially reasonable manner" with ordinary negligence), *aff'd* 857 A.D.2d 55 (N.Y. App. Div. 1st Dep't 2008).

[16] *See* BANA Br. at 29 (citing *Global Crossing Telecomm., Inc. v. CCT Commc'n, Inc. (In re CCT Commc'ns, Inc.)*, 2011 WL 3023501, at *5 (Bankr. S.D.N.Y. July 22, 2011)).

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Plaintiffs' reliance on *DRS Optronics, Inc. v. North Fork Bank* is misplaced because that case is factually inapposite. (*See* Pls. Opp. at 37–38.) In *DRS*, defendant North Fork Bank entered into a custodial agreement with DRS and another party, EDM, under which North Fork was required to ensure that no payments were made without "joint written instructions made by authorized signatories of DRS and EDM."[17] The court held that North Fork was grossly negligent because it made no effort "to implement any procedure to ensure that the two-signature requirement would be enforced" and, instead, established a system that "enabled EDM to unilaterally direct transfers."[18] But Plaintiffs cannot show that BANA did not "implement any procedure." To the contrary, as discussed above, there is ample evidence that, at a minimum, BANA (unlike North Fork) attempted to comply with its Disbursement Agreement duties, even if (as Plaintiffs claim in hindsight) those efforts fell short. Plaintiffs' inability to offer evidence creating an issue of fact on gross negligence entitles BANA to summary judgment.

III. PLAINTIFFS' BREACH ALLEGATIONS ARE FACTUALLY BASELESS AND LEGALLY DEFICIENT BECAUSE THERE IS NO EVIDENCE THAT BANA KNEW THE CONDITIONS PRECEDENT WERE NOT SATISFIED.

Unable to refute BANA's case-dispositive showing that (i) BANA fully performed its limited ministerial duties as agent, and (ii) there is no evidence that BANA was grossly negligent, Plaintiffs devote the bulk of their opposition brief to arguing that BANA knew that certain conditions precedent allegedly were not satisfied. (Pls. Opp. at 11–37.) But not only are these arguments irrelevant because they do not establish a breach of BANA's duties, much less a grossly negligent breach, they are simply wrong. As BANA demonstrated in its opening brief (BANA Br. at 31–36), Plaintiffs have failed to identify a genuine issue of disputed fact showing that BANA knew of unsatisfied conditions precedent.

A. BANA Properly Approved Post-Lehman Bankruptcy Advance Requests.

1. BANA Did Not Know That Fontainebleau Resorts Funded for Lehman in September 2008.

Plaintiffs' assertion that BANA knew that FBR funded Lehman's September 2008 Shared Costs is false and twists the factual record beyond recognition:

- Plaintiffs suggest that BANA must have known that Lehman did not fund the September Advance because BANA made a "cryptic" and non-specific request to Fontainebleau for assurances that all conditions precedent to funding (including

[17] 843 N.Y.S.2d 124, 126 (N.Y. App. Div. 2d Dep't 2007).
[18] *Id.* at 127–28.

funding by the Retail Lender) were satisfied. (Pls. Opp. at 13.) This is not only rank speculation, it ignores the reason for the broad request.[19] As Plaintiffs' own brief demonstrates, Lehman's bankruptcy could have caused Lenders to question any number of Fontainebleau's September 11, 2008 Advance Request certifications. Thus, it was *prudent*—and certainly not grossly negligent—for BANA to ask Fontainebleau to reaffirm all its certifications, rather than just focusing on the source of Lehman's funds. (*See* Cantor Reply Decl. Ex. 14 (Susman Dep. at 211:12–212:9).)

- Plaintiffs distort Jim Freeman's testimony regarding the legal advice he received. (Pls. Opp. at 13.) Freeman testified that he was "not sure" whether he told BANA that counsel advised him that there were limitations on what he could say about the Lehman situation. (BANA Reply to Pls. Add. SOUMF ¶ 35.) And not a single BANA witness testified that Freeman made such a statement. (*Id.*)
- Plaintiffs mischaracterize Brandon Bolio's supposedly "contemporaneous notes" as evidence that BANA knew in September 2008 that Lehman did not fund. (Pls. Opp. at 14.) There is no indication that the notes refer to the September 2008 Advance and Bolio testified that he did not recall to what they referred. (Cantor Reply Decl. Ex. 11 (Bolio Dep. at 59:15–22).) Indeed, the notes reflect dollar amounts that do not correspond to the September 2008 Advance. (BANA Reply to Pls. Add. SOUMF ¶ 37.)
- As BANA's opening brief showed—and Plaintiffs fail to refute—BANA's October 2008 communications with Highland do not establish that BANA knew that FBR funded for Lehman. (*See* BANA Br. at 15–16, 32–33.)
- Plaintiffs also fail to refute BANA's showing that Mac Rafeedie's inadmissible speculation is the only support for Plaintiffs' assertion that TriMont told BANA that FBR funded for Lehman. (BANA Br. at 12.)
- [redacted] (Pls. Opp. at 16.) [redacted] (Cantor Reply Decl. Ex. 2 (Kolben Dep. at 176:22-177:3); BANA Reply to Pls. Add. SOUMF ¶ 53.)

Plaintiffs' only argument that does not misstate the record is frivolous. Plaintiffs claim that BANA should have somehow inferred that FBR funded for Lehman from Freeman's "shift to the passive voice" in an October 7, 2008 memorandum to Lenders concerning the retail facility. (Pls. Opp. at 16.) But the record is clear that, at the time, BANA personnel did not consider the response evasive (*see* BANA Reply to Pls. Add. SOUMF ¶ 50)—and even if they

[19] *Walton-Horton v. Hyundai of Ala.*, 402 Fed. Appx. 405, 407 (11th Cir. 2010) ("Speculation or conjecture from a party cannot create a genuine issue of material fact.").

had, that would not be evidence of knowledge, nor would their failure to follow-up on an evasive answer constitute gross negligence. And Plaintiffs again misstate the record in asserting that Highland told BANA that the October 7, 2008 memorandum "failed to directly answer BofA's question regarding the source of the funding." (Pls. Opp. at 16 n.75.) Highland's e-mail simply stated that the "memo … doesn't address our [*i.e.*, Highland's] concerns," but did not identify the concerns or explain why they were not addressed. (Dep. Ex. 903.) [redacted] (BANA Br. at 16–17.)

2. BANA Did Not Know That the Retail Lenders Had Failed to Make Advances in Violation of Section 3.3.23.

Plaintiffs have failed to rebut BANA's showing that, before making the September 2008 through March 2009 Advances, BANA did not know that (i) Lehman had not funded the September 2008 Shared Costs, and (ii) [redacted] (*See* BANA Br. at 32–34.) And Plaintiffs' assertion that BANA "was aware that there was no permanent solution to the Lehman portion of the Retail Facility" (Pls. Opp. at 19) distorts the factual record because the evidence shows that in October and November 2008 Lehman funded its Shared Costs portion. (BANA SOUF ¶ 99.) Moreover, in an October 22 memorandum to Lenders, Fontainebleau represented that "Lehman Brothers has indicated to us that it has sought the necessary approvals to fund its commitment this month," and Fontainebleau 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." (BANA Br. at 14.) Thus, BANA had good reason to believe that the Lehman situation was being addressed prior to December 2008. Indeed, [redacted], combined with Fontainebleau's statement in the October 22 memorandum and Fontainebleau's February 23, 2009 response to BANA's February 20, 2009 letter, created the impression that a solution had been found.

Recognizing their argument's factual deficiencies, Plaintiffs also claim that Section 3.3.23 can only be satisfied if *each* Retail Lender funds a specific portion of the Advance. (Pls. Opp. at 19.) But as demonstrated in BANA's opening brief, this assertion is inconsistent with Section 3.3.23's plain terms. (*See* BANA Br. at 33–34.) Plaintiffs' only

response is to argue that in determining whether 3.3.23 was satisfied, the "critical question was … *who* made [the Retail Advances]." (Pls. Opp. at 19 (emphasis in original).) But the answer to that question here is that (as far as BANA knew) the Retail Lenders had made the Retail Advances—just as Section 3.3.23's plain terms require. Thus, Plaintiffs have failed to show that this condition precedent was not satisfied.

3. Lehman's Bankruptcy Was Not an MAE.

Plaintiffs claim that Section 3.3.11 was not satisfied because the Lehman bankruptcy filing alone "had a Material Adverse Effect on the Project … creat[ing] a hole in the financing that could have caused the Entire Project to shut down." (Pls. Opp. at 19–20.)[20] But there was no "financing hole": the undisputed fact is that *every month* from September 2008 through March 2009, TriMont wired BANA the *full amount of the requested Retail Shared Costs*. (BANA SOUF ¶¶ 73, 102.) Nor can Plaintiffs establish an MAE by mischaracterizing an out-of-context snippet from an e-mail BANA's Bret Yunker sent when Lehman filed for bankruptcy. (Pls. Opp. at 20; Pls. Add. SOUMF ¶ 31.) Yunker did not, as Plaintiffs claim, conclude that the Lehman bankruptcy *was* the Project's "death nail"; he simply speculated that "Lehman *may* be the death nail for FB." (*See* BANA Reply to Pls. Add. SOUMF ¶ 31; Dep. Ex. 67.) As Yunker testified, that was merely his uninformed initial reaction to the event. (Cantor Reply Decl. Ex. 4 (Yunker Dep. at 40:13–19); *see also* BANA Reply to Pls. Add. SOUMF ¶ 31.) BANA ultimately determined that the Lehman bankruptcy was not an MAE based on (among other things) (i) internal deliberations, (ii) discussions with counsel, other Lenders, and Fontainebleau, (iii) Jim Freeman's reaffirmation, and (iv) receiving all Shared Costs. (BANA Br. at 11–17.)

4. Lehman's Bankruptcy Did Not Result in a Failure of Sections 3.3.2(a), 3.3.3, 3.3.21 or 3.3.24's Conditions Precedent.

Plaintiffs' assertions that the Lehman bankruptcy and FBR's undisclosed funding of the September Advance resulted in the failure of Sections 3.3.2(a), 3.3.3, 3.3.21 or 3.3.24's conditions precedent (Pls. Opp. at 20–23) simply repeat arguments from Plaintiffs' summary judgment motion. As demonstrated in BANA's opposition brief, Plaintiffs cannot establish *either* that the conditions precedent had not been satisfied or BANA's knowledge, let alone both. (*See* Def. BANA's Opp. to Term Lender Pls. Mot. for Partial Summ. J. at 29–32.)

B. BANA Did Not Know That Fontainebleau Had Concealed the Anticipated Costs to Complete the Project.

BANA's opening brief demonstrated that BANA did not know that there were undisclosed additional costs to complete the Project. (BANA Br. at 17–22, 34.) Plaintiffs offer no evidence to the contrary. Indeed, conspicuously absent from Plaintiffs' brief is any mention of the great efforts—including maintaining two separate sets of books—that Fontainebleau and TWC took to hide budget overruns from BANA and IVI. (*See* BANA Br. at 22.) This same deception forms the basis for Plaintiffs' fraud claims against Fontainebleau, TWC, Soffer, Freeman, and other Fontainebleau-affiliated officers and directors. (*Id.* at 34.) Plaintiffs' claim that BANA nevertheless should have known of Fontainebleau's fraud is based on (i) a misleading interpretation of inadmissible third-party documents concerning a single change order and (ii) IVI's uncommunicated "gut" feeling that there were hidden costs—a feeling that IVI itself believed was insufficient to reject Fontainebleau's Advance Requests. (*See* Pls. Opp. at 23.) This meager showing does not create a genuine dispute regarding BANA's ignorance of the concealed costs.[21]

1. The May 2008 Change Order Claim is Baseless.

Faced with the indisputable (and admitted) fact that BANA received all required certifications before advancing funds to Fontainebleau, Plaintiffs attempt to manufacture a factual dispute by asserting that in May 2008 Fontainebleau "was substantially under-reporting the anticipated cost to complete the Project" and failing to disclose change orders that were nearly a year old. (Pls. Opp. at 23.) But Plaintiffs fail to provide any factual support for this claim. The only factual support Plaintiffs offer for their allegation that there were $201 million in under-reported costs is an inadmissible $41 million May 23, 2008 Fontainebleau Change Order executed by non-parties FBR and TWC. (Pls. Add. SOUMF ¶ 72; Pls. Opp. at 23 n.124.) No fact witness has authenticated this document or testified to its contents. Plaintiffs did not question any Fontainebleau or Turnberry witnesses about it, and when BANA's Jeff Susman was

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[20] Plaintiffs' argument that BANA cannot respond to their arguments concerning conditions precedent not specifically addressed in BANA's opening brief (Pls. Opp. at 18 n.94) is absurd. Local Rule 7.1(c) expressly permits BANA to rebut Plaintiffs' arguments.

[21] *See Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995) ("A genuine issue of material fact does not exist unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict in its favor.").

shown the document, he testified that it was "not a document that [he had] previously seen."[22] Thus, the document is hearsay and cannot be considered for the truth.[23] And even if the change order were admissible, it still would be unavailing. There is nothing on its face indicating that Fontainebleau was aware of (and concealed) the change order before May 2008.[24] To the contrary, the change order is accompanied by numerous letters, both from TWC to FBR and the subcontractor to TWC, demonstrating that the proposed change was still being negotiated as late as May 8, 2008.

Plaintiffs compound this factual distortion by ignoring that in June 2008, Fontainebleau increased the Project's budget and injected approximately $190 million in new equity to cover the costs.[25] Cost increases are a normal occurrence on projects of this size.[26] This is precisely why the Disbursement Agreement permitted Fontainebleau to cover cost increases with new equity. (Disbursement Agmt. § 6.9.1.) Both the increase in anticipated costs and the equity injection were *disclosed to Lenders* in, among other places, every IVI report beginning in June

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[22] Cantor Reply Decl. Ex. 14 (Susman Dep. at 100:12–14); *see also* BANA Reply to Pls. Add. SOUMF ¶¶ 72–74. Plaintiffs cite the testimony of Peter Badala, BANA's expert witness, to establish that BANA received the document. But expert opinion testimony cannot be used to establish facts.

[23] *See Ransom v. Equifax Inc.*, 2010 WL 1258084, at *4 (S.D. Fla. Mar. 30, 2010) (disregarding as hearsay letters offered by plaintiff opposing summary judgment); *Shannon v. Potter*, 2008 WL 4753732 at *3 (S.D. Fla. 2008) (rejecting exhibits attached to plaintiff's affidavit because plaintiff was not competent to authenticate memorandum authored by another individual); *Vickers v. Fed. Express Corp.*, 132 F. Supp. 2d 1371, 1381 (S.D. Fla. 2000) (disregarding as hearsay letters submitted by plaintiff because they were not authenticated or corroborated by testimony from their authors).

[24] Plaintiffs' citation to their own expert's report to establish the change order's veracity and contents is unavailing. "The law is clear . . . that an expert report cannot be used to prove the existence of facts set forth therein." *In re Citric Acid Litig.*, 191 F.3d 1090, 1102 (9th Cir. 1999); *see also Estate of Parsons v. Palestinian Auth.*, 715 F. Supp. 2d 27, 32–33 (D.D.C. 2010) (disregarding expert's affidavit and granting summary judgment to the defendant because "[e]xpert opinions may be based on hearsay, but they may not be a conduit for the introduction of factual assertions that are not based on personal knowledge"); *In re Lake States Commodities, Inc.*, 272 B.R. 233, 242–43 (Bankr. N.D. Ill. 2002) ("[T]he inadmissible evidence relied on by the expert is not somehow transmogrified into admissible evidence simply because an expert relies on it.") (internal citation omitted).

[25] *See* Decl. of Robert W. Barone, dated Aug. 4, 2011 ("Barone Decl.") Ex. 2 at 22 ("During the June 2008 PC, the Developer increased the Owner Equity Funds by $190,265,021.").

[26] *See* Barone Decl. ¶ 11.

2008.[27] Indeed, several Plaintiffs who were Lenders at the time testified that they viewed the equity infusion as a "positive" "[b]ecause [Fontainebleau was] covering their cost overrun and injecting additional liquidity on top of that."[28] [redacted].[29]

Plaintiffs likewise have no evidence to substantiate their claim that BANA "believed that there were additional change orders" not reported in May 2008. (Pls. Opp. at 23.) Plaintiffs offer only a June 10, 2008 BANA e-mail stating that IVI believed there were "additional known cost increases." (*See* Pls. Opp. at 23 n.126; Pls. Add. SOUMF ¶ 76.) But that e-mail also states that BANA contacted Fontainebleau's Jim Freeman to ensure that IVI received all information it needed regarding additional change orders. IVI promptly investigated the issue (Dep. Ex. 892), and its next construction consultant report (dated June 25, 2008), concluded "[a]t this time, the construction costs are anticipated to increase but not exceed the Developer's revised direct cost budget of $1,909,734,213 plus $190,265,021 in equity with the new direct cost budget of $2,099,999,234." (Dep. Ex. 868, at 14.) Thus, the record is clear that BANA addressed with IVI its concerns about "additional change orders" (and related undisclosed costs) in early-June 2008. And Plaintiffs ignore that BANA continued pressing Fontainebleau for construction cost-related disclosures in 2008-2009, disbursing funds only after receiving information that appeared correct and that Fontainebleau had certified as accurate and truthful. (*See* BANA SOUF ¶¶ 147–166.)

