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

IN RE:

FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.
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NOTICE OF FILING ON THE PUBLIC RECORD PLAINTIFFS' BRIEFS AND RELATED FILINGS PREVIOUSLY FILED UNDER SEAL SUPPORTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Avenue CLO Fund, et al. ("Plaintiffs") hereby give notice that they are filing on the public record certain briefs and related filings, previously filed under seal, related to Plaintiffs' Motion for Partial Summary Judgment in the above-titled case.

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

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

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

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

Plaintiffs previously filed under seal the briefs and related filings listed below in connection with their Motion For Partial Summary Judgment on August 5, 2011, September 27, 2011 and November 14, 2013. In compliance with this Court's Order Approving Joint Proposal, Plaintiffs now file the following briefs and related filings on the public record with the exception of portions of the documents that remain under seal and are therefore redacted (as indicated below):[2]

Tab	Document	Filing Status
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT		
1	Term Lender Plaintiffs' Motion For Partial Summary Judgment And Memorandum Of Law In Support Thereof (originally filed under seal on August 5, 2011)	Publicly filed with redactions (attached)
2	Statement Of Undisputed Material Facts In Support Of Plaintiffs' Motion For Partial Summary Judgment (originally filed under seal on August 5, 2011)	Publicly filed with redactions (attached)

[2] Additional documents previously filed under seal related to Plaintiffs' Motion for Partial Summary Judgment, including the evidence submitted in support of the motion that was attached to various appendices of exhibits and testimony, have been filed under separate cover.

Tab	Document	Filing Status
3	Revised Redlined Statement Of Undisputed Material Facts In Support Of Plaintiffs' Motion For Partial Summary Judgment (originally filed under seal on November 14, 2011)	Publicly filed with redactions (attached)
4	Declaration Of Robert W. Mockler And Request For Judicial Notice In Support Of Term Lender Plaintiffs' Motion For Partial Summary Judgment (originally filed under seal on August 5, 2011)	Publicly filed (attached)
5	Appendix Of Exhibits In Support Of Plaintiffs' Motion For Partial Summary Judgment excluding attachments (originally filed under seal on August 5, 2011)	Publicly filed with redactions (attached)
6	Appendix Of Testimony In Support Of Plaintiffs' Motion For Partial Summary Judgment excluding attachments (originally filed under seal on August 5, 2011)	Publicly filed (attached)
PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT		
7	Reply In Support Of Term Lender Plaintiffs' Motion For Partial Summary Judgment (originally filed under seal on September 27, 2011)	Publicly filed with redactions (attached)
8	Term Lender Plaintiffs' Reply To Defendant Bank Of America, N.A.'s Response To Plaintiffs' Statement Of Undisputed Material Facts And Term Lender Plaintiffs' Response To Bank Of America, N.A.'s Statement Of Additional Facts Re Plaintiffs' Motion For Partial Summary Judgment (originally filed under seal on September 27, 2011)	Publicly filed with redactions (attached)
9	Term Lender Plaintiffs' Revised Redlined Reply To Defendant Bank Of America, N.A.'s Response To Plaintiffs' Statement Of Undisputed Material Facts And Term Lender Plaintiffs' Revised Redlined Response To Bank Of America, N.A.'s Statement Of Additional Facts Re Plaintiffs' Motion For Partial Summary Judgment (originally filed under seal on November 14, 2011)	Publicly filed with redactions (attached)
10	Term Lender Plaintiffs' Response To Bank Of America, N.A.'s Evidentiary Objections (originally filed under seal on September 27, 2011)	Publicly filed with redactions (attached)
11	Supplemental Appendix Of Testimony And Exhibits In Support Of Plaintiffs' Motion For Partial Summary Judgment excluding attachments (originally filed under seal on September 27, 2011)	Publicly filed with redactions (attached)

Tab	Document	Filing Status
PLAINTIFFS' SUBMISSION OF RECENTLY PRODUCED DOCUMENTS		
12	Plaintiffs' Notice Of Submission Of Recently Produced Documents In Support Of Plaintiffs' Motion For Partial Summary Judgment And In Opposition To Bank Of America, N.A.'s Motion For Summary Judgment (originally filed under seal on November 14, 2011)	Publicly filed with redactions (attached)
13	Declaration of Robert W. Mockler In Support Of Plaintiffs' Notice Of Submission Of Recently Produced Documents In Support Of Plaintiffs' Motion For Summary Judgment And In Opposition To Bank Of America, N.A.'s Motion For Summary Judgment (originally filed under seal on November 14, 2011)	Publicly filed with redactions (attached)
14	Second Supplemental Appendix Of Exhibits In Support Of Plaintiffs' Motion For Partial Summary Judgment And In Opposition To Bank Of America, N.A.'s Motion For Summary Judgment excluding attachments (originally filed under seal on November 14, 2011)	Publicly filed with redactions (attached)

Date: Miami, Florida
December 6, 2013

.