2. IVI's Uncommunicated "Gut Feelings" Did Not Provide a Basis for Rejecting Fontainebleau's Advance Requests.

Plaintiffs also argue that IVI's cost concerns in late 2008–early 2009—which IVI's Robert Barone described as only "gut feelings" unsupported by substantiating evidence (BANA Br. at 18; Barone Decl. ¶¶ 15, 17)—were sufficient to permit it to reject Fontainebleau's Advance Requests. (Pls. Opp. at 24–29.) But Plaintiffs ignore that IVI—the construction

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[27] *See, e.g.*, Cantor Reply Decl. Ex. 19 [Dep. Ex. 868 at BANA_FB000329743, 329755]; Cantor Decl. Ex. 59 [Dep. Ex. 809 at BANA_FB00215230, 215245]; *id.* Ex. 66 [Dep. Ex. 600 at BANA_FB00235209, 235225]; Cantor Reply Decl. Ex. 36 [Dep. Ex. 828 at BANA_FB00104510, 104525].

[28] Cantor Reply Decl. Ex. 34 (Fu Dep. at 111:17–112:2); *see also id.* Ex. 37 [Dep. Ex. 151]; *id.* [redacted]

[29] Cantor Reply Decl. Ex. [redacted]; *see also id.* Ex. 38 [Dep. Ex. 175].

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expert—continued certifying Fontainebleau's Advance Requests despite its alleged "concerns," belying Plaintiffs' claim that those same concerns were sufficient for BANA to determine that Fontainebleau was concealing costs in violation of Sections 3.3.2, 3.3.4(a), 3.3.11, 3.3.21, and 3.3.24. Plaintiffs also again substitute fabrication for fact, claiming that IVI "suggested an audit" in March 2009. (Pls. Opp. at 26.) In fact, IVI observed that although it had not "conducted an audit of the information presented," it believed that the "information presented [by Borrowers] appears reasonable at this stage in the Project." (BANA Reply to Pls. Add. SOUMF ¶ 112.)

C. The FDIC Closure of First National Bank of Nevada Did Not Cause Conditions Precedent to Fail.

Plaintiffs strain credulity in arguing that a lender default—even one involving commitments totaling just 0.6% of the $1.85 billion Senior Credit Facility (and leaving an In Balance cushion of more than $107.7 million)—is "*always* material." (Pls. Opp. at 31 (emphasis added).) Not surprisingly, Plaintiffs cite no legal authority for this assertion. And their factual citations are inapposite—neither the cited portions of Pryor's report nor Badala's testimony addresses lender defaults. (*See* BANA Reply to Pls. Add. SOUMF ¶ 122.) Plaintiffs' assertion is also inconsistent with the loan documents—if the parties had intended that any Lender's failure to fund would be a Default, they would have included it as an Event of Default in Credit Agreement Section 7 and Disbursement Agreement Section 8. Moreover, as BANA's opening brief demonstrated (BANA Br. at 30), Plaintiffs' bright-line rule would be inconsistent with the parties' commercial expectations.[30] Neither the Initial Term Loan Lenders nor a sophisticated developer like FBR would have invested hundreds of million of dollars in the Project at its inception if the collapse of a lender with an indisputably insignificant (0.6%) commitment would cause the Project to fail. Plaintiffs have no response to this argument.

D. Guggenheim and Z Capital's March 2009 Failure To Fund Did Not Cause Conditions Precedent to Fail.

Plaintiffs acknowledge that their arguments concerning Guggenheim and Z Capital's March 2009 failure to fund Delay Draw Term Loans are the same as their arguments regarding FNBN. (Pls. Opp. at 32.) They fail for the same reasons. Moreover, Plaintiffs concede that no

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[30] *See Gutierrez v. State*, 871 N.Y.S.2d 729, 731 (N.Y. App. Div. 2d Dep't 2009) ("In interpreting a contract, the court must read the document as a whole to determine the parties' purpose and intent, giving a practical interpretation to the language employed so that the parties' reasonable expectations are realized.") (quotations omitted).

Lender disputed BANA's Disbursement Agreement analysis at the time or instructed BANA not to fund. (*Id.* at 33–34; BANA Br. at 35–36.) Plaintiffs' assertion that two Lenders, Highland and Deutsche Bank, "replied" to BANA's letter (Pls. Opp. at 33–34) misses the point: there is no evidence that those Lenders disagreed with BANA's position. As Plaintiffs point out, Highland refused to "state a position" and reserved its right to sue BANA regardless of whether it funded the March Advance. (*See* Dep. Ex. 471.) And the Deutsche Bank e-mail simply asked BANA to schedule a call to discuss certain Advance-related issues. (Dep. Ex. 832.) Contrary to Plaintiffs' claim, BANA held that call, which addressed Deutsche Bank's concerns. (*See* Pls. Ex. 1505.)

E. BANA Properly Accepted the March 2009 Supplemental Advance Request.

As demonstrated in BANA's opening brief, Plaintiffs' assertion that BANA should have rejected Fontainebleau's Supplemental March 2009 Advance Request as untimely (Pls. Opp. at 34) is baseless because the Disbursement Agreement has no deadline for supplementing Advance Requests. (BANA Br. at 36.) Plaintiffs' claim that BANA "had no authority" to accept a revised Advance Request that IVI initially rejected "for material misstatements" (Pls. Opp. at 35) similarly misreads the Disbursement Agreement. Contrary to Plaintiffs' contention, Section 2.4.4 does not restrict Fontainebleau's right to supplement Advance Requests voluntarily, it merely permits BANA to *"require* the Project Entities to revise and resubmit" any Advance Request. And Section 2.4.5 imposes no restrictions on BANA accepting revised Advance Requests, regardless of the reason for the revision. Moreover, even if there were such restrictions, there is no evidence that BANA knew why IVI had rejected the original Advance Request. While IVI's Robert Barone later testified that IVI had refused to certify the initial March 11, 2009 Advance Request because it "no longer believed it," that opinion was not reflected in IVI's actual March 2009 certificates, and there is no evidence even suggesting that IVI communicated its doubts to BANA before signing off on Fontainebleau's revised Advance Request, or before BANA funded the Advance Request on March 26. (BANA Reply to Pls. Add. SOUMF ¶ 106.)

Plaintiffs' argument that BANA "should not in good faith have approved the Request" (Pls. Opp. at 35–37) should be rejected because it confuses Plaintiffs' hindsight assessment of BANA's actions with evidence of bad faith. The undisputed evidence reflects that BANA acted conscientiously in approving the Request: pressing Fontainebleau and IVI for accurate and

complete information regarding the Project costs, obtaining all required documentation, and disclosing to the Lenders the bases for its decision to fund before honoring the Advance Request. (*See* BANA SOUF ¶¶147–166.) BANA's internal analysis of its future post-construction credit risk exposure as a lender (Pls. Opp. at 36) is irrelevant in determining its good faith as agent. The Credit Agreement and Disbursement Agreement establish that the Lenders were not relying on BANA to perform any credit analysis or provide the Lenders with "any credit or other information" concerning Fontainebleau. (Disbursement Agmt. §§ 9.2.5, 9.10; Credit Agmt. §§ 9.2, 9.3, 9.7.) And BANA was not free to substitute its subjective internal opinion as a lender of the Project's creditworthiness for its clear and unambiguous contractual duties as agent.

CONCLUSION

This is a straightforward motion. Despite the extensive discovery and the voluminous summary judgment briefing, this case comes down to a handful of unambiguous Disbursement Agreement provisions that (i) define BANA's ministerial duties in approving and funding Fontainebleau Advance Requests (Section 2.4), (ii) identify the documents on which BANA was permitted to rely in performing those duties (Section 9.3.2), and (iii) absolve BANA of liability for any contract breaches unless it was grossly negligent (Section 9.10).

Plaintiffs recognize that their breach of contract claim cannot survive summary judgment if Disbursement Agreement Sections 9.3.2 and 9.10 are applied as written. Thus, Plaintiffs invoke Section 9.1's general "commercially reasonable" language in an attempt to avoid Section 9.3.2 and 9.10's specific limitations on BANA's duties and to blunt Section 9.10's gross negligence standard. But BANA has demonstrated repeatedly in its summary judgment briefs that New York law does not permit Plaintiffs to neuter Sections 9.3.2 and 9.10's contractual protections with talismanic allegations that BANA's actions were not commercially reasonable. Plaintiffs' attempt to use 20/20 hindsight to second-guess BANA's good faith decisions is precisely what the parties sought to avoid in agreeing to Sections 9.3.2 and 9.10. The undisputed facts establish that BANA complied with its contractual duties in approving and funding Fontainebleau Advances Requests. And even if it somehow fell short in performing those duties, there is no evidence that BANA recklessly disregarded Plaintiffs' rights or intended to harm them, as is necessary to find gross negligence. Accordingly, BANA is entitled to summary judgment dismissing Plaintiffs' breach of contract claim.

Dated: September 27, 2011

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I, Asher L. Rivner, hereby certify that on September 27, 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 Reply Memorandum of Law in Further Support of its Motion for Summary Judgment upon the below-listed counsel of record and that the original and a paper copy of these documents is being filed with the Clerk of Court under seal.

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

IN RE:

FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.
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DEFENDANT BANK OF AMERICA, N.A.'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

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I. BANK OF AMERICA, N.A.'S RESPONSE TO PLAINTIFFS' STATEMENT OF ADDITIONAL UNDISPUTED MATERIAL FACTS[1]

Response to Paragraphs 1 through 5: Undisputed.

Response to Paragraph 6: Disputed. The Credit Agreement and Retail Agreement have different definitions of "Defaulting Lender." Undisputed that the quoted language appears only in the Credit Agreement. This quoted language does not appear in the Retail Agreement.

Response to Paragraph 7: Undisputed.

Response to Paragraph 8: Disputed. The cited evidence does not support this statement. Undisputed that Bank of America, N.A. ("BANA") received a copy of the Retail Facility Agreement, but the cited evidence reflects no amendments to that agreement.

Response to Paragraph 9: Undisputed.

Response to Paragraph 10: Disputed. The cited evidence reflects neither that Ms. Brown's and Mr. Naval's positions were "nominal," nor that they described their roles as "ministerial."

Response to Paragraph 11: Disputed. The cited evidence does not support this statement. Although BANA's CDP group decided whether to disburse funds to the Borrowers (*see* Decl. of Daniel L. Cantor in Support of BANA's Reply Mem. of Law in Further Support of its Mot. for Summ. Judg. ("Cantor Reply Decl.") Exs. 11 (Bolio Dep. at 83:3–7); 7 (Brown Dep. at 49:7–50:19); 14 (Susman Dep. at 49:22–50:15; 52:2–7)), BANA's Agency Management and Credit Services and Administration groups also had responsibilities relating to BANA's agent roles. For example, Credit Services reviewed the Borrowers' monthly draw packages to ensure that all required documents were included. (*Id.* Exs. 11 (Bolio Dep. at 30:1–32:20); 7 (Brown Dep. at 39:8–12).) Undisputed that Mr. Naval and Ms. Brown reported to the CDP group.

Response to Paragraph 12: Undisputed that Mr. Susman was a CDP Senior Vice President until mid-February 2009, when he left BANA. (Cantor Reply Decl. Ex. 14 (Susman Dep. at 16:1–4).)

Response to Paragraph 13: Disputed. The cited evidence does not support the statement that Mr. Yunker was an architect of the Disbursement Agreement. The cited evidence reflects only that Mr. Yunker participated in drafting the agreement. (*See* Cantor Reply Decl.

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[1] Defined terms are listed in Exhibit A hereto.

Ex. 4 (Yunker Dep. at 84:18–85:8).) Undisputed that Mr. Yunker was Vice President of the Global Gaming Team at BAS.

Response to Paragraph 14: Undisputed that Mr. Howard was a Managing Director of Syndications at BAS until March 31, 2009, when he left BAS. (Cantor Reply Decl. Ex. 5 (Howard Dep. at 10:16–23).)

Response to Paragraph 15: Undisputed.

Response to Paragraph 16: Disputed. This statement is ambiguous and is unsupported by the cited evidence. The Special Assets Group ("SAG") became involved with BANA's Administrative and Disbursement Agent roles in February 2009, but initially only at an advisory level. (Cantor Reply Decl. Ex. 12 (Yu Dep. at 39:11–17).) Mr. Yu was the SAG officer who was assigned to the Project. (*Id.* at 13:6–14:7.)

Response to Paragraph 17: Disputed. This statement is unsupported by the cited evidence. Mr. Susman testified only that if he had evidence that was inconsistent with the borrowers' representations, the decision to disburse "would depend on the degree of inconsistency," and that if he actually knew a representation to be false, he would not disburse. (Cantor Reply Decl. Ex. 14 (Susman Dep. at 181:9–19; 182:22–183:20).)

Response to Paragraph 18: Disputed. This statement is unsupported by the cited evidence. BANA's Brandon Bolio testified that he "would think" he would ask the Borrowers about discrepancies, but also testified that he was unaware of any obligation under loan documents to do so. (Cantor Reply Decl. Ex. 11 (Bolio Dep. at 164:20–165:12; 175:6–18).) Nor does the cited testimony establish that Mr. Bolio was Mr. Susman's "right hand man." And Mr. Varnell testified only that he believed that Mr. Susman "would undertake whatever he needed to satisfy himself that he had a legitimate draw" including obtaining additional information if necessary. (*Id.* Ex. 6 (Varnell Dep. at 211:13–212:5).) The cited evidence also lends no support to the statement that Mr. Varnell was involved in drafting the Disbursement Agreement.

Response to Paragraph 19: Disputed. This statement is not a "fact"; it is an expert opinion. Moreover, the statement is unsupported by the cited evidence. Mr. Lupiani simply testified that in certain cases it would be commercially reasonable, but not mandatory, for an agent to investigate information indicating that conditions precedent were not satisfied, as long as the information was sufficiently reliable and definitive. (Cantor Reply Decl. Ex. 15 (Lupiani Dep. at 131:10–132:19).)

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Response to Paragraph 20: Disputed. This statement is not a "fact"; it is an expert opinion. Mr. Pryor's opinion is inadmissible because it offers legal conclusions under the guise of an expert opinion by purporting to explain BANA's agent duties under the Disbursement Agreement.[2] (*See*, *e.g.*, Pls. Ex. ¶ 37 (interpreting conditions precedent).) In addition, the cited portions of Pls.' Ex. 1503 do not discuss bank agents' duties. Moreover, Mr. Pryor does not have 35 years of experience acting as an agent. He testified that he has been the agent in connection with fewer than ten credit facilities. (Cantor Reply Decl. Ex. 16 (Pryor Dep. at 12:11–17).) Moreover, Mr. Pryor retired from banking in 1991. (*See id.* Ex. 33 [Dep. Ex. 932 (Pryor Rep. Ex. A)].) Since that time, the syndicated lending industry has evolved significantly, away from small bank-only syndicates and virtually no secondary market to widely held loans that are actively traded in the secondary market by hedge fund investors—such as Plaintiffs here.[3]

Response to Paragraph 21: Disputed. This statement is not a "fact"; it is an expert opinion. Mr. Pryor's opinion is inadmissible because it offers legal conclusions under the guise of an expert opinion by purporting to explain when BANA should reject the Borrowers' Advance Requests under the Disbursement Agreement. (*See* Resp. to ¶ 20.) Moreover, the cited portions

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[2] *See*, *e.g.*, *Montgomery v. Aetna Cas. & Surety Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990) ("A witness … may not testify to the legal implications of conduct"); *In re FedEx Ground Package Sys., Inc. Employment Practices Litig.*, 2010 WL 1838400, at *5 (N.D. Ind. May 4, 2010) ("Whether the contract allows FedEx to control the manner and means of the work is a legal question for the court and isn't the proper subject of expert testimony."); *Smith v. Cont'l Cas. Co.*, 2008 WL 4462120, at *1 (M.D. Pa. Sept, 30, 2008) ("It is well-settled that expert testimony regarding legal conclusions, such as the interpretation of an insurance policy, is impermissible.").

[3] *See* Allison Taylor & Alicia Sansone, THE HANDBOOK OF LOAN SYNDICATIONS AND TRADING, xv (McGraw-Hill 2007) (cited in Pls. Opp. at 4) ("The business of corporate loan syndications, trading, & investing has changed at an astounding rate over the last fifteen years. Back then, banks would lend large amounts of money to their corporate borrowers and hold the loans on their books. Today, these loans are sold to other banks, institutional investors, mutual funds ... and hedge funds. Loans are traded, similar to equity and bonds; indices are made on the performance of loans; loans are put into structured vehicles to attract different types of investors, credit derivatives are made when loans are the underlying instrument; and loans are bought and sold around the globe."); *see also id.* at 39 ("Over the last 20 years, the corporate loan asset class has changed dramatically. It has developed from a primary-market and bank-oriented asset class into one with well-structured primary and secondary markets and a diversified investor base."); *id* at 3–7, 21–34, 61–65.

of Pls.' Ex. 1503 do not discuss a bank agent's duties. In addition, Mr. Pryor lacks knowledge and experience concerning the role of a bank agent on a large scale syndicated construction loan (*see supra* Resp. to ¶ 20), and is therefore not qualified to opine on the duties of a bank agent.

Response to Paragraph 22: Disputed. This statement is not material or relevant to the resolution of BANA's motion for summary judgment.

Response to Paragraph 23: Undisputed.

Response to Paragraph 24: Disputed. The statement is not supported by the cited evidence. The September 2008 disbursement occurred on September 26, 2008 (Dep. Ex. 625); the November 2008 disbursement occurred on November 26, 2008 (Dep. Exs. 245, 627), and the February 2009 disbursement occurred on February 27, 2009 (Dep. Exs. 251, 622–624). In addition, the cited evidence reflects that $67,178,114.44 of the Delay Draw Term Loan was disbursed on March 10, 2009, rather than $68,000,000. (*See* Dep. Exs. 634–636.) Thus, the total amount of Term Loans disbursed between September 2008 and March 2009 is $787,142,302.06. The cited documents reflect the *total* disbursements of Initial Term Loan and Delay Draw Term Loan proceeds, not all of which were funded by Plaintiffs or their alleged predecessors-in-interest.