By: /s/ Lorenz Michel Prüss
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **NOTICE OF FILING ON THE PUBLIC RECORD PLAINTIFFS' BRIEFS AND RELATED FILINGS PREVIOUSLY FILED UNDER SEAL SUPPORTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** was filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically the Notice of Electronic Filing.

Dated: December 6, 2013.

/s/ Lorenz Michel Prüss
Lorenz Michel Prüss

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

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to all actions.

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TERM LENDER PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF

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Plaintiffs, Term Lenders under a $1.85 billion Credit Facility for the construction of the Fontainebleau Hotel and Resort in Las Vegas, bring this motion for partial summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7.5 of the Local Rules of the United States District Court for the Southern District of Florida. Bank of America, N.A. ("BofA") was the Bank Agent and Disbursement Agent under the Credit Facility. Plaintiffs seek a determination that BofA wrongfully and with gross negligence breached its obligations as Bank Agent and Disbursement Agent by improperly disbursing more than $788 million of Term Lender Loan proceeds to the Borrowers when it knew that the bankruptcy and subsequent defaults of a related Lender, Lehman Brothers Holding, Inc., had caused multiple conditions precedent to disbursement to fail.[1]

Plaintiffs base this motion on the incorporated Memorandum of Law, the accompanying Separate Statement of Undisputed Material Facts, Appendix of Exhibits and Appendix of Testimony.

I. INTRODUCTION

Plaintiffs are Term Lenders under a $1.85 billion Credit Facility that provided a portion of the financing for the development and construction of the Fontainebleau Resort and Casino in Las Vegas, Nevada (the "Project"). Additional financing for the Project included a $315 million

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[1] Plaintiffs have alleged numerous additional bases that, individually and collectively, support their claim that BofA breached its obligations and was grossly negligent in disbursing Term Lender Loans in the face of known failures of conditions precedent to disbursement. Other failed conditions precedent include: the Borrowers' concealment of anticipated costs of construction; First National Bank of Nevada's repudiation of its lending commitments under the Credit Agreement; the failure of certain Term Lenders to fund their commitments under the Credit Agreement in March 2009; the failure of the Borrowers to meet the contractual deadlines for submission of Advance Requests in March 2009; and BofA's awareness of numerous negative conditions surrounding the Borrowers and the Project in March 2009. Plaintiffs are not seeking partial summary judgment at this time on these other bases of liability.

Retail Facility, without which the Project could not be completed. Lehman Brothers Holdings, Inc. was the Agent for the Retail Facility and the largest Retail Lender.

BofA was a Revolving Lender and Bank Agent under the Credit Facility. It was also the Disbursement Agent for the Project responsible for controlling the disbursement of all Loan proceeds to the Borrowers. BofA was authorized to make disbursements only when all conditions precedent to disbursement set forth in a Master Disbursement Agreement were satisfied. If any condition were not satisfied, BofA could not disburse and was required instead to issue a Stop Funding Notice. All Lenders, including the Term Lenders, were dependent upon BofA to ensure that the proceeds of their loans were not disbursed contrary to these contractual safeguards.

On September 15, 2008, Lehman filed for bankruptcy. Thereafter, Lehman failed to make Advances required of it under the Retail Facility. BofA understood the significance to the Project of Lehman's bankruptcy, characterizing it as the "death nail" for Fontainebleau. BofA also understood that Lehman's defaults under the Retail Facility caused multiple conditions precedent to disbursement to fail, the most obvious of which was the requirement that "the Retail Lenders shall . . . make any Advances required of them." In the face of these known failures and defaults, BofA disbursed more than $788 million of Term Lender Loans to the Borrowers in reckless disregard of the Term Lenders' rights under the Disbursement Agreement.

BofA then terminated the Revolver Loan under the Credit Agreement on behalf of itself and other Revolver Lenders, asserting unspecified conditions of default. As a result, the Borrowers filed for bankruptcy. By this action, Plaintiffs seek to recover the damages they have suffered as a result of BofA's wrongful conduct.

II. STATEMENT OF FACTS

A. The Project and Its Financing.

Between March and June 2007, Plaintiffs or their predecessors were approached by a syndicate of investment banks, led by Banc of America Securities, to participate in a $1.85 billion bank financing for the development and construction of the Fontainebleau Resort and Casino in Las Vegas, Nevada. The Project was designed to be a 24.4 acre destination casino-resort on the north end of the Las Vegas Strip. It was to include a 63-story glass skyscraper; more than 3,800 guest rooms, suites and condominium units; a 100-foot high three-level podium complex housing casino/gaming areas, restaurants and bars, a spa and salon, a live entertainment theater and rooftop pools; a parking garage with space for more than 6,000 vehicles; and a 353,000 square-foot convention center. The Project also was to include approximately 286,500 square-feet of retail space, including retail shops, restaurants, and a nightclub.