Response to Paragraph 25: Undisputed. Plaintiffs' citation to Exhibit 1504 is improper as its contents are inadmissible hearsay. Exhibit 1504 is a September 2009 filing by non-party Fontainebleau Las Vegas Retail, LLC in the Lehman bankruptcy. The document is not in evidence and cannot be introduced to prove the truth of any matter asserted in the filing.[4]

Response to Paragraphs 26 and 27: Undisputed.

Response to Paragraph 28: Disputed. The cited evidence does not support this statement. David Howard, Jeff Susman and Bret Yunker testified that credit market conditions created challenges if Lehman needed to be replaced, but offered no opinion regarding the likelihood that a Lehman replacement would need to be found, or the likelihood of finding a replacement lender if one was needed. (Cantor Reply Decl. Exs. 5 (Howard Dep. at 117:17–24); 14 (Susman Dep. at 147:25–148:9); 4 (Yunker Dep. at 37:19–38:8; 39:8–23).)

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[4] *See Autonation, Inc. v. O'Brien*, 347 F. Supp. 2d 1299, 1310 (S.D. Fla. 2004) ("A court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but to establish the fact of such litigation and related filings.") (citations omitted).

Response to Paragraph 29: Disputed. The evidence cited does not establish that "any failure by Lehman to fund the Project" could have caused the Project to "shutdown." The cited evidence shows that "the way the documents were constructed, that if retail funds were not funded, then the [resort] lenders were not required . . . to fund." (Cantor Reply Decl. Exs. 5 (Howard Dep. at 39:23–40:3); 14 (Susman Dep. at 146:10–18).) As explained by Bret Yunker: "That's different from the project shutting down." (*Id.* Ex. 4 (Yunker Dep. at 37:2–11).)

Response to Paragraph 30: Disputed. The statement is ambiguous and is not supported by the cited evidence. Dep. Ex. 896 is an e-mail Mr. Susman sent on the day of Lehman's bankruptcy and Mr. Susman testified that his remark that Lehman was a "big issue" reflected only his immediate reaction to the "potential impact" of that event. (*See* Cantor Reply Decl. Ex. 14 (Susman Dep. at 150:25–151:2).)

Response to Paragraph 31: Disputed. The cited evidence does not support the statement. Dep. Ex. 67 is an e-mail Mr. Yunker sent on the day of Lehman's bankruptcy. Mr. Yunker testified that the e-mail merely reflects his uninformed reaction to that event. (Cantor Reply Decl. Ex. 4 (Yunker Dep. at 40:13–18).) Moreover, the e-mail states, "Lehman *may* be the death nail for FB"—Plaintiffs misleadingly omit the word "may."

Response to Paragraph 32: Disputed. This is a nonsensical statement to which no response is required. Among other things, the statement does not identify the payment the non-Retail Lenders would be making.

Response to Paragraph 33: Disputed. Plaintiffs distort Mr. Yunker's testimony. Mr. Yunker testified to his belief that "*part of the purpose* was to quell concerns not only from BofA but other lenders as to compliance with the condition precedent regarding the retail funding." (*See* Cantor Reply Decl. Ex. 4 (Yunker Dep. at 111:9–13).) He further testified that BANA's September 26, 2008 call was intended to address other Lender concerns raised by the Lehman bankruptcy filing. (*Id.* at 111:13–19.)

Response to Paragraph 34: Disputed. The cited evidence does not support this statement. On September 22, 2008, BANA asked Fontainebleau to schedule a call with the Lenders to address their Lehman-related questions. (Decl. of Daniel L. Cantor in Support of BANA's Mot. for Summ. Judg. ("Cantor Decl.") Ex. 37 [Dep. Ex. 901].) Fontainebleau agreed to participate in the Lender call in October 2008, but later declined to hold the call. (*Id.* Ex. 43 [Dep. Ex. 205].) Fontainebleau later discussed the Lehman bankruptcy's implications with

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Lenders on numerous occasions, including an October 29, 2008 call, a November 18, 2008 meeting, an early-December 2008 call, and a March 2009 presentation. (*See* Cantor Reply Decl. Exs. 23 [Dep. Ex. 158]; 24 [Dep. Ex. 377]; 26 [Dep. Ex. 379]; 27 [Dep. Ex. 381]; 28 [Dep. Ex. 160].) In addition, numerous Lenders held meetings or calls with Fontainebleau during the fall of 2008, during which the Lehman bankruptcy's implications were discussed. (*Id.* Exs. [redacted]; 17 [Dep. Ex. 382 (Mulé's notes of Caspian's call with Freeman)]; 25 (Brigade e-mail thanking Fontainebleau for arranging call).)

Response to Paragraph 35: Disputed. Plaintiffs' statement is a fabrication. There is no evidence that Fontainebleau's Jim Freeman told BANA's Jeff Susman or David Howard that he did not want to have a Lender meeting because there were "limitations on what we were and weren't allowed to say, based on our discussions with counsel." Mr. Freeman testified that he was "not sure" whether he told BANA that counsel advised him that there were limitations on what he could say about the Lehman situation. (Cantor Reply Decl. Ex. 8 (Freeman Dep. at 106:11–20).) And Mr. Susman testified that he did not recall ever being told by Mr. Freeman that Fontainebleau was limited in what it could discuss based on advice of counsel. (*Id.* Ex. 14 (Susman Dep. at 156:9–157:22).) The lack of a reasonable basis for Plaintiffs' statement is further reflected by the fact that (i) the cited Howard testimony has nothing to do with Lehman and concerns his employment by BAS, and (ii) the cited Susman and Yunker testimony makes absolutely no reference to Fontainebleau's counsel's alleged advice to Mr. Freeman.

Response to Paragraph 36: Disputed. Plaintiffs' statement is a fabrication. [redacted] And Plaintiffs' characterization of Dep. Ex. 254 is false. This is an e-mail from Mr. Freeman to BANA, but it makes no mention of an inability to discuss the Lehman situation. To the contrary, Mr. Freeman indicates that he spoke with Highland about the Lehman situation.

Response to Paragraph 37: Disputed. The cited evidence lends no support for the statement. The notes are undated and there is no indication that Mr. Bolio was referring to the September 2008 Shared Retail Costs. The dollar amounts—"25 mm" and "2mm Lehman"—do not correspond to the Shared Costs requested by the Borrowers in September 2008. [redacted]

[redacted] (*See* Cantor Reply Decl. Ex. 20 [Dep. Ex. 11].) Finally, Mr. Bolio testified that he could not recall what the notes referred to. (*Id.* Ex. 11 (Bolio Dep. at 59:15–60:25).)

Response to Paragraph 38: Disputed. This statement is unsupported by the cited evidence. None of the cited deposition exhibits reflects that BANA believed that Lehman's failure to fund was "material and adverse to the Project." Moreover, none of the deposition exhibits reflects BANA's knowledge that Lehman did not fund its portion of the Retail Shared Costs in September 2008. Indeed, contemporaneous internal BANA documents reflect BANA's belief that Lehman had funded the September 2008 Shared Costs. (Cantor Decl. Ex. 56 [Dep. Ex. 905].) Further, Plaintiffs misleadingly claim that BANA's employees considered Lehman's failure to fund "material and adverse" while citing only to their immediate reaction in the days following Lehman's bankruptcy filing, and not to ULLICO's later decision to fund for Lehman.

Response to Paragraph 39: Disputed. The cited evidence does not support this statement. Far from describing a "custom and practice," TriMont's Mac Rafeedie testified that he could not "recall the exact things that were discussed" with BANA, but that "consistent with [his] practice," he "could have" told BANA that FBR funded for Lehman. (Cantor Reply Decl. Ex. 3 (Rafeedie Dep. at 57:5–58:19; 112:6–20).) Mr. Rafeedie testified that the discussion "could have been just that Lehman's dollars were funded, not necessarily who funded what." (*Id.* at 58:1–9.) BANA's Jeanne Brown (Mr. Rafeedie's principal BANA contact) testified that she did not remember TriMont telling her that Lehman was not funding in September 2008. (*Id.* Ex. 7 (Brown Dep. at 57:1–8).) In addition, in responding to Advance Requests, it was TriMont's practice to send a single wire transfer to BANA for the entire requested Retail Shared Cost without identifying the amounts funded by each Retail Co-Lender. (*Id.* Exs. 3 (Rafeedie Dep. at 39:18–41:9); 14 (Susman Dep. at 204:9–10).)

Response to Paragraph 40: Disputed. The cited evidence does not support the statement. BANA's Bret Yunker and Fontainebleau's Jim Freeman both testified that they did not recall whether they had a conversation regarding the impact of FBR's funding on the conditions precedent to disbursement, but left open the possibility that a discussion took place between Freeman and BANA. (*See* Cantor Reply Decl. Exs. 8 (Freeman Dep. at 74:12–24, 88:19–91:11); 4 (Yunker Dep. at 96:11–98:14).)

Response to Paragraph 41: Disputed. The cited evidence does not support this statement. BANA disputes that Highland confirmed a "mutual understanding" that Lehman had

not made disbursements while in bankruptcy. Plaintiffs mischaracterize the quoted e-mail. The e-mail simply listed Highland's position on several Lehman-related issues and asked BANA to confirm them. (Dep. Ex. 80; Pls.' Ex. 1502.) Plaintiffs fail to identify any evidence that Mr. Scott or anyone from BANA subsequently confirmed those self-serving assertions or came to any kind of "mutual understanding" with Highland. Moreover, the statement quoted by Plaintiffs is hearsay and is inadmissible as evidence of the truth of the matters asserted therein. The statement at issue was made in Mr. Dorenbaum's e-mail to Mr. Scott, copied to Highland's Brad Means and Kevin Rourke, and purports to recount a prior conversation between Messrs. Dorenbaum and Scott. Messrs. Scott, Dorenbaum, and Means have not been deposed in this case. [redacted] Thus, Dep. Ex. 80 and Pls.' Ex. 1502 are inadmissible hearsay and double hearsay.[5] Lastly, BANA did not understand that Lehman had made no disbursements while in bankruptcy. For example, 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].)

Response to Paragraph 42: Disputed. This statement is not material. The extent to which the Highland e-mail was distributed has no relevance to the resolution of BANA's motion. Moreover, the cited evidence does not support that the Merrill Lynch report was "widely disseminated." The e-mail was sent to a handful of recipients.

Response to Paragraph 43: Disputed. The cited evidence does not support the statement. It reflects that only three Lenders received Mr. Maxwell's reports, and [redacted] Moreover, none of the cited evidence establishes that Fontainebleau communicated to Mr. Maxwell before October 2008. Dep. Exs. 274 and 399 are e-mails from Mr. Maxwell to undisclosed recipients stating that "[w]e spoke with Company management." This is inadmissible hearsay to the extent it is offered to

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[5] *See* Fed. R. Evid. 801–802; *see also Read v. Teton Springs Golf & Casting Club, LLC*, 2010 WL 5158882 at *6 (D. Idaho Dec. 14, 2010) (striking e-mail attached to the plaintiff's opposition to the defendant's motion for summary judgment because although the e-mail was authenticated in a deposition, it "contains hearsay statements not based on the affiant's personal knowledge"); *Design X Mfg., Inc. v. ABF Freight Sys., Inc.*, 584 F. Supp. 2d 464, 468 (D. Conn. 2008) (refusing to consider on summary judgment an e-mail recounting non-deponent witness' alleged statement to another non-deponent witness because the e-mail was inadmissible hearsay within hearsay).

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support the statement that Mr. Maxwell was in direct communication with Fontainebleau.[6] Mr. Maxwell was not deposed, and no Fontainebleau deponents testified that they communicated with Mr. Maxwell. Dep. Ex. 275 is an e-mail from Mr. Maxwell to Jim Freeman requesting an update, but Plaintiffs offer no evidence that Fontainebleau responded to Mr. Maxwell's request.

Response to Paragraph 44: Disputed. The cited evidence offers no support to the statement. Dep. Exs. 274, 275 and 399 are self-contained e-mails, and do not attach or even refer to a "more detailed report." Moreover, the alleged separate report is not in evidence. [redacted] (Cantor Reply Decl. Ex. 10 (Rourke Dep. at 104:8–10).)

Response to Paragraph 45: Disputed. BANA's acquisition of Merrill Lynch & Co., Inc. is not material to the resolution of any issue. Moreover, the cited evidence does not support this statement. It does not specify when the transaction closed.

Response to Paragraphs 46, 47 and 48: Undisputed.

Response to Paragraph 49: Disputed. Mr. Freeman's October 7, 2008 memorandum answered BANA's question whether Lehman funded in September 2008. The memo assured the Lenders that the August and September shared costs had been "funded in full" and that Fontainebleau did not "believe there will be any interruption in the retail funding of the project." (Cantor Decl. Ex. 47 [Dep. Ex. 77].) The memo 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.*" (*Id.* (emphasis added).) In addition, BANA's Brandon Bolio testified that although the memo did not provide "as much detail as would have been … nice," it adequately "answer[ed] the question." (Cantor Reply Decl. Ex. 11 (Bolio Dep. at 80:19–81:6).) BANA's Bret Yunker also testified that he could not recall any dissatisfaction on the part of BANA employees with Fontainebleau's memo responses, and that from his personal perspective Fontainebleau's response provided sufficient clarity to resolve the issue. (*Id.* Ex. 4 (Yunker Dep. at 116:6–117:5).)

Response to Paragraph 50: Disputed. This statement is a gross mischaracterization of

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[6] *See id.*

the cited evidence. Dep. Ex. 903 is a letter from Highland to BANA stating that Fontainebleau's October 7, 2008 memorandum to Lenders "doesn't address our concerns." The e-mail makes no mention of BANA's alleged question regarding Lehman.

Response to Paragraph 51: Disputed to the extent that the word "informed" is intended as an assertion that Highland provided BANA with evidence of an existing fact. As discussed in its response to paragraph 38, BANA was unaware that Fontainebleau paid Lehman's portion of the September 2008 Retail Shared Costs.

Response to Paragraph 52: Disputed. The cited evidence does not support the statement. [redacted] The cited evidence (Dep. Exs. 231, 232) establishes only that a conference call was scheduled for, and occurred in, October 2008, and not what was discussed during the call. In fact, the call's primary purpose was to provide an update on the Project to the Retail Lenders, at the Retail Lenders' request. (*See* Cantor Reply Decl. Ex. 6 (Varnell Dep. at 198:1–7).) And although the Lehman bankruptcy's implications were discussed at the October 2008 meeting, the cited evidence makes clear that the meeting's purpose was for the Retail Lenders to get a report from the Resort Lenders' agent (*i.e.*, BANA) on the Project's overall progress. (Dep. Ex. 18; Cantor Reply Decl. Ex. 8 (Freeman Dep. at 110:23–111:9).)

Response to Paragraph 53: Disputed. Plaintiffs mischaracterize the evidence. [redacted] (Cantor Reply Decl. Ex. 2 (Kolben Dep. at 69:11–18; 176:16–177:3).) [redacted]

Response to Paragraph 54: Disputed. [redacted]

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[redacted] (*See* Cantor Reply Decl. Ex. 2 (Kolben Dep. at 175:19–176:9).) In addition, Dep. Ex. 19 is inadmissible and should be disregarded. It is a National City Special Assets Committee Report, which was never authenticated. (*See id.* Exs. [redacted]; 4 (Yunker Dep. at 174:16–175:5).) The exhibit is apparently an internal memorandum prepared by an unidentified employee of non-party National City and obtained from non-party PNC Bank, and its contents are hearsay and lack foundation. Because the document is being offered for the truth of its contents, it is inadmissible under Fed. R. of Evid. 802.[7]

Response to Paragraph 55: Disputed. The cited evidence does not support the statement. The Retail Lenders asked BANA to take over Lehman's remaining commitment under the Retail Facility, (Cantor Reply Decl. Ex. 5 (Howard Dep. at 112:19–113:10; 146:1–13)), but there is no evidence that Fontainebleau made the request at the October Retail meeting. Furthermore, much of the cited evidence has nothing to do with the October 2008 meeting. (*See* Dep. Ex. 907; Cantor Reply Decl. Exs. 5 (Howard Dep. at 112:9–18; 113:11–114:4); 14 (Susman Dep. at 277:19–278:9).)

Response to Paragraph 56: Disputed. The statement is not a "fact;" rather it is conclusion of law that does not create a disputed issue of material fact. Moreover, it is a gross distortion of the cited evidence. The Intercreditor Agreement provision cited by Plaintiffs grants "to the Bank Agent the right (without any obligation) to purchase, at any time after the occurrence of a Retail Purchase Option Event, all . . . of the principal of and interest on the Retail Secured Obligations," but they offer no evidence that a Retail Purchase Option Event ever occurred. For a "Retail Purchase Option Event" to occur there must be a "failure of the Retail Agent to fund any Advance requested by the Project Credit Parties for Shared Costs, which the Retail Agent is required to fund in accordance with the terms of the Disbursement Agreement." (Dep. Ex. 884 at 4.) There is no evidence that a Retail Purchase Option Event ever occurred. And the cited Howard deposition testimony makes no reference to the Intercreditor Agreement.

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[7] *See* Fed. R. Evid. 801(c), 802; *see also Cortezano v. Salin Bank & Trust Co.*, 2011 WL 573755, at *11 (S.D. Ind. Feb. 15, 2011) (ruling that e-mail containing excerpts of meeting minutes sent by a non-party to plaintiff was inadmissible hearsay because "there was no indication of who prepared these notes, when they were prepared, or whether they were taken in the normal course of business").

Response to Paragraph 57: Disputed. Undisputed that Lehman funded its portion of the Shared Retail Costs in October and November 2008. The cited evidence does not reflect whether Lehman funding was "touch and go." The cited testimony reflects only TriMont's Mac Rafeedie's recollection, and not that of FB, BANA or Lehman.

Response to Paragraph 58: Disputed. [redacted] Dep. Ex. 804 is a February 2009 e-mail which only states after the fact that Lehman had failed to fund since December 2008. [redacted] (*See* Dep. Exs. 22, 28, 34, 40.) And the cited Freeman testimony reflects only his understanding in December 2008 and January 2009 that Lehman would not be funding those months.

Response to Paragraph 59: Undisputed, but BANA disputes that the cited evidence supports the statement. Dep. Exs. 206, 609, 814, 831, 906 and 907 do not support the statement because they do not reflect that ULLICO did not agree to permanently pay or to assume Lehman's obligations under the Retail Facility.

Response to Paragraph 60: Undisputed.

Response to Paragraph 61: Disputed. The cited evidence does not support the statement. There is no evidence that BANA knew that Retail Lenders National City Bank, Sumitomo or ULLICO would not agree to assume Lehman's remaining commitment. The cited documents reflect that Fontainebleau informed BANA that discussions with the Retail Lenders regarding the Retail Facility were ongoing. The cited deposition testimony likewise lends no support to Plaintiffs' statement. It is limited to an October 23, 2008 meeting between Fontainebleau, the Retail Lenders and BANA during which ULLICO stated that it was considering funding for Lehman. (Cantor Reply Decl. Ex. 5 (Howard Dep. at 150:22–151:13).) In fact, after the meeting, Fontainebleau consistently reported that the Retail Co-Lenders could fund for Lehman after Lehman's bankruptcy. For example, in a February 23, 2009 letter to BANA, Fontainebleau stated 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." (Cantor Decl. Ex. 63 [Dep. Ex. 811].) Moreover, Mr. Susman explained in his testimony that while he understood that ULLICO was a short-term deal "[a]s it was initially presented to [BANA]," he added that "Ullico could decide to fund it on a long-term basis." (Cantor Reply Decl. Ex. 14 (Susman Dep. at 273:23–275:7).)

Response to Paragraph 62: Undisputed.

Response to Paragraph 63: Disputed. The cited evidence does not support the statement. The cited evidence reflects no "funding gap." In fact, the evidence demonstrates that ULLICO funded Lehman's share of the Retail Shared Costs [redacted], demonstrating that there was no "financing gap." Moreover, as described in BANA's response to paragraph 61, Fontainebleau consistently reported to BANA that the Retail Co-Lenders would fund for Lehman after Lehman's bankruptcy.

Response to Paragraph 64: Undisputed.

Response to Paragraph 65: Disputed. The cited evidence does not reflect that Fontainebleau failed to provide a meaningful response to the questions raised by BANA's February 20, 2009 letter. In fact, Fontainebleau responded to several of BANA's questions in a February 23, 2009 letter. (*See* Cantor Decl. Ex. 63 [Dep. Ex. 811].)

Response to Paragraph 66: Undisputed.

Response to Paragraph 67: Disputed. [redacted]

Response to Paragraphs 68 and 69: Undisputed.

Response to Paragraph 70: Disputed. Dep. Ex. 868—a June 2008 report prepared by the Construction Consultant—does not support this statement as it does not reflect $201 million in change orders. In addition, Dep. Ex. 216 does not support this statement as it does not identify previously disclosed change orders.

Response to Paragraph 71: Disputed. This statement is not material or relevant to the resolution of BANA's motion for summary judgment. To the extent a response is required, the statement is false. Dep. Exs. 216, 868, and 917 do not indicate whether the costs had been disclosed to IVI and/or BANA before May 2008. Additionally, BANA's Jeff Susman testified

that he did not recall whether BANA was informed of these change orders before May or June of 2008. (Cantor Reply Decl. Ex. 14 (Susman Dep. at 93:2–8).)

Response to Paragraph 72: Disputed. This statement is not material or relevant to the resolution of BANA's motion for summary judgment. To the extent a response is required, the statement lacks any support in the evidence. Dep. Exs. 891 and 915 address a single change order. Dep. Ex. 891 is an unauthenticated Owner Change Order ("OCO") signed by non-parties Fontainebleau Resorts and Turnberry West Construction on May 23, 2008. The OCO is accompanied by numerous letters from TWC to FBR or from WW Steel to TWC. No fact witness has authenticated Dep. Ex. 891 or testified about its contents. The document was introduced as an exhibit during Mr. Susman's deposition but he testified that he had never seen it. Moreover, the document's signers—TWC's Robert Ambridge and Fontainebleau's Deven Kumar—were both deposed but neither witness was asked about this document. Thus, it is inadmissible and may not be considered for the truth of its contents. Moreover, even if it were admissible, Dep. Ex. 891 lends no support to the statement. To the contrary, the change order is accompanied by numerous letters, both from TWC to FBR and the subcontractor to TWC, demonstrating that the proposed change was still being negotiated as late as May 8, 2008. Thus Plaintiffs' assertion that the change order had been known to the Borrowers for a year is false. Dep. Ex. 915—Plaintiffs' expert Donald Boyken's report—should also be disregarded. Plaintiffs cannot circumvent Dep. Ex. 891's hearsay and foundation issues by having their expert put his spin on its contents.[8]

Response to Paragraph 73: Disputed. This statement is not material or relevant to the resolution of BANA's motion for summary judgment. To the extent a response is required, this statement lacks any support in the evidence. Dep. Ex. 891 is inadmissible as explained in

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[8] *See* Fed. R. Evid. 801(c), 802; *see also Marvel Worldwide, Inc. v. Kirby*, 777 F. Supp. 2d 720, 729 (S.D.N.Y. 2011) (striking expert reports because they were "merely factual narratives based on their review of secondary sources and interviews that attempt to reconstruct events about which neither has first-hand knowledge. Although Rule 703 of the Federal Rules of Evidence permits an expert to rely on hearsay in reaching his own opinion, a party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony.") (quotations omitted); *Estate of Parsons v. Palestinian Auth.*, 715 F. Supp. 2d 27, 32-33 (D.D.C. 2010) (disregarding expert's affidavit and granting summary judgment to the defendant because expert opinions "may be based on hearsay, but they may not be a conduit for the introduction of factual assertions that are not based on personal knowledge").

BANA's response to paragraph 72, *supra*. In addition, Plaintiffs' expert's testimony sheds no light on when the Borrowers learned about the OCO and should be disregarded as explained in BANA's response to paragraph 72, *supra*.

Response to Paragraph 74: Disputed. This statement is not material or relevant to the resolution of BANA's motion for summary judgment. To the extent a response is required, the cited testimony does not support this statement. Plaintiffs offer no admissible evidence establishing that BANA was furnished with documentation relating to a structural steel change order in mid-2008. Plaintiffs attempt to cite BANA's expert Peter Badala's testimony in support of their statement, but Mr. Badala's expert opinion cannot be used to establish facts about which he has no personal knowledge any more than Mr. Boyken's expert opinion, as explained in BANA's response to paragraph 72, *supra*.

Response to Paragraph 75: Disputed. This statement is not material or relevant to the resolution of BANA's motion for summary judgment. To the extent a response is required, the cited evidence does not support this statement. Neither the cited document nor testimony supports Plaintiffs' statement that learning about $201 million in additional costs was important to BANA.

Response to Paragraph 76: Disputed. The cited evidence does not support this statement. Dep. Ex. 217—an internal BANA e-mail—states IVI believed there were "additional known cost increases," but it says nothing about BANA's belief, or unreported change orders. Moreover, the record is clear that BANA promptly followed up with IVI on the construction cost increases disclosed by Fontainebleau, and gained closure on the issue. (Cantor Reply Decl. Ex. 18 [Dep. Ex. 892].) And in IVI's next project status report, dated June 25, 2008, IVI further stated that "[a]t this time, the construction costs are anticipated to increase but not exceed the Developer's revised direct cost budget of $1,909,734,213 plus $190,265,021 in equity with the new direct cost budget of $2,099,999,234." (*Id.* Ex. 19 [Dep. Ex. 868].) Thus any concerns that may have existed were limited to early June 2008, and were addressed by Fontainebleau and IVI.

Response to Paragraph 77: Disputed. The cited evidence and testimony do not support this statement. IVI's Robert Barone stated that he raised concerns about the completeness and accuracy of the additional costs in the fourth quarter of 2008, but he did not mention raising concerns about the timeliness of reporting, or to whom the concerns were raised. (Dep. Ex. 851

at ¶ 14.) BANA's Jeff Susman testified that he did not recall whether IVI raised concerns with BANA in Q4 2008. (Cantor Reply Decl. Ex. 14 (Susman Dep. at 134:10–135:14).)

Response to Paragraph 78: Disputed. This is a nonsensical statement to which no response is required. This statement does not indicate or provide any context as to what concerns of BANA and the other Lenders are at issue. To the extent a response is required, the statement does not support that BANA had concerns about the accuracy and timeliness of the Borrowers' reporting anticipated construction costs. Mr. Newby's testimony does not specify when the concerns arose, and Mr. Susman testified that he did not recall whether IVI raised concerns with BANA in Q4 2008. (Cantor Reply Decl. Ex. 14 (Susman Dep. at 134:10–135:14).) While Messrs. Howard and Bolio testified that Deutsche Bank e-mailed BANA about Project costs, its questions were unsubstantiated. When Deutsche Bank asked BANA in December 2008, about Project costs, BANA responded by asking Deutsche Bank to provide additional information because BANA was unaware of any such issues. (*Id.* Ex. 11 (Bolio Dep. at 171:3–172:7.) There is no evidence that BANA received a response from Deutsche Bank.

Response to Paragraph 79: Undisputed.

Response to Paragraph 80: Disputed. IVI's Robert Barone raised concerns about the completeness and accuracy of the additional costs in the fourth quarter of 2008, but did not raise concerns about the timeliness of reporting. Moreover, Plaintiffs have offered no evidence as to whom IVI's concerns were raised. (Dep. Ex. 851 at ¶ 14.) BANA's Jeff Susman testified that he did not recall whether IVI raised concerns with BANA in the fourth quarter of 2008. (Cantor Reply Decl. Ex. 14 (Susman Dep. at 134:10–135:14).)

Response to Paragraph 81: Disputed. The statement mischaracterizes the evidence. IVI's January 30, 2009 Project Status Report No. 21 identified as concerns "that all the subcontractor claims have not been fully incorporated into the [Anticipated Cost Report] and potential acceleration impact to meet the schedule has not been included" and "that the LEED credits are tracking behind projects." (Cantor Decl. Ex. 59 at 7 [Dep. Ex. 809].)

Response to Paragraph 82: Disputed. The cited testimony does not support this statement. The cited Jeanne Brown testimony makes no reference to concerns raised by IVI. (Cantor Reply Decl. Ex. 7 (Brown Dep. at 96:3–7).)

Response to Paragraph 83: Disputed. The cited evidence does not support this statement. The evidence makes no reference to the accuracy of LEED credit reporting. (*See*

Cantor Decl. Ex. 84 at ¶ 20 [Dep. Ex. 808 (Decl. of Henry Yu)]; Dep. Ex. 851 at ¶ 15; Cantor Reply Decl. Ex. 12 (Yu Dep. at 105:12–23).)

Response to Paragraphs 84 and 85: Undisputed.

Response to Paragraph 86: Disputed. The cited evidence and testimony do not support this statement. While IVI continued to be concerned that there were unreported costs, IVI's March and April 2009 Project Status Reports stated that the Anticipated Cost Reports issued by the Developer indicated the project was expected to stay within budget. (Dep. Exs. 600 at 23; 828 at 22.) IVI also reported a potential issue with LEED credits tracking behind projections, but was awaiting an audit by Fontainebleau that would provide additional information. (Dep. Exs. 600 at 23; 828 at 22.) The cited Bolio testimony consists solely of his interpretation of IVI's February 2009 report, and does not address his view of whether BANA received satisfactory information from the Borrowers. (Cantor Reply Decl. Ex. 11 (Bolio Dep. at 204:9–206:19).) The cited Henry Yu testimony recounts Mr. Freeman's initial refusal to meet with BANA around March 2009, but again contains no assessment of whether BANA was receiving satisfactory information at the time. (*Id.* Ex. 12 (Yu Dep. at 49:24–51:5).)

Response to Paragraph 87: Undisputed.

Response to Paragraph 88: Undisputed, but the cited testimony does not support this statement.

Response to Paragraph 89: Disputed. Plaintiffs mischaracterize the cited evidence. The letter is a request for elaboration on issues that were raised in IVI's January 2009 report rather than an indication of concern by JP Morgan Chase. (Cantor Decl. Ex. 61 [Dep. Ex. 810].)

Response to Paragraph 90: Undisputed.

Response to Paragraph 91: Disputed. The cited testimony does not reflect that BANA thought it was a "bad sign" that Fontainebleau refused to meet with Lenders in February 2009. (*See* Cantor Reply Decl. Ex. 12 (Yu Dep. at 128:1–13).) In fact, Mr. Yu testified that he understood in February 2009 that Fontainebleau was meeting with other Lenders, but refused to meet with him. (*Id.* at 127:4–12; 129:6–15.)

Response to Paragraph 92: Undisputed.

Response to Paragraph 93: Disputed. The cited evidence does not support this statement. The cited evidence concerns Mr. Yu's opinion as of March 4, 2009 concerning Fontainebleau's answer to the questions posed in its February 23, 2009 letter. (Cantor Reply

Decl. Ex. 12 (Yu Dep. at 143:17–144:4).)

Response to Paragraph 94: Undisputed.

Response to Paragraph 95: Disputed. Plaintiffs mischaracterize the evidence. According to the letter, IVI's concerns were based on a review of the TWC Requisition for February 2009 and the January 2009 ACR. (Cantor Decl. Ex. 69 [Dep. Ex. 604].)

Response to Paragraph 96: Undisputed that, upon being asked during his deposition whether IVI's concerns about unreported project costs were a "pretty big deal," Brandon Bolio responded, "[i]t is." (*See* Cantor Reply Decl. Ex. 11 (Bolio Dep. at 229:20–230:5).)

Response to Paragraph 97: Disputed. The cited evidence does not support the statement. There was no "refusal" by Fontainebleau to meet. During the weekend of March 7–8, 2009, BANA offered to meet with Fontainebleau, but as of March 10, 2009, Fontainebleau had "still not agreed to meet" with BANA. (*See* Cantor Decl. Ex. 71 [Dep. Ex. 819].)

Response to Paragraphs 98 and 99: Undisputed.

Response to Paragraph 100: Disputed. The cited evidence does not support the statement. There were no discussion between Borrowers and IVI in mid-2009. The cited evidence reflects that in mid-March 2009, following discussions with IVI, the Borrowers acknowledged that there were outstanding costs in addition to the $35 million in costs initially disclosed, and agreed to increase the Project's budget by a further $50 million. (Dep. Ex. 851 at ¶ 26; *see also* BANA SOUF ¶ 153; Cantor Reply Decl. Ex. 9 (Kumar Dep. at 165:22–166:24).)

Response to Paragraph 101: Disputed. The cited evidence does not support this statement. The cited evidence reflects that IVI sent an update to BANA about anticipated costs, and noted that IVI expected to receive a summary of the construction budget exposure based on updated projections from the general contractor. (Cantor Decl. Ex. 72 [Dep. Ex. 608].) IVI's Robert Barone testified that he remained skeptical about whether all subcontractor claims were incorporated into the disclosed costs. (Cantor Reply Decl. Ex. 13 (Barone Dep. at 75:19–24).)

Response to Paragraph 102: Disputed. The cited evidence does not support this statement. Mr. Yu testified that IVI held this belief in early-March 2009. (*See* Cantor Reply Decl. Ex. 12 (Yu Dep. at 145:6–24).)

Response to Paragraph 103: Disputed. This statement mischaracterizes the evidence. On February 23, 2009, Fontainebleau wrote to BANA and explained that it was engaging auditors with respect to the Project's LEED credits. (*See* Cantor Decl. Ex. 63 [Dep. Ex. 811].)

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On March 5, 2009, IVI requested that the audit be expedited. (*See* Dep. Ex. 851 at ¶ 25.) On March 20, 2009, the Borrowers informed the Lenders that it had retained KPMG to conduct the LEED audit, and that an internal LEED review was ongoing. (*See* Cantor Reply Decl. Ex. 29 at ING014067 [Dep. Ex. 346].) But before the results of the LEED audit were disclosed, the revolving lenders terminated the Revolver Loan under the Credit Agreement and litigation commenced. (*See* Cantor Decl. Ex. 82 [Dep. Ex. 827].)

Response to Paragraph 104: Disputed. The statement mischaracterizes the cited evidence. Henry Yu testified that he told Mr. Freeman that the LEED audit should be completed as soon as possible, but could not remember whether BANA gave Mr. Freeman a deadline for completion of the LEED audit. (*See* Cantor Reply Decl. Ex. 12 (Yu Dep. at 121:6–15).)

Response to Paragraph 105: Disputed. The statement mischaracterizes the cited evidence. The March 11, 2009 Advance Request did not reflect certain additional costs that Fontainebleau's Deven Kumar disclosed to IVI on March 11, 2009. (*See* Dep. Ex. 851 at ¶ 27.)

Response to Paragraph 106: Disputed. The statement mischaracterizes the stated evidence. IVI refused to approve the Borrowers' March 11, 2009 Advance Request because of material errors in the Request, and did so through a Construction Consultant Advance Certificate that identified those errors. (Bolio Decl. Ex. 36 [Dep. Ex. 860]; Cantor Reply Decl. Ex. 12 (Yu Dep. 193:5–9).) Mr. Barone testified that IVI refused to certify the Advance Request because it "no longer believed it" (*see* Cantor Reply Decl. Ex. 13 (Barone Dep. at 60:24-62:16)), but this was not reflected in the IVI Construction Consultant Advance Certificate provided to BANA. (*See* Bolio Decl. Ex. 36 [Dep. Ex. 860].)