The financing for the Project was comprised of three facilities: a $675 million 2nd Mortgage Note offering (the "Second Lien Facility"); the $1.85 billion bank financing provided under a June 6, 2007 Credit Agreement to Fontainebleau Las Vegas, LLC and Fontainebleau Las Vegas II, LLC (collectively, the "Borrowers"); and a $315 million Retail Facility Agreement to finance construction of the retail portion of the Project.[2] The $1.85 billion bank financing included three tranches: (a) a $700 million Initial Term Loan Facility; (b) a $350 million Delay Draw Term Loan Facility (together with the Initial Term Loan Facility, the "Term Loan

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[2] Ex. 5 at pp. 28-29; Ex. 8 (Retail Loan Agreement ("R.A.")) § 2.1; Ex. 884 at p. 1. All exhibits are attached to the accompanying Appendix of Exhibits and identified by their deposition exhibit number. Exhibits that were not identified during depositions are numbered sequentially beginning with number 1501.

Facilities"), and (c) an $800 million Revolving Loan Facility. Plaintiffs are each lenders under the Term Loan Facilities ("Term Lenders").[3]

The sale of condominiums and the ongoing operation of the Project were the primary sources of repayment for the Loans.[4] The major risk for the Lenders was that the Project would not be completed. The completion of the Project in turn depended upon the existence of sufficient and secure financing. Without the assurance of continuing financing to complete the Project, no lender would have agreed to loan.[5]

The Term Lenders or their predecessors funded the $700 million Initial Term Loan Facility into the Bank Proceeds Account upon the closing of the Credit Agreement in June 2007[6] and funded the majority of the $350 million Delay Draw Term Loan Facility in early March 2009.[7]

B. BofA's Disbursement of Loan Proceeds.

BofA served as Bank Agent (or Administrative Agent) to all lenders under the Credit Agreement and as Disbursement Agent for the benefit of all lenders under the related Master Disbursement Agreement.[8] The Disbursement Agreement governed the disbursement of all funds to the Borrowers under the Credit Agreement, the Second Lien Facility and the Retail Facility. No Term Lender had the right to authorize or prevent disbursements. They were fully dependent upon BofA to ensure that no loan proceeds were disbursed unless all contractual

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[3] Ex. 658 (Credit Agreement ("C.A.")) § 2.1.

[4] Exs. 3, 4; C.A. § 2.11(a).

[5] *See* Ex. 1503 (Pryor Report) at ¶ 14.

[6] Ex. 644; Ex. 1501 at pp. 12-13, V-2.

[7] Exs. 636, 642, 643.

[8] C.A. § 9.1(a); Ex. 72 (Master Disbursement Agreement ("D.A.")) § 9.1.

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safeguards were met. BofA served as the last line of defense for each of the Lenders to protect against the improper transfer of funds to the Borrowers.

BofA's activities as Bank and Disbursement Agents for the Project were managed by its Corporate Debt Products Group.[9] Jeff Susman, a Senior Vice President of Corporate Debt Products, had primary management responsibility until his departure from BofA in February 2009.[10] In undertaking its responsibilities under the Disbursement Agreement, BofA agreed "to exercise commercially prudent practices in the performance of its duties consistent with those of similar institutions holding collateral, administering construction loans and disbursing disbursement control funds."[11]

The Borrowers gained access to funds from the Revolving Facility, the Delay Draw Facility, and the Retail Facility in two steps.[12] After appropriate notice and subject only to specific conditions precedent in each of the agreements, the Lenders remitted funds to BofA (as Bank Agent).[13] For loans used to fund the construction of the Project, known as "Disbursement

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[9] Susman Depo., 18:21-19:18, 39:18-40:5, 49:22-50:15, 52:2-7, 53:10-22, 59:1-25, 62:14-18, 63:24-64:5, 65:6-17, 68:8-14, 70:8-23, 253:12-254:1. The nominal Bank/Administrative Agent, Mr. Naval, and Disbursement Agent, Ms. Brown, described their roles as ministerial. Brown Depo., 11:2-9, 30:14-31:10, 32:4-6, 32:16-34:4, 35:7-36:2, 36:8-11, 39:8-40:2, 63:22-64:16, 87:21-88:10, 95:17-96:19; Naval Depo., 14:17-25, 15:13-16:6; 20:21-22:8; 23:25-24:3, 25:17-21, 27:25-28:7, 29:4-6, 35:18-36:20, 56:10-57:7, 96:8-13, 98:23-99:4. (All deposition testimony is attached to the accompanying Appendix of Transcripts under the tab corresponding to the deponent's name.) They both reported to and took direction from the Corporate Debt Products Group, who made all decisions relating to the disbursement of the loans. Bolio Depo., 24:5-12, 26:2-27:25, 28:8-29:2, 30:1-15, 32:21-33:4, 71:10-72:9, 83:3-7, 86:3-13, 279:9-18; Brown Depo., 30:14-31:10, 32:4-6, 33:10-34:4, 35:7-36:2, 49:7-50:19, 63:22-64:16, 87:21-88:10; Naval Dep., 20:21-22:8, 23:25-24:3, 29:4-6, 56:10-57:7, 58:2-8, 96:8-13, 98:23-99:4.

[10] *Id.*; Ex. 1; Susman Depo., 14:20-15:25.