Response to Paragraph 107: Disputed. The cited evidence does not support the statement. The March 11 Advance Request contained errors that were resolved through negotiations between the Borrowers and IVI. (Cantor Reply Decl. Exs. 30 [Dep. Ex. 861]; 13 (Barone Dep. at 65:6–66:2).) These negotiations added costs and shifted the Project's opening date. The cited evidence does not establish that the March 11 Advance Request "failed to include all of the cost overruns that had been identified and failed to indicate that the opening date for the Resort would have to be moved back by a month" because it implies that such facts were known to Borrowers as of March 11, 2009, an assertion for which the cited evidence lends no support.

Response to Paragraph 108: Disputed. The statement is not supported by the cited evidence. The cited evidence makes no mention of cost overruns. IVI's concerns were limited to Fontainebleau's representations regarding disclosure of subcontractor claims. (*See* Dep. Ex. 828 at 7, 21–22; Cantor Reply Decl. Ex. 13 (Barone Dep. at 75:19–24).) Moreover, IVI also concluded that "construction costs are anticipated to increase but not exceed the Developer's revised direct cost budget." (Dep. Ex. 828 at 22.)

Response to Paragraph 109: Disputed. Mr. Barone's testimony concerns subcontractor claims in late March 2009. (*See* Cantor Reply Decl. Ex. 13 (Barone Dep. at 75:19–24).)

Response to Paragraph 110: Disputed. The cited evidence does not support this statement. While it is true that IVI expressed concerns about Fontainebleau's cost disclosures in January and February 2009, IVI executed the Construction Consultant Advance Certificates for the January and February 2009 Advance Requests indicating that it had identified no material errors in the Borrowers' Advance Request. (Barone Decl. ¶¶ 15, 20, Exs. 3, 6; Cantor Decl. Exs. 59 at 7 [Dep. Ex. 809]; 66 at 23 [Dep. Ex. 600].) IVI also executed a Construction Consultant Advance Certificate approving the Borrowers' Revised March 2009 Advance Request. (Cantor Reply Decl. Ex. 31 (Dep. Ex. 862).) Moreover, IVI indicated that the Project was expected to remain within budget in both of its Project Status Reports for January 2009 and February 2009. (Cantor Decl. Exs. 59 at 7 [Dep. Ex. 809]; 66 at 23 [Dep. Ex. 600].) Any concerns IVI may have had were based only on its "gut" feelings, and IVI lacked evidence supporting its suspicions. (Barone Decl. ¶ 17.) Moreover, IVI pressed the Borrowers for additional information and received responses the Borrowers represented were accurate and that IVI believed to be "credible." (Barone Decl. ¶ 28; Cantor Reply Decl. Ex. 30 [Dep. Ex. 861].)

Response to Paragraph 111: Disputed. The cited evidence does not support the statement. Henry Yu testified that the Borrower did not answer some of IVI's questions that had been pending since January 2009. (Cantor Reply Decl. Ex. 12 (Yu Dep. at 195:2–10).)

Response to Paragraph 112: Disputed. Plaintiffs mischaracterize the evidence. IVI never raised the possibility of an audit of the Borrower's construction costs. Rather, IVI acknowledged that it had not "conducted an audit of the information presented," but it nonetheless believed that "the information presented appears reasonable at this stage in the project." (Dep. Ex. 861.) Undisputed that BANA never conducted an audit of information presented by the Borrowers.

Response to Paragraph 113: Disputed. BANA's acquisition of Merrill Lynch & Co., Inc. is not material to the resolution of any issue. In addition, the cited evidence does not support this statement. While BANA was aware of Merrill Lynch's involvement in fundraising efforts by Turnberry (not Fontainebleau), it did not know for what purpose. (Dep. Ex. 222; Cantor Reply Decl. Ex. 4 (Yunker Dep. at 58:2–19).) The cited evidence does not reflect that Borrowers were trying to raise hundreds of millions of dollars in added capital for the Project.

Response to Paragraph 114: Disputed. The Notice of Borrowing was originally submitted on March 2, 2009, and a corrected version was submitted on March 3, 2009. (*See* Pls.' Ex. 1507 at BANA_FB00215940.) The Notice of Borrowing submitted on March 3, 2009 requested an aggregate amount of $1,006,522,698.00, composed of $350,000,000.00 under the Delay Draw Loan, and $656,522,698.00 under the Revolver. (*See id.* at BANA_FB00215942.)

Response to Paragraph 115: Disputed. The statement mischaracterizes the cited evidence. Mr. Yu did not testify that the Borrowers' proposal to enter into a pre-negotiation agreement "increased BofA's concern that the Borrowers were not providing accurate or complete information about the Project." Mr. Yu testified that he found the standstill provision of the proposed pre-negotiation agreement to be "objectionable" and that he viewed it as a "continuation of [the Borrowers'] behavior of not providing information." (Cantor Reply Decl. Ex. 12 (Yu Dep. at 179:7–22).)

Response to Paragraph 116: Disputed. The cited evidence does not support the statement. Plaintiffs cite to IVI's May 15, 2009 Cost-to-Complete Report and an April 13, 2009 e-mail from Henry Yu to Robert Barone and others. Neither document references anticipated change orders totaling over $350 million, nearly $190 million of which were admitted to be for previously committed construction costs.

Response to Paragraph 117: Disputed. Mr. Barone testified that he was "stunned" to learn of the additional unreported costs revealed by the Borrowers in mid-April 2009. (*See* Cantor Reply Decl. Exs. 13 (Barone Dep. at 81:3–82:7; 85:10–86:8); 32 at ¶ 33 [Dep. Ex. 851] ("I was stunned to see such an enormous increase in anticipated costs, which had not been previously reported to us, despite our repeated requests that all such information be disclosed.").)

Response to Paragraph 118: Disputed. Plaintiffs mischaracterize the cited evidence. BANA does not dispute that the evidence cited is an e-mail from Mr. Bonvicino stating, "Pretty close to my 150 mil." But when Mr. Barone was asked if he recalled "Mr. Bonvicino

predict[ing] or . . . know[ing] that there were 150 million dollars in cost overruns," he stated only that he remembered Mr. Bonvicino "speculating" about cost overruns. (Cantor Reply Decl. Ex. 13 (Barone Dep. at 85:1–5).)

Response to Paragraph 119: Disputed. The statement is not a "fact;" rather it is a conclusion of law.

Response to Paragraphs 120 and 121: Undisputed.

Response to Paragraph 122: Disputed. This statement is a legal conclusion, not a factual statement. Moreover, the cited evidence offers no support for this statement. Plaintiffs' Exhibit 1503 is a report by Plaintiffs' expert Shepherd Pryor IV. Paragraph 35 deals with borrower representations and makes no reference to lender defaults. And even if it did, Mr. Pryor (who retired from banking in 1991) is not qualified to testify about current practices concerning widely held and actively traded syndicated loans. (*See* Cantor Reply Decl. Exs. 16 (Pryor Dep. at 75:24–76:3 (testifying that he did not rely on anything "other than [his] experience and the . . . materials that appear in [Pryor Report] Ex. B."); *id.* at 11:25–12:10 (testifying that he did not recall working as an agent on any construction loans); *id.* at 12:7–9; 19:19–24 (testifying typically served as agent on credits with "15 or 20 participating lenders" and at most, 30 banks)); 33 [Dep. Ex. 932 (Pryor Rep. Ex. B)]; *supra* Resp. to Para. 20.) Peter Badala's deposition testimony likewise makes no reference to lender defaults. Nor could it, as Mr. Badala is BANA's expert on construction-related issues.

Response to Paragraph 123: Undisputed.

Response to Paragraph 124: Disputed. The cited evidence does not support the statement. Dep. Ex. 291-B is a March 30, 2009 e-mail from Whitney Thier to Albert Kotite, Sony Ben-Moshe, Jed Bergman, Michael Krietzer, Jim Freeman, Augusto Sasso and Todd Kaplan attaching letters from Fontainebleau Las Vegas, LLC—signed by Ms. Thier—to Z Capital Partners, L.L.C. and the Guggenheim lenders. Neither the e-mail, nor the attached letters use the phrase "defaulting lender" or reference Mr. Howard. And to the extent Plaintiffs imply that Mr. Howard testified that a lender's failure to fund constituted a "default" under any of the loan agreements, that would be inaccurate. Mr. Howard testified: "we had lots of cases where Lehman was involved, other transactions where it didn't constitute a default under the agreement, it just created a shortfall . . . It didn't necessarily create a default under the document." (Cantor Reply Decl. Ex. 5 (Howard Dep. at 193:3–15).)

Response to Paragraph 125: Disputed. None of the cited evidence refers to "defaulted DDTL Loans." Dep. Ex. 104 is a March 23, 2009 letter from BANA to Lenders stating: "Several Lenders … have not funded the $350MM Delay Draw Term Loan requested by the Borrower. . . . Bank of America's position is that it is willing to include the $21,666,667 for the March 25 Advance, pending further information about whether these lenders will fund. Absent any other changes, note that the exclusion of the $21,666,667 amount from Available Funds would result in a failure to satisfy the In-Balance Test. . . . We request that any Lender which does not support these interpretations immediately inform us in writing of their specific position." (Cantor Decl. Ex. 76 [Dep. Ex. 104].)

Response to Paragraph 126: Disputed. The statement is not supported by the cited evidence. Ms. Brown's testimony was limited to receipt of the retail funds. She testified that BANA "wouldn't go forward [and disburse the funds] unless [it] had [the retail] part. That was part of the protocol. Each step had to come in order." (Cantor Reply Decl. Ex. 7 (Brown Dep. at 72:16–73:1).) And as for the Term Lenders' funds, Ms. Brown testified "I don't even remember anything about the term lenders." (*Id.* at 109:22–110:3.)

Response to Paragraph 127: Disputed. "Defaulting DDTL Lenders" is not a defined term in any of the loan agreements. Moreover, Mr. Yu did not testify that he was "never sure" that certain DDTL lenders would make payments. He testified only that he did not want to represent to the other Lenders in writing "don't worry, the Guggenheim money is coming in, so that's going to be okay" because, in general, "[u]ntil the money comes in, you're never sure" and "until something happen[s], there's always a chance that it's not going to happen." (Cantor Reply Decl. Ex. 12 (Yu Dep. at 232:3–23; 233:8–23).)

Response to Paragraph 128: Disputed. "Defaulting DDTL Lenders" is not a defined term under any of the loan agreements. Undisputed that in early April 2009, the Guggenheim lenders funded $10,000,000 in Delay Draw Term Loan funds. (Dep. Ex. 643.)

Response to Paragraph 129: Disputed. "Defaulting Delay Draw Lenders" is not a defined term under any of the loan agreements. The cited evidence does not support this statement. Mr. Yu's testimony concerned a Lender disagreement over whether the Borrowers would be permitted to borrow under the Revolver in April 2009—not whether the unfunded Delay Draw funds should be included in the Available Sources for purposes of the In Balance Test as suggested by Plaintiffs. Mr. Yu was testifying about the March 23, 2009 letter from

BANA to the Lenders stating that there was "a divergence of opinions as to the reading of 2.1(c)(iii) of the Credit Agreement." (Cantor Decl. Ex. 76 [Dep. Ex. 104].) Section 2.1(c)(iii) concerns borrowings under the Revolver, *not* the In Balance Test's computation.

Response to Paragraphs 130, 131 and 132: Undisputed.

Response to Paragraph 133: Disputed. The statement is unsupported by the cited evidence. None of the cited testimony supports an assertion that "[e]arly 2009 was a time of stress in . . . the Las Vegas market in particular." Undisputed that early-2009 was a time of economic stress in the financial markets in general.

Response to Paragraph 134: Disputed. This statement is overly broad and ambiguous, and not material or relevant to the resolution of BANA's motion for summary judgment. The cited evidence reflects only that BANA internally monitored the Project as a Lender in 2008 and 2009, a role that was distinct from its agent roles.

Response to Paragraph 135: Disputed. This statement is not material nor relevant to the resolution of BANA's motion for summary judgment because BANA's internal analysis of its future post-construction credit risk exposure as a lender is irrelevant in determining its good faith as agent. (*See* Cantor Reply Decl. Ex. 11 (Bolio Dep. at 11:22–16:25).)

Response to Paragraphs 136 and 137: Disputed. (*See* Resp. to ¶ 135.)

Response to Paragraph 138: Disputed. This statement is not material nor relevant to the resolution of BANA's motion for summary judgment because BANA's internal analysis of its future post-construction credit risk exposure as a lender is irrelevant in determining its good faith as agent. (*See* Resp. to ¶ 135.)This statement is also unsupported by the cited evidence. Dep. Ex. 831 is a Scheduled Exposure Report ("SER") dated April 6, 2009 and does not reflect any "continuing concern" by BANA regarding condo sales. Moreover, while Dep. Ex. 831 states that "it is unlikely that the Company will sell the 933 condo units," it notes that "the Company has the ability to convert the unsold condos into hotel rooms." (Dep. Ex. 831 at 4.)

Response to Paragraph 139: Disputed. This statement is not material nor relevant to the resolution of BANA's motion for summary judgment because BANA's internal analysis of its future post-construction credit risk exposure as a lender is irrelevant in determining its good faith as agent. (*See* Resp. to ¶ 135.) To the extent a response is required, the cited evidence does not support Plaintiffs' statement. Credit Agreement § 2.11(a)(ii) refers to "mandatory prepayments," not *repayments*. While some of the cited documents indicate that condo sales

would be a source of debt repayment, they do not indicate that that condo sales would "substantially repay outstanding debt." Similarly, Messrs. Varnell and Yunker testified that both condo sales and operating cash flows from the casino and hotel would service the debt, but he did not testify that they would substantially repay outstanding debt after the Project's opening. (Cantor Reply Decl. Exs. 4 (Yunker Dep. at 43:16–44:17); 6 (Varnell Dep. at 67:6–11).)

Response to Paragraph 140: Disputed. This statement is not material nor relevant to the resolution of BANA's motion for summary judgment because BANA's internal analysis of its future post-construction credit risk exposure as a lender is irrelevant in determining its good faith as agent. (*See* Resp. to ¶ 135.) To the extent a further response is required, it is unsupported by the cited evidence. Mr. Bolio did not testify that the Project could be "in default" upon opening. Mr. Bolio testified that while Fontainebleau Las Vegas "[c]ould have a difficulty meeting its covenants when it opened," that "[w]as not the expectation. It was something that could happen, and it was [CDP's] job to factor that in." (Cantor Reply Decl. Ex. 11 (Bolio Dep. at 35:14–36:2).)

Response to Paragraph 141: Disputed. This statement is not material nor relevant to the resolution of BANA's motion for summary judgment because BANA's internal analysis of its future post-construction credit risk exposure as a lender is irrelevant in determining its good faith as agent. (*See* Resp. to ¶ 135.) To the extent a response is required, the statement is not supported by the cited evidence. Moreover, the cited evidence is inadmissible because it was never authenticated and contains hearsay. Pls.' Ex. 1508 is an October 18, 2007 e-mail from Jon Varnell to BAS' Michael Malone and others at BAS, stating that Mr. Varnell had heard that Fontainebleau's Jeff Soffer told Mr. Malone that the Borrowers had decided not to sell condos. The e-mail also states that Jim Freeman told Mr. Varnell that although Mr. Soffer had raised the idea of not selling condos "internally," his idea had "no support from any other FB or Turnberry executive, particularly Glenn." Neither the sender, nor any of the recipients that were deposed were questioned about the e-mail during their depositions. Messrs. Freeman and Varnell did not testify about the purported conversations and Messrs. Soffer and Malone have not been deposed in this case. Because no witnesses with personal knowledge of the e-mail or conversations have

testified about them, the speculative statements contained in Pls.' Ex. 1508 purporting to describe those conversations are inadmissible hearsay.[9]

Response to Paragraph 142: Disputed. This statement is not material nor relevant to the resolution of BANA's motion for summary judgment because BANA's internal analysis of its future post-construction credit risk exposure as a lender is irrelevant in determining its good faith as agent (*see* Resp. to ¶ 135), and is not supported by the cited evidence. Plaintiffs offer no evidence of a condo sale schedule or projections. Moreover, Pls.' Ex. 1509 is inadmissible because it contains hearsay statements. It is a March 27, 2008 e-mail from Kyle Bender to Jon Varnell and Bret Yunker forwarding a Barclays Capital analyst report that purports to summarize conversations that Barclays had with Fontainebleau "management." The report's contents lack foundation and constitute inadmissible hearsay because the analyst was never deposed and Plaintiffs cite the report for the truth of its contents.[10] Because no witnesses with personal knowledge of the analyst report or purported conversations testified about them, the speculative statements contained in Pls.' Ex. 1509 are inadmissible hearsay.

Response to Paragraph 143: Disputed. This statement is not material nor relevant to the resolution of BANA's motion for summary judgment because BANA's internal analysis of its future post-construction credit risk exposure as a lender is irrelevant in determining its good faith as agent (*see* Resp. to ¶ 135), and is not supported by the cited evidence. Dep. Ex. 831, an internal BANA report dated April 6, 2009, states "it is *unlikely* that the Company will sell the 933 condo units." (Dep. Ex. 831 at p. 4 (emphasis added).)

II. DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO BANA'S STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Fed. R. Civ. P. 56 and S.D. Fla. L.R. 7.5(c) and (d), BANA submits this reply to Plaintiffs' Response to Defendants' Statement of Undisputed Material Facts. BANA's initial statement establishes that the facts are undisputed and are supported by the cited evidence. Constrained by page limitations, BANA writes to address certain issues raised by Plaintiffs'

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9 *See* Fed. R. Evid. 801–802; *Design X Mfg., Inc. v. ABF Freight Sys., Inc.*, 584 F. Supp. 2d 464, 468 (D. Conn. 2008) (refusing to consider on summary judgment an e-mail recounting what one non-deponent witness purportedly told another non-deponent witness because the e-mail was inadmissible hearsay within hearsay).

10 *See United States v. Baker*, 432 F.3d 1189, 1211 (11th Cir. 2005) (news report inadmissible as hearsay).

Response. BANA does not concede that any statement to which Plaintiffs have objected is either disputed or not material and relevant.

In a transparent attempt to manufacture the appearance of disputed issues of material fact where none exists, Plaintiffs' response mischaracterizes the evidence on several key points:

- **Pls.' Resp. to BANA SOUF Paras. 72, 75, 118.** Plaintiffs do nothing more than repeat their baseless claim that BANA knew that Fontainebleau Resorts funded Lehman's share of the Retail Shared Costs in September 2008. Plaintiffs fail to offer any evidence supporting their assertions. As explained in BANA's Response to Plaintiffs' Statement of Undisputed Material Facts, the factual record shows Plaintiffs' assertions to be false.
- **Pls.' Resp. to BANA SOUF Para. 79.** There are ***no*** documents supporting Plaintiffs' conclusory assertion that BANA was aware that Lehman did not fund its share of Shared Costs in September 2008. Dep. Ex. 204 is an e-mail sent a week before the Shared Costs were received by BANA from TriMont. And Dep. Ex. 475—Bolio's undated handwritten notes—are clearly irrelevant as the noted dollar amounts—"25 mm" and "2mm Lehman"—do not correspond to the September 2008 Shared Costs. [redacted] (*See* Cantor Reply Decl. Ex. 20 [Dep. Ex. 11].)
- **Pls.' Resp. to BANA SOUF Para. 73.** Plaintiffs' claim that BANA received more than one wire from TriMont, the Retail Servicer, is contradicted by the evidence they cite. Bolio Decl. Ex. 29 is a December 30, 2008 Jeanne Brown e-mail clearly reflecting that a single wire was received that day by BANA from TriMont for the Retail Costs requested by Fontainebleau in the December 2008 Advance Request. Ms. Brown writes "The wire in the amount of $4,969,135.00 has been received." The accompanying Advance Request states that the "Amounts to be Advanced From the Retail Facility for Shared Costs" are $4,969,135.00. The cited Brown testimony is likewise off point—it refers only to when she learned there were multiple Retail Lenders, and not about whether multiple wires were sent by TriMont to BANA.
- **Pls.' Resp. to BANA SOUF Para. 83.** Jeanne Brown's testimony is unambiguous that she did not recall discussing with TriMont's Mac Rafeedie whether Lehman funded in September 2008: "Q. And in September 2008, which as I stated was the month Lehman filed bankruptcy, so the month Lehman filed bankruptcy, did Mr. Rafeedie tell you that

Lehman was not funding? Would that have been one of your sources of information? A. ***I don't remember him telling me that***." (Cantor Reply Decl. Ex. 7 (Brown Dep. at 57:1–8) (emphasis added).) Plaintiffs nonetheless attempt to manufacture a factual dispute.

- **Pls.' Resp. to BANA SOUF Paras. 100 and 103.** [redacted]
- **Pls.' Resp. to BANA SOUF Para. 115.** Plaintiffs dispute that BANA concluded that Highland's September 30, 2008 claims were incorrect. While they cite an evidentiary kitchen sink, almost none of the cited evidence has anything to do with Highland's e-mail. Indeed, most of it consists of documents and testimony concerning events that occurred long after September 30, 2008. Incredibly, Plaintiffs even cite a September 2009 filing in the Lehman bankruptcy by Fontainebleau Las Vegas Retail, LLC (Pls.' Ex. 1504), a document created more than a year after the events at issue. Plaintiffs clearly lack any good faith basis for their response to Paragraph 115.
- **Pls.' Resp. to BANA SOUF Paras. 121 and 123.** Plaintiffs' assertion that BANA "did not evaluate Highland's claims but turned a blind eye to them" or that it "dismissed Highland's claims out of hand" is shown to be false by the evidence that Plaintiffs themselves have submitted. Plaintiffs introduced numerous e-mails between BANA and Highland reflecting BANA's attempts to address Highland's Lehman-related concerns. (*See* Cantor Reply Decl. Exs. 21 [Dep. Ex. 81]; 22 [Dep. Ex. 80]; Cantor Decl. Ex. 49 [Dep. Ex. 904]; *see also* Susman Decl. Ex. 5; *id.* ¶¶ 14–16, 22–24; Cantor Reply Decl. Exs. [redacted]; 5 (Howard Dep. at 52:19–53:19).)
- **Pls.' Resp. to BANA SOUF Paras. 137 and 146.** There is no material dispute that concerns raised by IVI in Project Status Report 21 were only "gut" feelings, and IVI had no evidence supporting its suspicions. In fact, the documents Plaintiffs rely upon make clear that IVI's concerns were only a "gut" feeling and there was nothing concrete that IVI could point to as evidence of problems.

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- **Pls.' Resp. to BANA SOUF Para. 193.** Plaintiffs ignore the unambiguous deposition testimony cited by BANA where Henry Yu explained that Guggenheim informed him that it was "rounding up all the parties" and intended to fund its $10 million Delay Draw commitment in March 2009: "I believe I had a conversation with Guggenheim, with Guggenheim saying, "Yes, we're rounding up all the parties, all our investors, and we intend to send those funds, and as they come in, we have been sending them, that's why you already got some and the rest are coming." (Cantor Reply Decl. Ex. 12 (Yu Dep. at 228:15–229:4).)

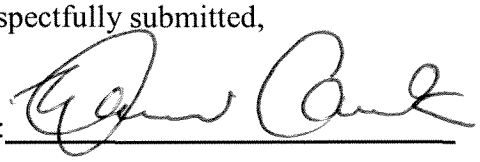
In addition, while claiming to dispute certain statements, Plaintiffs concede certain key facts:

- **Pls.' Resp. to BANA SOUF Para. 57.** Plaintiffs do not dispute that BANA received all required certifications from Fontainebleau, TWC, and BWA for September 2008 through March 2009 or from IVI for September 2008 through February 2009. Plaintiffs admit in response to Paragraph 162 that IVI provided BANA with a certificate for March 2009 before BANA approved funding of the March 2009 Advance Request.
- **Pls.' Resp. to BANA SOUF Para. 74.** Plaintiffs do not dispute that 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 conditions precedent to funding were satisfied.
- **Pls.' Resp. to BANA SOUF Para. 76.** Plaintiffs do not dispute that BANA understood in September 2008 and thereafter that Lehman was continuing to honor some loan commitments. The Susman testimony cited by Plaintiffs is entirely consistent with this statement.
- **Pls.' Resp. to BANA SOUF Para. 120.** [redacted]
- **Pls.' Resp. to BANA SOUF Para. 154.** Plaintiffs admit that the March 19, 2009 Construction Consultant Certificate was the first time that IVI declared it had discovered material errors in the Advance Request and supporting documentation.
- **Pls.' Resp. to BANA SOUF Para. 196.** Plaintiffs' assertion that two Lenders, Highland and Deutsche Bank, "replied" to BANA's letter misses the point: there is no evidence

that those Lenders ***disagreed*** with BANA's position. As Plaintiffs point out, Highland refused to "state a position" and reserved its right to sue BANA regardless of whether it funded the March Advance. (*See* Dep. Ex. 471.) And the Deutsche Bank e-mail simply asked BANA to schedule a call to discuss certain Advance-related issues. (Dep. Ex. 832.) Contrary to Plaintiffs' claim, BANA did hold that that call, which addressed Deutsche Bank's concerns. (*See* Pls.' Ex. 1505.)

Dated: September 27, 2011

Respectfully submitted,

By: 

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Attorneys for Bank of America, N.A.

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EXHIBIT A – DEFINED TERMS

ACR – Anticipated Cost Report

BANA – Bank of America, N.A, Defendant

Bank Proceeds Account – The designated bank account into which Lenders transferred Project funds.

BAS – Banc of America Securities, LLC

CDP – BANA's Corporate Debt Products Group

Credit Agreement or Credit Agmt. – Credit Agreement dated as of June 6, 2007 attached as Exhibit 2 to the Declaration of Daniel L. Cantor in Support of BANA's Opposition to Plaintiffs' Motion for Partial Summary Judgment.

Delay Draw Term Loan – The $350 million delay draw term loan under the Credit Agreement.

Disbursement Agreement or Disbursement Agmt. – Master Disbursement Agreement dated as of June 6, 2007 attached as Exhibit 1 to the Declaration of Daniel L. Cantor in Support of BANA's Opposition to Plaintiffs' Motion for Partial Summary Judgment.

FBR or Fontainebleau Resorts – Fontainebleau Resorts, LLC

Fontainebleau or Borrowers – Fontainebleau Las Vegas, LLC and Fontainebleau Las Vegas II, LLC

Guarantors – Jeffrey Soffer, Fontainebleau Resorts, LLC, and Turnberry Residential Limited Partner, L.P., together.

Highland – Highland Capital Management

Initial Term Loan – The $700 million initial term loan under the Credit Agreement.

IVI or Construction Consultant – Inspection and Valuation International, Inc.

LEED – Leadership in Energy and Environmental Design.

Lehman – Lehman Brothers Holdings, Inc.

Lenders – Lenders under the Credit Agreement for the Senior Credit Facility.

MAE – Material Adverse Effect

National City – National City Bank

OCO – Owner Change Order

Project – The Fontainebleau Las Vegas, a partially completed resort and casino development on an approximately 24.4 acre parcel at the Las Vegas Strip's north end.

Retail Affiliate – Fontainebleau Las Vegas Retail, LLC

Retail Co-Lending Agreement – The confidential Retail Co-Lending Agreement dated as of September 24, 2007 attached as Exhibit 49 to the Declaration of Daniel L. Cantor in Support of BANA's Opposition to Plaintiffs' Motion for Partial Summary Judgment.

Retail Facility Agreement or Retail Agmt. – Retail Facility Agreement dated as of June 6, 2007 attached as Exhibit 43 to the Declaration of Daniel L. Cantor in Support of BANA's Opposition to Plaintiffs' Motion for Partial Summary Judgment.

Retail Facility – The $315 million in loans earmarked for the Project's retail space.

Retail Lenders – Lenders among whom the Retail Facility was syndicated under the Retail Co-Lending Agreement.

Revolver Loan – The $800 million revolving loan under the Credit Agreement.

Senior Credit Facility – The $1.85 billion senior secured facilities under the Credit Agreement.

Shared Costs – The $83 million in resort costs to be funded through the Retail Facility.

SMRH – Sheppard Mullin Richter & Hampton LLP

Sumitomo – Sumitomo Mitsui Banking Corp.

TriMont – TriMont Real Estate Advisors, Inc.

TRLP – Turnberry Residential Limited Partners

TWC or Contractor – Turnberry West Construction

ULLICO – Union Labor Life Insurance Company

FILED UNDER SEAL

CERTIFICATE OF SERVICE

I, Asher L. Rivner, hereby certify that on September 27, 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 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 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

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 IN SUPPORT OF BANK OF AMERICA, N.A.'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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 Reply Memorandum of Law in Further Support of its Motion for Summary Judgment.

3. Attached as Exhibit 1 is a true and correct copy of excerpts from the transcript of the February 17, 2011 William S. Newby deposition.

4. Attached as Exhibit 2 is a true and correct copy of excerpts from the transcript of the February 22, 2011 Herbert Kolben deposition.

5. Attached as Exhibit 3 is a true and correct copy of excerpts from the transcript of the February 24, 2011 McLendon P. Rafeedie deposition.

6. Attached as Exhibit 4 is a true and correct copy of excerpts from the transcript of the March 1, 2011 Bret Yunker deposition.

7. Attached as Exhibit 5 is a true and correct copy of excerpts from the transcript of the March 11, 2011 David Howard deposition.

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

FILED UNDER SEAL

8. Attached as Exhibit 6 is a true and correct copy of excerpts from the transcript of the March 17, 2011 Jon Varnell deposition.

9. Attached as Exhibit 7 is a true and correct copy of excerpts from the transcript of the March 20, 2011 Jeanne Brown deposition.

10. Attached as Exhibit 8 is a true and correct copy of excerpts from the transcript of the March 23, 2011 Jim Freeman deposition.

11. Attached as Exhibit 9 is a true and correct copy of excerpts from the transcript of the March 24, 2011 Deven Kumar deposition.

12. Attached as Exhibit 10 is a true and correct copy of excerpts from the transcript of the March 29, 2011 Kevin Rourke deposition.

13. Attached as Exhibit 11 is a true and correct copy of excerpts from the transcript of the March 30, 2011 Brandon Bolio deposition.

14. Attached as Exhibit 12 is a true and correct copy of excerpts from the transcript of the April 7, 2011 Henry Yu deposition.

15. Attached as Exhibit 13 is a true and correct copy of excerpts from the transcript of the April 11, 2011 Robert Barone deposition.

16. Attached as Exhibit 14 is a true and correct copy of excerpts from the transcript of the April 28, 2011 Jeff Susman deposition.

17. Attached as Exhibit 15 is a true and correct copy of excerpts from the transcript of the July 21, 2011 Daniel Lupiani deposition.

18. Attached as Exhibit 16 is a true and correct copy of excerpts from the transcript of the August 17, 2011 Shepherd Pryor deposition.

19. Attached as Exhibit 17 is a true and correct copy of Deposition Exhibit 382, undated handwritten meeting notes, produced in this lawsuit by plaintiffs Caspian Capital Partners, L.P. and Caspian Select Credit Master Fund, Ltd. as CASP 061714.

20. Attached as Exhibit 18 is a true and correct copy of Deposition Exhibit 892, a June 11, 2008 e-mail from Brandon Bolio to Jeff Susman, Kyle Bender, Bret Yunker and Jon Varnell, copied to Paul Bonvicino, produced in this lawsuit by BANA as BANA_FB00358727-28.

FILED UNDER SEAL

21. Attached as Exhibit 19 is a true and correct copy of Deposition Exhibit 868, IVI's Project Status Report No. 14, dated June 25, 2008, produced in this lawsuit by BANA as BANA_FB00329740-811.

22. Attached as Exhibit 20 is a true and correct copy of Deposition Exhibit 11, [redacted], produced in this lawsuit by ULLICO as ULL-FLVR0007582.002706-18.

23. Attached as Exhibit 21 is a true and correct copy of Deposition Exhibit 81, an October 6, 2008 e-mail from Kevin Rourke to David Howard, copied to Andrei Dorenbaum, produced in this lawsuit by BANA as BANA_FB00735454-55.

24. Attached as Exhibit 22 is a true and correct copy of Deposition Exhibit 80, an October 13, 2008 e-mail from Bill Scott to Jeff Susman, Bret Yunker, Jon Varnell, David Howard and Peter Fuad, copied to Richard Brunette and Fred Puglisi, produced in this lawsuit by BANA as BANA_FB00884074-76.

25. Attached as Exhibit 23 is a true and correct copy of Deposition Exhibit 158, an October 29, 2008 e-mail from Vincent Fu to John Casparian, Steve Ahearn and Kevin Hickam, produced in this lawsuit by plaintiff Churchill Pacific Asset Management LLC as CRCH 000866.

26. Attached as Exhibit 24 is a true and correct copy of Deposition Exhibit 377, an October 29, 2008 e-mail from Philip Mule to David Corleto, produced in this lawsuit by plaintiffs Caspian Capital Partners, L.P. and Caspian Select Credit Master Fund, Ltd. as CASP 053298-99.

27. Attached as Exhibit 25 is a true and correct copy of a November 5, 2008 e-mail from Fontainebleau Resorts LLC's Albert Kotite to Douglas Pardon, copied to Glenn Schaeffer and Jim Freeman, produced in this lawsuit by plaintiffs Brigade Leveraged Capital Structures Fund, Ltd. and Battalion CLO 2007-I Ltd. as BGD 000845-49.

28. Attached as Exhibit 26 is a true and correct copy of Deposition Exhibit 379, a November 12, 2008 e-mail from Philip Mule to John Maxwell, produced in this lawsuit by plaintiffs Caspian Capital Partners, L.P. and Caspian Select Credit Master Fund, Ltd. as CASP 053803-04.

29. Attached as Exhibit 27 is a true and correct copy of Deposition Exhibit 381, handwritten meeting notes dated November 18, 2008, produced in this lawsuit by plaintiffs Caspian Capital Partners, L.P. and Caspian Select Credit Master Fund, Ltd. as CASP 061712.

30. Attached as Exhibit 28 is a true and correct copy of Deposition Exhibit 160, a December 4, 2008 e-mail from Martin Kim to John Casparian, Kevin Hickam and Steve Ahearn, copied to Vincent Fu, produced in this lawsuit by plaintiff Churchill Pacific Asset Management LLC as CRCH 001013.

31. Attached as Exhibit 29 is a true and correct copy of Deposition Exhibit 346, a March 20, 2009 lender presentation, produced in this lawsuit by plaintiff ING Investment Management as ING 014045-71.

32. Attached as Exhibit 30 is a true and correct copy of Deposition Exhibit 861, a March 22, 2009 e-mail from Bill Scott to Alan Martin and Eric Sieke, copied to Henry Yu, produced in this lawsuit by BANA as BANA_FB00899769-71.