[11] D.A. § 9.1.

[12] Ex. 808 at pp. 3-4.

[13] C.A. §§ 5.1, 5.2.

Agreement Loans," BofA (as Bank Agent) paid the funds into the Bank Proceeds Account.[14] The Borrowers had no access to funds in the Bank Proceeds Account.[15]

In order to obtain funds from the Bank Proceeds Account (including the Initial Term, Delay Draw and Revolver Loans), the Borrowers were required to submit an "Advance Request" to BofA (as Disbursement Agent).[16] Only when each of the conditions precedent to disbursement set forth in Section 3.3 of the Disbursement Agreement were fully satisfied was BofA authorized to disburse loan proceeds to the Bank Funding Account (and ultimately to the Resort Payment Account from which the Borrowers could access funds).[17] The conditions precedent to disbursement included:

- **§ 3.3.2** – each representation and warranty of each Project Entity in Article 4 was true and correct as if made on such date;
- **§ 3.3.3** – there was no Default or Event of Default under any of the Financing Agreements;
- **§ 3.3.21** – BofA as Bank Agent was not aware of any information that was inconsistent in a material and adverse manner to other information disclosed concerning the Project;
- **§ 3.3.23** – the Retail Agent and Retail Lenders under the Retail Facility had made all Advances required of them under the Advance Request; and

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[14] Ex. 1501 at pp. 12-13, V-2; C.A. § 2.1(b)(iii).

[15] D.A. §§ 2.2, 2.3.

[16] D.A. § 2.4.

[17] Specifically, once the conditions precedent were fully satisfied, BofA, together with the Project Entities, issued an Advance Confirmation Notice, authorizing BofA (as Bank Agent) to advance funds from the Bank Proceeds Account to the Bank Funding Account. *Id.* at §§ 2.4.6, 2.6.1(b). Once the funds were advanced to the Bank Funding Account, BofA (as Disbursement Agent) then disbursed them to the Borrowers. *Id.* at §§ 2.4.6, 2.6.2.

- **§ 3.3.24** – BofA as Bank Agent received any other documents and evidence customary for transactions of this type as it reasonably requested in order to evidence the satisfaction of the other conditions precedent.

BofA (as Bank Agent) had discretion to waive these conditions precedent.[18] Any such waiver, however, was required to be in writing and was effective "only to the extent in such writing specifically set forth."[19] BofA never waived any conditions precedent to disbursement.[20]

If any condition precedent to disbursement were not satisfied, BofA (as Disbursement Agent) was obligated to issue a "Stop Funding Notice."[21] Upon the issuance of a Stop Funding Notice, (1) BofA could not "withdraw, transfer or release any funds on deposit in the Accounts," including the Bank Proceeds Account,[22] and (2) the Lenders were relieved of any obligation under the Credit Agreement to make additional Loans.[23] Until the circumstances giving rise to the Stop Funding Notice were resolved, all Loans remained in the Bank Proceeds Account.

C. The Retail Facility and Lehman's Bankruptcy.

The Retail Facility was a critical component of the overall financing. The Retail Facility provided funding for the construction of the retail portion of the Project as well as certain "Shared Costs," including the construction costs to complete the Podium.[24] Fontainebleau and

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[18] *Id.* at § 3.7.2.

[19] *Id.* at § 11.3.

[20] Howard Depo., 76:17-77:2, 77:17-20, 129:20-130:1; Varnell Depo., 182:20-183:1. *See also* Susman Depo., 171:24-172:22.

[21] D.A. § 2.5.1.

[22] *Id.* at § 2.5.2(a)(ii).

[23] C.A. § 2.4(e).

[24] D.A. at Ex. A, p. 31.

BofA both understood and agreed that without the Retail Financing, the Project could not be built.[25]

Lehman Brothers Holdings, Inc. was the Agent for the Retail Facility as well as the largest Retail Lender, responsible for $215 million, or 68.25% of the Retail Facility.[26] As of the Closing Date, $125.4 million of the Retail Facility had been advanced, leaving $189.6 million remaining to be funded.[27] On September 15, 2008, slightly more than halfway through the construction of the Project, Lehman filed for bankruptcy.[28]

BofA recognized that Lehman's bankruptcy was material: it meant that there were no assurances that Lehman would continue to fund its commitments under the Retail Facility.[29] BofA also recognized that without a replacement lender, Lehman's failure to fund created a hole in the financing that could cause the Project to shut down.[30] Mr. Susman considered Lehman's bankruptcy to be "[a] big issue" for Fontainebleau.[31] Others at BofA were more graphic. Bret Yunker, Vice President of the Global Gaming Team at Banc of America Securities and one of

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[25] Freeman Depo., 56:24-57:3; Howard Depo., 39:13-40:6; [redacted] Susman Depo., 154:13-155:2; Yunker Depo., 35:22-38:8; 38:16-39:2.

[26] Ex. 9 at Ex. A; Ex. 23; Ex. 831; Ex. 1504.

[27] R.A. § 2.1.

[28] [redacted]

[29] Exs. 67, 68, 206, 251, 831, 896, 899, 907; Bolio Depo., 40:17-41:10; Brown Depo., 85:17-86:4, 112:19-113:4, 130:11-19; Howard Depo., 27:22-28:9, 109:8-112:7; Susman Depo., 145:16-147:24, 213:14-21, 220:22-221:18; Varnell Depo., 69:7-10; Yunker Depo., 24:17-25:6, 52:13-53:4, 63:19-64:10.

[30] Howard Depo., 39:13-40:6; Susman Depo., 145:16-147:24, 150:22-151:5, 154:13-155:2; Yunker Depo., 35:22-38:8, 38:16-39:2.

[31] Ex. 896; Susman Depo., 150:22-151:2.

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the architects of the Disbursement Agreement,[32] described Lehman's bankruptcy as the "death nail"[33] for Fontainebleau.[34]

D. BofA Learns That Lehman Failed to Make Required Retail Advances.

BofA's concern was well taken. Lehman failed to fund its portion of the Retail Advances for September 2008[35] and at all times after December 2008.[36] These failures constituted "Lender Defaults" under the Retail Facility[37] and, as set forth in more detail below, caused numerous conditions precedent to disbursement to fail. BofA nonetheless refused to issue the required Stop Funding Notices. Instead, in the face of known failed conditions precedent, BofA disbursed more than $788 million of Term Lender funds to the Borrowers.[38]

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[32] Ex. 1; Varnell Depo., 176:8-14; Yunker Depo., 84:18-85:8.

[33] Ex. 67; Yunker Depo., 39:3-23.

[34] At least one Term Lender, Highland Capital Management, was similarly concerned and notified BofA that Lehman's bankruptcy resulted in the failure of several conditions precedent to funding. Exs. 79-81, 455, 456, 473, 898, 1502.

[35] Exs. 14, 50, 56, 61; Freeman Depo., 75:13-22; [redacted] Kotite Depo., 22:13-16; Susman Depo., 264:24-265:3.

[36] Exs. 21-23, 28, 29, 34, 35, 38, 40, 41, 46, 47, 53, 54, 57, 59, 61; Bolio Depo., 90:1-91:12; Freeman Depo., 117:13-119:2, [redacted]; Rafeedie Depo., 69:22-70:3, 83:16-21, 97:9-13; Susman Depo., 270:10-19.

[37] R.A. § I, p. 15. A proof of claim filed by the Retail Borrower in Lehman's bankruptcy case listed Lehman's failure to pay beginning in September 2008 and on four occasions thereafter as defaults under the Retail Facility. Ex. 1504.

[38] BofA disbursed: $99,332,189.81 of the Initial Term Loan on September 25, 2008; $101,914,293.51 of the Initial Term Loan on October 28, 2008; $143,838,250.93 of the Initial Term Loan on November 25, 2008; $102,800,125.34 of the Initial Term Loan on December 30, 2008; $88,801,951.38 of the Initial Term Loan on January 28, 2009; $50,241,078.79 of the Initial Term Loan on February 25, 2009; $68,000,000 of the Delay Draw Term Loan on March 10, 2009; [redacted] Exs. 237, 243-252, 622-629, 634-636, 639-642, 653-655.

(1) Lehman Fails to Make the September 2008 Retail Advance.

Fontainebleau funded Lehman's share of the September Retail Advance[39] and BofA knew it.[40] Shortly after Lehman filed for bankruptcy, BofA learned that Fontainebleau was considering funding Lehman's share of the September Retail Advance.[41] Jim Freeman, Fontainebleau's CFO,[42] and BofA's Brett Yunker had conversations "concerning the possibility of Fontainebleau Resorts, or some affiliate, funding Lehman's portion of the September draw."[43] Following this conversation, BofA analyzed the implications of Fontainebleau paying Lehman's commitment.[44] Specifically, BofA looked to Section 3.3.23 of the Disbursement Agreement that required as a condition precedent to disbursement that the Retail Lenders make all Advances required of them.[45] BofA correctly concluded that Fontainebleau's payment of Lehman's Retail Advance would cause the Section 3.3.23 condition to fail.[46]

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[39] Exs. 14, 56, 61, 78, 80, 1502; Freeman Depo., 75:13-76:4; [redacted] Kotite Depo., 22:13-16; Susman Depo., 264:24-265:3.

[40] "The Court is not permitted to deny a summary judgment motion based on unreasonable inferences that amount to nothing but speculation or conjecture." *Concepcion v. Dowd*, 2011 U.S. Dist. LEXIS 69158 (M.D. Fla. June 28, 2011) (citing *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005)).

[41] Exs. 73, 204, 475 at BANA_FB00846432; Varnell Depo., 174:9-14, 174:21-175:4, 181:10-15; Yunker Depo., 73:6-22, 81:13-83:14, 87:3-89:13, 96:25-97:17, 103:2-105:2.

[42] Freeman Depo., 12:10-14.

[43] Yunker Depo., 73:6-16.