33. Attached as Exhibit 31 is a true and correct copy of Deposition Exhibit 862, a March 23, 2009 e-mail from Robert Barone to Brandon Bolio, Paul Bonvicino, Henry Yu, Alan Martin, Brian Corum, Bill Scott, Ronaldo Naval, Jeanne Brown and Eric Sieke forwarding an executed Construction Consultant Advance Certificate, produced in this lawsuit by IVI as IVI 080500-21.

34. Attached as Exhibit 32 is a true and correct copy of Deposition Exhibit 851, a copy of the Declaration of Robert W. Barone dated June 30, 2009 in *Fontainebleau Las Vegas LLC v. Bank of America, N.A., et al.*, Adv. No. 09-01621-AP-AJC (S.D. Fla.).

35. Attached as Exhibit 33 is a true and correct copy of Deposition Exhibit 932, the Expert Report of Shepherd G. Pryor IV, dated May 23, 2011.

36. Attached as Exhibit 34 is a true and correct copy of excerpts from the transcript of the March 17, 2011 Vincent Fu deposition.

37. Attached as Exhibit 35 is a true and correct copy of excerpts from the transcript of the March 18, 2011 Chaney Sheffield deposition.

38. Attached as Exhibit 36 is a true and correct copy of Deposition Exhibit 828, IVI's Project Status Report No. 23, dated April 23, 2009, produced by BANA as BANA_FB00104507-579.

39. Attached as Exhibit 37 is a true and correct copy of Deposition Exhibit 151, a June 5, 2008 e-mail from Vincent Fu to Steve Ahearn, John Casparian, Kevin Hickam and James Eustice, produced in this lawsuit by plaintiff Churchill Pacific Asset Management LLC as CRCH 001031.

40. Attached as Exhibit 38 is a true and correct copy of Deposition Exhibit 175, a June 2, 2008 e-mail from Henry Chyung to Patrick Dooley, produced in this lawsuit by plaintiffs CanPartners Investments IV, LLC, Canyon Special Opportunities Master Fund (Cayman), Ltd., Canyon Capital CLO 2004 1 Ltd., Canyon Capital CLO 2006 1 Ltd., and Canyon Capital CLO 2007 1 Ltd. as CNY 044601.

41. 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: September 27, 2011
New York, New York

DANIEL L. CANTOR

CERTIFICATE OF SERVICE

I, Asher L. Rivner, hereby certify that on September 27, 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 in Support of Bank of America, N.A.'s Reply Memorandum of Law in Further Support of its Motion for Summary Judgment, and the exhibits attached 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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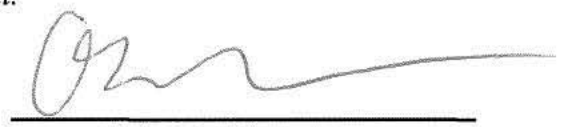

Asher L. Rivner

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 OPPOSITION TO PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF TERM LENDER PLAINTIFFS' OPPOSITION TO BANK OF AMERICA N.A'S MOTION FOR SUMMARY JUDGMENT

Defendant Bank of America, N.A. ("BANA") respectfully submits this Opposition to Plaintiffs' Request for Judicial Notice in Support of Term Lender Plaintiffs' Opposition to Bank of America N.A's Motion for Summary Judgment. As demonstrated below, the document designated by Plaintiffs as Exhibit 1504 to the Declaration of Robert W. Mockler and Request for Judicial Notice is not a proper subject of judicial notice. At most, the Court should take judicial notice solely of the document's existence, but not its truthfulness or Plaintiffs' interpretation of it.

ARGUMENT

To be judicially noticed, a fact must be "one not subject to reasonable dispute." Fed. R. Evid. 201(b). Exhibit 1504 does not meet this requirement because it is not "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id.* Exhibit 1504 is a filing by Fontainebleau Las Vegas Retail, LLC ("FBLV Retail") in the Lehman Brothers Holdings Inc. bankruptcy. The filing's contents are nothing more than FBLV Retail's allegations in a court filing. No FBLV Retail witness or attorney has been deposed to corroborate the basis for the averments set forth in the court filing. Courts "may take judicial

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notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but to establish the fact of such litigation and related filings." *Autonation, Inc. v. O'Brien*, 347 F. Supp. 2d 1299, 1310 (S.D. Fla. 2004) (citations omitted). To the extent Plaintiffs seek to introduce a proof of claim filed in a bankruptcy court as evidence of the disputed facts contained therein—and not merely to establish the fact that such a document was filed—judicial notice of Ex. 1504 should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' request for judicial notice of Exhibit 1504 or, in the alternative, take judicial notice solely of the document's existence. A proposed Order is attached hereto as Exhibit A.

Dated: September 27, 2011

Respectfully submitted,

By: _____

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Attorneys for Bank of America, N.A.

FILED UNDER SEAL

CERTIFICATE OF SERVICE

I, Asher L. Rivner, hereby certify that on September 27, 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 Opposition to Plaintiffs' Request for Judicial Notice in Support of Term Lender Plaintiffs' Opposition to Bank of America N.A's Motion for Summary Judgment 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

EXHIBIT A

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

IN RE:

FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.
_____/

ORDER DENYING PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE

THIS CAUSE is before the Court on Defendant Bank of America, N.A.'s ("BANA") Opposition to Plaintiffs' Request for Judicial Notice dated September 27, 2011. Having reviewed Plaintiffs' Request for Judicial Notice, BANA's Opposition to Plaintiffs' Request for Judicial Notice in Support of Term Lender Plaintiffs' Opposition to Bank of America N.A's Motion for Summary Judgment, the record and otherwise being duly advised, it is hereby

ORDERED AND ADJUDGED that:

1. Plaintiffs' Request for Judicial Notice of the document designated by Plaintiffs as Exhibit 1504 is DENIED.
2. The document designated by Plaintiffs as Exhibit 1504 is STRICKEN.

DONE and ORDERED in Chambers in Miami, Florida this ___ day of _____, 2011.

_____
THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc:
Counsel of Record
Magistrate Judge Goodman

FILED UNDER SEAL

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 REPLY TO TERM LENDER PLAINTIFFS' RESPONSE TO BANK OF AMERICA, N.A.'S EVIDENTIARY OBJECTIONS

Defendant Bank of America, N.A. ("BANA") respectfully submits this Reply to Term Lender Plaintiffs' Response to BANA's Evidentiary Objections Included in its Response to Plaintiffs' Statement of Additional Undisputed Material Facts in Opposition to Defendant's Motion for Summary Judgment ("Pls. Resp."), filed under seal on October 7, 2011. As an initial matter, the Court should disregard Plaintiffs' "Response," as it is not provided for by the Federal Rules of Civil Procedure or the Southern District of Florida's Local Rules and is clearly improper. Moreover, Plaintiffs' Response is unavailing because it fails to establish that Deposition Exhibits 19, 80, 274, 399, 891, and 915, Plaintiffs' Exhibits 1502, 1503, 1504, 1508, and 1509, or the Donald Boyken and Peter Badala deposition excerpts are admissible evidence that can be considered in opposition to BANA's Motion for Summary Judgment.[1]

ARGUMENT

I. THE CITED PORTIONS OF SHEPHERD PRYOR'S EXPERT REPORT (PLS.' EX. 1503) ARE INADMISSIBLE.

Plaintiffs improperly cite portions of Shepherd Pryor's expert report to support their legal conclusions that (1) "it would not be commercially reasonable for a bank agent to disburse funds when it knew facts that contradicted or were materially inconsistent with certifications provided

[1] BANA's reply addresses only the evidentiary issues raised by Plaintiffs' arguments. There are additional issues with Plaintiffs' mischaracterization of the cited documents and testimony as detailed in BANA's Response to Plaintiffs' Statement of Additional Undisputed Material Facts in Opposition to Defendant's Motion for Summary Judgment.

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by a borrower" (Pls.' Opp. SOUMF, Add. Facts at ¶ 20), and (2) a "lender default is always material" (*id.* at ¶ 122). Plaintiffs' assertion that these are "fact[s], and not a legal conclusion" fails for several reasons. (*See* Pls. Resp. at 1, 12.)

First, the cited excerpts are inadmissible under the Federal Rules of Evidence because they are nothing more than an attempt to have Plaintiffs' purported expert offer his interpretation of the Disbursement Agreement and Credit Agreement's terms. Expert opinions interpreting a contract's provision are routinely excluded, particularly where the expert essentially testifies that a party has breached an agreement.[2] Thus, the cited excerpts from Mr. Pryor's opinion regarding the reasonableness of BANA's funds disbursements to Fontainebleau should be excluded because they amount to nothing more than an opinion that BANA breached the Disbursement Agreement.[3] Mr. Pryor's opinion concerning the materiality of purported lender defaults is a legal conclusion that should likewise be excluded.[4]

Second, even if Mr. Pryor's opinions regarding the loan documents' terms are deemed facts, they are irrelevant to the resolution of BANA's summary judgment motion because under New York's parol evidence rule, expert and lay witnesses' subjective views cannot trump the unambiguous contractual terms that define the parties' duties.[5]

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2 Plaintiffs' reliance on *Gans v. Mundy*, 762 F.2d 338, 342 (3d Cir. 1985) is misplaced because it concerns the use of an expert's testimony in establishing the duty of care in a tort case, not a breach claim based on an unambiguous contract.

3 *See Montgomery v. Aetna Cas. & Surety Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990) (holding "[t]he district court abused its discretion by allowing [expert] to testify about the scope of Aetna's duty under the policy."); *In re FedEx Ground Package Sys., Inc. Employment Practices Litig.*, 2010 WL 1838400, at *5 (N.D. Ind. May 4, 2010) (granting defendant's motion to exclude plaintiff's expert's report for summary judgment purposes because the expert's interpretation of contract terms was not a "proper subject for expert testimony."); *Smith v. Cont'l Cas. Co.*, 2008 WL 4462120, at *1 (M.D. Pa. Sept. 30, 2008) ("It is well-settled that expert testimony regarding legal conclusions, such as the interpretation of an insurance policy, is impermissible.").

4 *See Hoefer & Arnett, Inc. v. Lehigh Press, Inc.*, 1988 WL 12505, at *1 (E.D. Pa. Feb. 16, 1988) (holding "plaintiffs' experts are precluded from testifying to legal conclusions of 'materiality', or what constitutes a fiduciary's duty. Those are questions of law, to be charged by the court."); *see also U.S. v. Mavashev*, 2010 WL 234773, at *4 (E.D.N.Y. Jan. 14, 2010) ("[N]o witness, expert or otherwise, may testify as to legal conclusions, including whether a … statement is material or not.").

5 *See Excess Ins. Co. v. Factory Mut. Ins. Co.*, 769 N.Y.S.2d 487, 489 (N.Y. App. Div. 1st Dep't 2003) ("[T]he expert affidavit submitted by defendant regarding industry custom is extrinsic evidence which should not be considered in interpreting this clear and unambiguous

II. FBLV RETAIL'S SEPTEMBER 2009 FILING IN THE LEHMAN BANKRUPTCY (PLS.' EX. 1504) IS INADMISSIBLE HEARSAY.

Plaintiffs' Exhibit 1504 is a September 2009 filing by non-party Fontainebleau Las Vegas Retail, LLC in the Lehman bankruptcy. Plaintiffs concede (as they must) that this document is not in evidence and cannot be introduced to prove the truth of any matter asserted in the filing. (Pls. Resp. at 4.) But contrary to Plaintiffs' assertion that they are merely offering the document to prove that it was filed (*id.*), they cite to the filing to establish the truth of facts set forth therein regarding Lehman's role as a Retail Lender. (*See* Pls.' Opp. SOUMF, Add. Facts at ¶ 25.) The document is hearsay and it is inadmissible to prove the truth of the matters set forth therein.[6]

III. E-MAILS FROM MR. MAXWELL (DEP. EXS. 274 AND 399) ARE INADMISSIBLE HEARSAY.

Deposition Exhibits 274 and 399 are e-mails from a Merrill Lynch analyst—John Maxwell—to undisclosed recipients stating, among other things, "[w]e spoke with Company management." To the extent Plaintiffs cite these e-mails to demonstrate that Mr. Maxwell was in direct communication with Fontainebleau, they are inadmissible hearsay. (*See* Pls. Resp. at 7.) Mr. Maxwell was never deposed and no Fontainebleau deponents testified to speaking with Mr. Maxwell. Plaintiffs falsely assert that Fontainebleau's Jim Freeman "testified that he, and potentially Glenn Schaeffer, communicated with Mr. Maxwell." To the contrary, Mr. Freeman merely testified that he or Mr. Schaeffer "may have" spoken with Mr. Maxwell before September 2008 but stated, "I don't remember if I did or I didn't," and when asked if he communicated with Mr. Maxwell in connection with a September 2008 analyst report, he responded "I can't remember." (Freeman Dep. at 228:12–229:24.) Accordingly, the contents of Deposition Exhibits 274 and 399 are hearsay and they are inadmissible to support Plaintiffs' claim that Mr. Maxwell spoke with Fontainebleau before October 2008.

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document."); *Hess v. Zoological Soc'y of Buffalo, Inc.*, 521 N.Y.S.2d 903, 904 (N.Y. App. Div. 4th Dep't 1987) (affirming refusal to consider expert opinion where contract was "clear and unambiguous"). New York's parol evidence rule applies here because it is a substantive law. *See Clanton v. Inter.Net Global, L.L.C.*, 435 F.3d 1319, 1326 n.8 (11th Cir. 2006).

[6] *See Autonation, Inc. v. O'Brien*, 347 F. Supp. 2d 1299, 1310 (S.D. Fla. 2004) (Courts "may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but to establish the fact of such litigation and related filings.").

IV. PARAGRAPHS 56 AND 119 OF PLAINTIFFS' ADDITIONAL FACTS ARE CONCLUSIONS OF LAW—NOT FACTS.

Plaintiffs improperly characterize legal conclusions as "facts" in Paragraphs 56 and 119 of their Statement of Additional Material Facts in Opposition to BANA's Statement of Undisputed Material. Conclusions of law are not facts, thus, they cannot be used to create a disputed issue of material fact on summary judgment.[7]

First, Plaintiffs' claim that "BofA was entitled to take over Lehman's remaining commitment under an Intercreditor Agreement with Lehman and the Retail Borrower" is clearly a legal conclusion regarding BANA's rights under the Intercreditor Agreement, not a statement of fact. (*See* Pls.' Opp. SOUMF, Add. Facts at ¶ 56.) Moreover, even if the statement were factual, it would lack foundation. As demonstrated in BANA's Response to Plaintiffs' Additional Statement of Undisputed Material Facts, Plaintiffs offer no any evidence supporting their statement. Intercreditor Agreement Section 7.1 grants "the Bank Agent the right (without any obligation) to purchase, at any time after the occurrence of a Retail Purchase Option Event, all … of the principal of and interest on the Retail Secured Obligations," but states that for a "Retail Purchase Option Event" to occur, there must be a "failure of the Retail Agent to fund any Advance requested by the Project Credit Parties for Shared Costs, which the Retail Agent is required to fund in accordance with the terms of the Disbursement Agreement." (Dep. Ex. 884 at 4.) Plaintiffs fail to offer any evidence that a Retail Purchase Option Event occurred. Moreover, the David Howard deposition testimony Plaintiffs cite is unavailing because it makes no reference to the Intercreditor Agreement. Thus, Paragraph 56 of Plaintiffs' Additional Statement of Undisputed Material Facts is an unsupported legal conclusion that cannot be used to create an issue of material *fact* on summary judgment.

Second, Plaintiffs' statement that "Mr. Susman recognized that the FDIC's repudiation resulted in FNBN defaulting on its obligations" is also a legal conclusion that does not create a disputed issue of material fact. (*See* BANA's Resp. to Pls.' Add. SOUMF ¶ 119.) Plaintiffs attempt to salvage their purported "fact" by arguing that the statement is a "factual recitation of

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[7] *See Bellsouth Adver. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc.*, 999 F.2d 1436, 1484–85 (11th Cir. 1993) ("As a non-moving party opposing a motion for summary judgment … [the non-moving party] could not simply rely on legal conclusions or evidence which would be inadmissible at trial in order to meet its burden of coming forward with relevant and competent evidence.").

Mr. Susman's testimony" reflecting his "understanding." (Pls. Resp. at 11.) But to the extent Plaintiffs use Mr. Susman's testimony to support a conclusion that the First National Bank of Nevada "default[ed]" on its obligations, this attempt fails because it is a legal conclusion. Thus, Paragraph 119 of Plaintiffs' Additional Statement of Undisputed Material Fact is an improper legal conclusion and cannot be used to create an issue of material fact on summary judgment.

V. THE OWNER CHANGE ORDER (DEP. EX. 891), DONALD BOYKEN'S EXPERT REPORT (DEP. EX. 915) AND THE CITED BOYKEN AND BADALA DEPOSITION TESTIMONY ARE INADMISSIBLE.

Plaintiffs' response regarding Deposition Exhibits 891 and 915 does not address the grave foundational and hearsay problems with those documents. Plaintiffs' claim that these documents have been authenticated by the testimony of lay and expert witnesses is false.

A. Deposition Exhibit 891 Has Not Been Authenticated, and Its Contents Are Hearsay.

Deposition Exhibit 891 is an unauthenticated Owner Change Order ("OCO") signed by non-parties Fontainebleau Resorts ("FBR") and Turnberry West Construction ("TWC") on May 23, 2008, and accompanied by numerous letters from TWC to FBR or from WW Steel to TWC. No fact witness has authenticated Deposition Exhibit 891 or testified about its contents. Moreover, although the documents' signatories—TWC's Robert Ambridge and Fontainebleau's Deven Kumar—were both deposed, Plaintiffs failed to ask either witness about this document. Accordingly, the document is inadmissible and may not be considered for the truth of its contents. (BANA's Resp. to Pls.' Add. SOUMF ¶¶ 72–73.)