[44] Ex. 204; Bolio Depo., 42:9-43:8, 43:16-44:15; Susman Depo., 167:13-23; Yunker Depo., 73:6-75:13, 96:11-20.

[45] Bolio Depo., 45:7-22; Howard Depo., 65:4-66:11; Susman Depo., 168:21-169:20; Yunker Depo., 96:11-20, 110:19-112:12.

[46] Exs. 204, 475, 804; Bolio Depo., 46:10-47:2, 57:14-58:1; Brown Depo., 72:16-73:1; Howard Depo., 118:19-119:22; Susman Depo., 159:2-162:14, 169:17-20, 175:16-23, 250:22-251:20, 258:9-16; Yunker Depo., 96:11-20, 97:18-98:6, 110:19-112:12.

BofA never discussed its conclusion with Fontainebleau.[47] Fontainebleau, however, apparently came to this same conclusion on its own. Having initially informed BofA that it was considering the option of funding Lehman's share, Fontainebleau subsequently avoided discussions on this critical issue and refused to return calls from Lenders.[48] BofA requested that Jim Freeman participate in a call with the Lenders "to discuss the implications of the recent bankruptcy filing by Lehman" on the Project.[49] Mr. Freeman refused.[50]

Lehman's bankruptcy was of substantial concern to the Lenders. On September 26, 2008, Andrei Dorenbaum, counsel for Highland Capital Management (one of the original Term Lenders), notified Mr. Susman that Lehman's bankruptcy meant that "[n]o disbursements may be made under the Loan Facility."[51]

On October 6, 2008, Kevin Rourke of Highland informed David Howard, the Managing Director of Syndications at Banc of America Securities,[52] of public reports that Fontainebleau had paid Lehman's share of the September Retail Advance and expressed his concern regarding "[m]anagement's continued evasiveness."[53] On October 13, 2008, Mr. Dorenbaum informed BofA's outside counsel, Bill Scott, of a Merrill Lynch analyst report stating that Fontainebleau

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[47] Freeman Depo., 74:12-24; Yunker Depo., 96:11-98:6.

[48] Ex. 205; Howard Depo., 104:14-106:23; [redacted] Susman Depo., 224:2-9, 227:7-228:13, 247:4-248:18; Yunker Depo., 167:17-169:6.

[49] Ex. 901.

[50] Howard Depo., 104:14-106:23; Susman Depo., 224:25-226:2, 227:7-228:13.

[51] Ex. 455. On that same day, Mr. Dorenbaum had additional communications with BofA and its outside counsel regarding the implications of Lehman's bankruptcy with respect to the Project. Exs. 473, 898.

[52] Ex. 1; [redacted], 21:3-23.

[53] Ex. 81. Mr. Howard alerted Mr. Susman and others at BofA of Mr. Rourke's concerns. Ex. 230.

had "funded the amount required from Lehman on the retail credit facility."[54] Mr. Dorenbaum confirmed with Mr. Scott their mutual understanding "that Lehman has not made any disbursements while in bankruptcy."[55] Mr. Varnell of BofA sent the Merrill Lynch report to Mr. Freeman at Fontainebleau, but never asked Mr. Freeman to confirm or deny that Fontainebleau had funded for Lehman.[56]

Mr. Rourke and Mr. Dorenbaum also separately informed BofA and its counsel that Fontainebleau's funding of Lehman's share of the September Advance would cause the condition precedent in Section 3.3.23 to fail (a conclusion BofA had already reached on its own).[57]

Under pressure from Lenders, on September 30, 2008, BofA wrote to Mr. Freeman and again requested a call to discuss issues related to Lehman's bankruptcy.[58] Specifically, BofA asked:

> Did Lehman fund its portion of the requested $3,789,276.00 of Shared Costs last Friday (9/26/08) or was this made up from other sources? If Lehman did not fund its portion, what were the other sources?

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[54] Exs. 78, 80, 1502. Others within BofA were aware of the Merrill Lynch analyst report. Yunker Depo., 150:9-15.

[55] Exs. 80, 1502. Mr. Scott thereafter forwarded Mr. Dorenbaum's email and the Merrill Lynch report to the BofA team, including Jon Varnell, a Managing Director of the Global Gaming Team at Banc of America Securities involved in structuring the financing for the Project (Ex. 1), and Mr. Susman. (Exs. 78, 80, 1502)

[56] Ex. 233; Freeman Depo., 97:7-99:25; Varnell Depo., 208:1-210:11.

[57] Exs. 80, 472; [redacted]

[58] Ex. 76.

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BofA already knew that the retail portion had been paid.[59] What it wanted to know was the *source* of that payment. Rather than participating in a call in which the Lenders would be able to press for an answer to this question,[60] Mr. Freeman sent a memo on October 7, 2008 stating: "In August and September, the retail portion of … shared costs was $5mm and $3.8mm respectively, all of which was funded."[61] This shift to the passive voice effectively answered the first question. The funding was from other sources.

Eliminating any doubt that Lehman had not paid its share, [redacted][63] So was the fact that the other Retail Lenders were not willing to assume Lehman's commitment under the Retail Facility.[64] Indeed, Fontainebleau and the Retail Lenders asked BofA to take over

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[59] Ex. 241; Brown Depo., 42:4-8, 43:18-24; [redacted]

[60] Mr. Freeman testified that he told Mr. Susman and/or Mr. Howard that there were "limitations on what we were and weren't allowed to say, based on our discussions with counsel." Freeman Depo., 106:11-109:9. *See also* Ex. 205; Howard Depo., 104:14-106:23; Susman Depo., 247:4-247:18; Yunker Depo., 167:17-169:6.

[61] Ex. 77. This of course did not answer BofA's question regarding the *source* of Lehman's payment. Exs. 77, 903; Bolio Depo., 79:18-81:6; Freeman Depo., 92:17-94:3, 226:24-227:20; Susman Depo., 252:2-10; Varnell Depo., 192:19-193:1; Yunker Depo., 147:19-148:7.

[62] Exs. 16, 18, 231, 232.

[63] [redacted]

[64] Ex. 19 at p. 3; [redacted]

Lehman's remaining commitment and fill the funding gap.[65] Although it was entitled to do so under an Intercreditor Agreement with Lehman and the Retail Borrower,[66] BofA refused.[67]

(2) BofA Knows But Ignores Information that Contradicts Fontainebleau's Representations.

BofA knew from multiple sources information that resulted in the failure of multiple conditions precedent. Under such circumstances, BofA was not authorized to disburse Loan proceeds to the Borrowers. BofA's witnesses agree. Mr. Susman oversaw BofA's agency responsibilities and testified that it would not be reasonable for BofA to disregard information that was inconsistent with representations of the Borrowers and that he would expect BofA to inquire further to determine the truth before disbursing.[68]

So would both banking experts. Shepherd Pryor, a commercial banker with over 35 years of experience, testified that 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 by a borrower.[69] Rather, the agent should refuse to disburse until all of the inconsistencies were addressed.[70] BofA's expert, Daniel Lupiani, based his opinion in large part on a Handbook published by a trade association for the floating rate corporate loan market, which, in pertinent part, concludes:

> Credit agreements do not normally allow the mere delivery of a certificate to satisfy the condition itself; rather, the condition will

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[65] Ex. 907; Howard Depo., 112:9-114:4, 143:18-146:13; Susman Depo., 277:19-278:9.

[66] Ex. 884 § 7.1.

[67] Howard Depo., 112:9-114:9, 143:18-146:13.

[68] Susman Depo. 181:9-19, 182:22-183:20. *See also* Bolio Depo., 164:20-165:12, 175:6-18; Varnell Depo., 211:13-212:5.

[69] Ex. 1503 at ¶¶ 33-38.

[70] *Id.*

> go to the underlying facts, so that, if the lenders have reason to believe that the certificate is inaccurate, they are not barred from asserting that the condition has not been satisfied.[71]

Mr. Lupiani agrees with this proposition. He testified that if an agent had reliable information that was inconsistent with representations and warranties in certificates provided by the borrower, it would be commercially reasonable for the agent to inquire with the borrower and verify the information rather than disbursing in blind reliance on the certificates.[72]

BofA had the undisputed right to seek additional information. Section 3.3.24 of the Disbursement Agreement conditioned disbursement on BofA's receipt of "such other documents and evidence as are customary for transactions of this type as the Bank Agent may reasonably request in order to evidence the satisfaction of the other conditions set forth above." Thus, where BofA had information inconsistent with the Borrowers' certificates, it had the right prior to disbursing to demand additional information sufficient to demonstrate that all conditions to disbursement had been satisfied. BofA did so, specifically asking Mr. Freeman about the source of payment of the Lehman Advance.[73] After Mr. Freeman answered by his careful shift to the passive voice, BofA ignored its own information and behaved as though it had received a different answer.[74]

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[71] ALLISON TAYLOR & ALICIA SANSONE, THE HANDBOOK OF LOAN SYNDICATIONS AND TRADING 274 (McGraw Hill and the Loan Syndication and Trading Association 2007).

[72] Lupiani Depo., 89:8-90:8, 132:11-19, 151:7-17, 153:7-155:9, 166:20-167:24. Indeed, Section 2.6.3 of the Disbursement Agreement specifically precluded BofA from disbursing funds unless the Retail Lenders had, in fact, made the Advances required of them.

[73] Ex. 76.

[74] Freeman Depo., 92:17-94:3, 109:15-110:8.

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(3) [redacted]

Beginning in December 2008, Lehman informed Fontainebleau that it would not fund its commitments under the Retail Facility.[75] [redacted] However, ULLICO refused to assume Lehman's obligations under the Retail Facility.[78] [redacted] BofA also knew that ULLICO had not and would not agree to

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[75] Exs. 21, 22, 28, 34, 40, 804; Freeman Depo., 117:13-22, 118:24-119:2.

[76] Exs. 24, 30, 36, 42.