Each of Plaintiffs' explanations for why this document should be admitted fails.

- Plaintiffs' assertion that Deposition Exhibit 891 was included as page 60 of IVI's Cost-to-Complete Review (Dep. Ex. 298) is false. (Pls. Resp. at 9.) The OCO is not included in the Cost-to-Complete Review. Page 60 contains a chart titled "Owner Change Order Contract Log", which lists the OCO as a single line among numerous change orders but does not otherwise include the contents or a copy of the OCO. Thus, while Mr. Barone authenticated the Cost-to-Complete Review during his deposition (Dep. Ex. 298), he never authenticated Deposition Exhibit 891.
- Plaintiffs falsely claim that Mr. Barone testified that he recalled the structural steel change order in connection with IVI Status Report No. 14. (Pls. Resp. at 9.) But his testimony makes no reference to the OCO at issue.
- Plaintiffs' reliance on the deposition testimony of BANA's expert Peter Badala does not remedy Deposition Exhibit 891's foundational and hearsay problems because Mr. Badala lacks personal knowledge of its contents or how or whether BANA received a copy of it.

Moreover, Plaintiffs ignore that even if Deposition Exhibit 891 were authenticated—and it was not—it still would not be admissible for the truth of its contents because the contents of the communications between FBR, TWC and WW Steel that comprise the OCO are hearsay.

B. Deposition Exhibit 915 Cannot Be Used to Introduce Deposition Exhibit 891's Hearsay Contents into Evidence.

Deposition Exhibit 915, Plaintiffs' expert Donald Boyken's report, should also be disregarded. Plaintiffs cite Mr. Boyken's report and his testimony in support of their unfounded assertion that the OCO "had been known (but undisclosed) since the weeks following closing of the credit facilities in June 2007." (Pls. Opp. SOUMF, Add. Facts at ¶ 73.) But Mr. Boyken cannot authenticate Deposition Exhibit 891 or resolve the hearsay problem simply by referring to it in his opinion.[8] And Plaintiffs' claim that Deposition Exhibit 891 only formed part of the support for Mr. Boyken's opinion is fallacious. His report's discussion of steel costs cites only the OCO, and the cited testimony does not refer to IVI's Project Status Report No. 14 or explain how it addresses the foundational and hearsay problems presented by Deposition Exhibit 891.

VI. THE SEPTEMBER 2008 HIGHLAND CAPITAL E-MAILS (DEP. EX. 80 AND PLS.' EX. 1502) ARE INADMISSIBLE HEARSAY.

Plaintiffs' claim that Deposition Exhibit 80 and Plaintiffs' Exhibit 1502 are admissible for the truth of their contents should be rejected because Plaintiffs fail to lay the required evidentiary foundation. Plaintiffs' Exhibit 1502 is an October 13, 2008 e-mail from BANA's outside counsel Bill Scott to BANA recipients, forwarding an e-mail from non-party Highland Capital Management L.P.'s ("Highland") Andrei Dorenbaum. Mr. Dorenbaum's e-mail purports to "confirm" a conversation with Mr. Scott that took place "last week" regarding the Lehman bankruptcy's implications for the Fontainebleau Project. Mr. Dorenbaum's e-mail attaches an e-mail to Mr. Dorenbaum and Highland's Brad Means from Highland's Kevin Rourke, which, in turn, forwards an e-mail from a Merrill Lynch analyst that, among several other topics,

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[8] *See In re Citric Acid Litig.*, 191 F.3d 1090, 1102 (9th Cir. 1999) ("The law is clear … that an expert report cannot be used to prove the existence of facts set forth therein."); *see also Estate of Parsons v. Palestinian Auth.*, 715 F. Supp. 2d 27, 32–33 (D.D.C. 2010) (disregarding expert's affidavit and granting summary judgment to the defendant because "[e]xpert opinions may be based on hearsay, but they may not be a conduit for the introduction of factual assertions that are not based on personal knowledge."); *In re Lake States Commodities, Inc.*, 272 B.R. 233, 242–43 (Bankr. N.D. Ill. 2002) ("[T]he inadmissible evidence relied on by the expert is not somehow transmogrified into admissible evidence simply because an expert relies on it.") (internal citations omitted).

speculates that a Fontainebleau affiliate funded Lehman's September Shared Costs portion. Deposition Exhibit 80 is a copy of the Bill Scott e-mail without the attached Highland e-mail. Plaintiffs' assertion that the contents of (i) Mr. Dorenbaum's e-mail to Mr. Scott, and (ii) the Merrill Lynch report are admissible as adoptive admissions because BANA "fail[ed] to respond or contradict Highland's statement" fails for several reasons. (*See* Pls. Resp. at 5.)

First, Plaintiffs offer no evidence that BANA acquiesced in Highland's assertions or the Merrill Lynch Report's contents, or that BANA did not respond to Highland. As the party seeking to admit the documents into evidence, Plaintiffs bear the burden of demonstrating that BANA acquiesced to the statements in the e-mail—*i.e.*, that it did not respond to Mr. Dorenbaum's e-mail.[9] But Plaintiffs cannot point to any evidence that BANA agreed with Highland's assertions or the Merrill Lynch Report. Indeed, as demonstrated in BANA's Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment ("BANA's SOUMF"), BANA understood that Lehman funded its share of the Shared Retail Costs in September 2008 (*see* BANA's SOUMF ¶ 79; *see also* Susman Decl. at ¶ 20) and did not acquiesce in or adopt Highland's assertions (*see* BANA's SOUMF ¶ 121; *see also* Susman Decl. at ¶ 24). Moreover, Plaintiffs point to no evidence to support their naked claim that BANA "fail[ed] to respond or contradict Highland's statement." (Pls. Resp. at 5.) Nor are there any documents or testimony supporting Plaintiffs' claim. Indeed, Plaintiffs made no effort during discovery to establish this fact—failing to ask any deponent (including BANA's Brandon Bolio, David Howard, Jeff Susman, Jon Varnell and Bret Yunker) whether BANA responded to Mr. Dorenbaum's e-mail, and choosing not to depose Bill Scott or Highland's Andrei Dorenbaum. [redacted] It is too late for Plaintiffs to attempt to fill in their evidentiary vacuum with unfounded speculation.

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[9] *See White Indus., Inc. v. Cessna Aircraft Co.*, 611 F. Supp. 1049, 1063 (W.D. Mo. 1985) ("First, and quite obviously, the fact of silence or non-response must itself be shown as a part of the proponent's proof. It is not sufficient merely to establish that a communication was received by a party-opponent, or to suggest that the party-opponent should prove the fact of a response if it claims there was one.").

Moreover, Plaintiffs simply ignore documents produced by BANA in this litigation reflecting that, in fact, BANA *did respond* to Mr. Dorenbaum's e-mail.[10] (*See* Exs. A and B.)

Second, even if Plaintiffs' groundless assertion that BANA did not respond were credited, the e-mails would still be inadmissible because Plaintiffs do not explain why BANA's silence would have been unreasonable.[11] [redacted] (*See* BANA's SOUMF ¶¶ 125–126; *see also* BANA Opp. SOUMF, Add. Facts at ¶¶ 120–122.) Thus, it would have been completely reasonable for BANA to assume that Highland would resolve its concerns directly with Fontainebleau. Accordingly, Plaintiffs' claim that Deposition Exhibit 80 and Plaintiffs' Exhibit 1502 are adoptive admissions fails.[12]

VII. THE NATIONAL CITY SPECIAL ASSETS COMMITTEE REPORT (DEP. EX. 19) IS INADMISSIBLE HEARSAY.

Deposition Exhibit 19 appears to be an internal memorandum prepared by non-party National City and obtained through non-party discovery from PNC Bank. This document was never authenticated during depositions and, in any event, its contents are hearsay.[13] Plaintiffs

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10 Plaintiffs' authorities are inapposite. *U.S. v. Central Gulf Lines*, 974 F.2d 621 (5th Cir. 1992) is off-point because the adoptive admissions concerned survey reports prepared with the extensive involvement of the party against whom the survey reports were introduced at trial, and there was no evidence that the party objected to the survey reports. And *Hellenic Lines Ltd. v. Gulf Oil Corp.*, 340 F.2d 398 (2d Cir. 1965), lends no support to Plaintiffs because the court did not find that the unanswered letter there was an adoptive admission.

11 *See Tober v. Graco Children's Prods., Inc.*, 431 F.3d 572, 576 (7th Cir. 2005) ("The burden is on the party seeking to introduce the letter to establish that under the circumstances the failure to respond is so unnatural that it supports the inference that the party acquiesced to the statements contained in the letter.") (citations omitted); *S. Stone Co. v. Singer*, 665 F.2d 698, 703 (5th Cir. 1982) ("[T]he mere failure to respond to a letter does not indicate an adoption unless it was reasonable under the circumstances for the sender to expect the recipient to respond and to correct erroneous assertions.").

12 *See S. Stone*, 665 F.2d at 703 (rejecting claim that defendant's failure to respond to letter was an admission where plaintiff "fail[ed] to lay a foundation for the introduction of the letter more solid than [defendant's] mere failure to respond").

13 *See TLT-Babcock, Inc. v. Emerson Elec. Co.*, 33 F.3d 397, 401 (4th Cir. 1994) (excluding as hearsay memorandum purporting to summarize meeting); *Cortezano v. Salin Bank & Trust Co.*, 2011 WL 573755, at *11 (S.D. Ind. Feb. 15, 2011) (excluding as hearsay meeting minute e-mail sent by a non-party to plaintiff because "there [was] no indication of who prepared these notes, when they were prepared, or whether they were taken in the normal course of business.").

argue that [redacted] and that BANA's Bret Yunker said the exhibit was "generally consistent" with what he recalled from that meeting. (Pls. Resp. at 7.) But neither [redacted] nor Mr. Yunker was competent to authenticate the document. [redacted], and Mr. Yunker's statement was vague (Yunker Dep. at 174:16–175:9). Moreover, Plaintiffs could have deposed a National City or PNC Bank witness but elected not to do so. Thus, the document is hearsay and should be disregarded.

VIII. THE E-MAILS REGARDING CONDOMINIUM SALES (PLS.' EXS. 1508 AND 1509) ARE INADMISSIBLE.

Plaintiffs' Exhibits 1508 and 1509 are internal BANA e-mails containing inadmissible hearsay statements. The fact that the documents were produced by BANA does not remedy the issue that the documents contain hearsay statements and are, therefore, inadmissible for the truth of their contents.[14]

Plaintiffs' claim that the e-mails are not being offered for the truth of their contents is false. (*See* Pls. Resp. at 12–13, 14.) Plaintiffs' Exhibit 1508 is an October 18, 2007 e-mail from Jon Varnell to BAS' Mike Malone and others at BAS, stating that Mr. Varnell had heard that Fontainebleau's Jeff Soffer told Mr. Malone that the Borrowers had decided not to sell condos. (*See* Pls. Ex. 1508.) Plaintiffs cite Exhibit 1508 to show that "BofA knew as early as October 2007 that the deteriorating real estate market caused the Borrowers to consider eliminating the sale of condos from the Project." (Pls.' Opp. SOUMF, Add. Facts at ¶ 141.) This document is inadmissible to the extent it is offered for the truth of the statement that the Borrowers were considering eliminating condo sales as early as October 2007 because Mr. Soffer's alleged statement is hearsay and is inadmissible.[15]

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[14] *See Read v. Teton Springs Golf & Casting Club, LLC*, 08 Civ. 99, 2010 WL 5158882, at *6 (D. Idaho Dec. 14, 2010) (striking e-mail attached to plaintiff's opposition to summary judgment motion because although the e-mail was produced by the defendant, it "contains hearsay statements not based on the affiant's personal knowledge.").

[15] Even if the statements in Exhibit 1508 were not hearsay, they do not show that BANA "knew" the Borrowers were considering eliminating the condo sales. In the e-mail, Mr. Varnell explains that Fontainebleau's Jim Freeman denied the rumor that the Borrowers were considering eliminating condo sales.

Plaintiffs' argument likewise fails with respect to Plaintiffs' Exhibit 1509, a March 27, 2008 e-mail from Kyle Bender to Jon Varnell and Bret Yunker forwarding a Barclays Capital analyst report that purports to summarize conversations that Barclays had with Fontainebleau "[m]anagement," offered in Paragraph 142 of Plaintiffs' Additional Facts in support of the purported "fact" that "[c]ondo sales lagged well behind schedule and below projections." The statements contained in the e-mail are hearsay, as they are quotations from the Barclays report, which purports to convey alleged statements by Fontainebleau management regarding a timetable for condominium sales. (*See* Pls. Ex. 1509.) The alleged statements by Fontainebleau "[m]anagement" contained in the Barclays report are themselves hearsay because no witnesses with personal knowledge of those purported conversations has testified about them.[16] Recognizing that the hearsay statements in Exhibit 1509 cannot be used to show whether condominium sales were on schedule, Plaintiffs now argue that they were using the document "to show BofA's knowledge of the statements in the report, not the truth of those statements." (Pls. Resp. at 14.) But this argument is patently false because Paragraph 142 of their Additional Facts has nothing to do with what BANA supposedly knew.

Because the hearsay contents of Plaintiffs' Exhibits 1508 and 1509 are offered for the truth of the matters asserted therein they should be disregarded.

CONCLUSION

For the foregoing reasons, the Court should not consider as evidence Deposition Exhibits 19, 80, 274, 399, 891, and 915, Plaintiffs' Exhibits 1502, 1503, 1504, 1508, and 1509, or the Donald Boyken and Peter Badala deposition excerpts.

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[16] *See United States v. Baker*, 432 F.3d 1189, 1211 (11th Cir. 2005) (news report inadmissible as hearsay).

Dated: October 17, 2011

Respectfully submitted,

By: _____

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FILED UNDER SEAL

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic means pursuant to an agreement between the parties on October 17, 2011, on all counsel or parties of record listed below.

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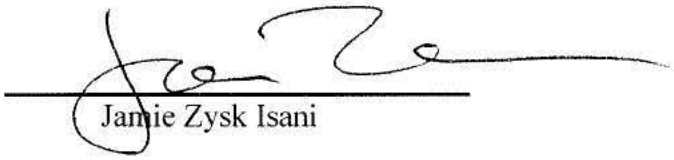

Jamie Zysk Isani

EXHIBIT A

From:	Susman, Jeff.	Sent:10/16/2008 9:57 AM.
To:	Bill Scott; Varnell, Jon M; Bill Scott; Varnell, Jon M.	
Cc:	.	
Bcc:	.	
Subject:	RE: Fontainebleau Resorts.	

Bill, I am fine with your reply.

From: Bill Scott [mailto:bscott@sheppardmullin.com]
Sent: Monday, October 13, 2008 10:17 PM
To: Varnell, Jon M; Susman, Jeff
Subject: FW: Fontainebleau Resorts

Redacted--Privileged

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From: Andrei Dorenbaum [mailto:ADorenbaum@hcmlp.com]
Sent: Monday, October 13, 2008 9:37 AM
To: Bill Scott
Cc: Brad Means; Kevin Rourke
Subject: RE: Fontainebleau Resorts

Bill,

This e-mail follows-up our conversation from last week. We would like to confirm the following matters:

1. Under section 3.3.23 of the Master Disbursement Agreement, the borrower cannot request disbursements without demonstrating that the Retail Lenders made required advances under the relevant financing agreements.

2. We are unaware and understand that the agent is unaware of any facts that would support that Lehman, as a Retail Lender, made any disbursements while in bankruptcy. In fact, as we discussed, it is both your understanding and our understanding that Lehman has not made any disbursements while in bankruptcy.

3. It does not appear that Retail Lenders made the Sept. payment, but rather equity investors. Please see attached report from Merrill Lynch. This would indicate that the reps the company made for that funding request were false.

4. Given the above, we believe that the agent should request the borrower to provide 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). This includes confirmation for the Sept. payment as this issues raises a breach concern under the Disbursement Agreement.

5. The borrower's legal counsel should provide an opinion that the Lehman funding agreement is in full force and effect. This issue is a legal question and should be certified by qualified bankruptcy counsel, rather than the borrower's CFO. Our position is that Lehman is in breach of the agreement because it failed to fund and thus the agreement is not in full force.

Please let me know if you have any additional questions.

Best regards,

Andrei Dorenbaum

Assistant General Counsel

Highland Capital Management, L.P.

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Dallas, Texas 75240

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fax: 972-628-4147

adorenbaum@hcmlp.com

EXHIBIT B

From:	Howard, David.	Sent:10/17/2008 5:24 PM.
To:	KRourke@hcmlp.com; KRourke@hcmlp.com.	
Cc:	Susman, Jeff; Susman, Jeff.	
Bcc:	.	
Subject:	Re: Fontainebleau - follow up.	

I had called Jim after we spoke and he was planning to call you. I just called him and he said he definitely would call you today or Monday. You might shoot him an email with some good times.

I'll check Bill Scott's status and get back.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Kevin Rourke <KRourke@hcmlp.com>
To: Howard, David
Cc: Andrei Dorenbaum <ADorenbaum@hcmlp.com>
Sent: Fri Oct 17 16:03:09 2008
Subject: Fontainebleau - follow up

David –

To follow up on our conversation yesterday, we are still awaiting a response from Bill Scott regarding Bank of America's position on the contractual points we raised previously. In addition, please advise status of either i) and all lender call or ii) a call with Highland.

The continued silence of both Fontainebleau Management and Agent's counsel on these matters as we approach another draw funding date is a source of growing concern for Highland. I appreciate your assistance in resolving these matters.

Regards,

Kevin Rourke
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13455 Noel Road, Suite 800
(972) 628-4100
krourke@hcmlp.com

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