[77] Exs. 23, 24, 26, 29, 30, 31, 32, 35-38, 41-48, 53, 54, 59, 61-63; Freeman Depo., 126:25-127:12, 128:16-129:16; [redacted] Rafeedie Depo., 83:16-84:2, 98:19-99:2.

[78] Exs. 206, 609, 814; Ex. 831 at p. 4; Ex. 906 at BANA_FB00811830; Ex. 907; [redacted].

[79] Exs. 58, 62, 239, 240, 479, 481; Ex. 607 at BANA_FB00846453; Ex. 804; Ex. 905; Ex. 906 at BANA_FB00811830; Bolio Depo., 83:13-84:12, 90:1-91:12; Rafeedie Depo., 79:25-80:2, 86:11-22, 97:9-19, 103:24-104:6, 105:16-107:1; Susman Depo., 269:24-270:19.

assume Lehman's remaining commitment.[80] BofA thus knew that the financing gap created by Lehman's bankruptcy had not been cured. On February 20, 2009, at the Lenders' insistence, BofA again demanded that the Borrowers "comment on the status of the Retail Facility, and the commitments of the Retail Lenders to fund under the Retail Facility, in particular, whether you anticipate that Lehman Brothers Holdings, Inc. will fund its share of requested loans, and whether the other Lenders under the Retail Facility intend to cover any shortfalls."[81] Again, the Borrowers failed to provide a meaningful response to BofA's questions.[82] And, again, BofA continued disbursing Term Lender Loans.

E. BofA Terminates Funding and the Project Collapses.

On April 20, 2009, after disbursing approximately $788 million of Term Lender proceeds and at a time when there were no Revolver Loans outstanding, BofA, on behalf of itself and other Revolver Lenders, terminated the Revolver Loan under the Credit Agreement, asserting unspecified conditions of default.[83] As a result, on June 9, 2009 the Borrowers filed a Chapter 11 Petition in the United States Bankruptcy Court for the Southern District of Florida.[84]

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[80] Exs. 115, 206, 251, 493, 609, 814; Ex. 831 at p. 4; Ex. 906 at BANA_FB00811830; Ex. 907; Howard Depo., 111:7-113:10, 142:13-146:13, 147:25-148:6; [redacted] Susman Depo., 273:7-274:1, 277:19-278:9.

[81] Exs. 497, 498.

[82] Ex. 811; Yu Depo., 125:25-126:14.

[83] Ex. 827.

[84] *In re Fontainebleau Las Vegas Holdings, LLC et al.*, Case No. 09-21481-BKC-AJC.

III. ARGUMENT

A. Summary Judgment Standard.

Partial summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[85] A party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact as to a dispositive issue.[86] Once the moving party has met this burden, the party opposing the motion must produce specific evidence establishing the existence of a genuine factual dispute that a reasonable jury could find in its favor.[87] The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts."[88] A "mere scintilla" of evidence will not do; rather, "the non-moving party must produce substantial evidence."[89] To withstand a summary judgment motion, sufficient evidence must exist upon which reasonable fact finders could resolve the issue in favor of the non-moving party.[90] Thus, summary judgment is proper where there is "an absence of evidence to support the non-moving party's case."[91]

Under governing New York law,[92] "courts must enforce written agreements according to the plain meaning of their terms."[93] "In the absence of ambiguity, the intent of the parties must

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[85] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *see also* Fed. R. Civ. P. 56(c).

[86] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

[87] Fed. R. Civ. P. 56; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

[88] *Matsushita*, 475 U.S. at 586.

[89] *Garczynski v. Bradshaw*, 573 F.3d 1158, 1165 (11th Cir. 2009).

[90] *Anderson*, 477 U.S. at 248-49; *Matsushita*, 475 U.S. at 587.

[91] *Celotex Corp.*, 477 U.S. at 325.

[92] New York law governs the terms of the Disbursement, Credit and Retail Agreements. D.A. § 11.6; C.A. § 10.11; R.A. § 11.3.

[93] *In re Fontainebleau Las Vegas Contract Litig.*, 716 F. Supp. 2d 1237, 1251 (S.D. Fla. 2010) (quoting *Greenfield v. Philles Records*, 98 N.Y. 2d 562, 569 (N.Y. 2002)).

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be determined from their final writing and no parol evidence or extrinsic evidence is admissible."[94] Ambiguity "is determined by looking within the four corners of the document, not to outside sources."[95] The test "is whether an objective reading of a term could produce more than one reasonable meaning."[96] "A party . . . may not create ambiguity in otherwise clear language simply by urging a different interpretation."[97]

B. BofA Breached Its Obligations Under the Disbursement Agreement When it Disbursed Hundreds of Millions of Dollars of Term Lender Funds Knowing that Lehman Failed to Meet Its Commitments Under the Retail Facility.

BofA disbursed $788 million of Term Lender funds to the Borrowers during and after September 2008. As set forth in more detail below, BofA's disbursement of these funds during times when Lehman failed to fund its commitments under the Retail facility violated conditions precedent to disbursement under the Disbursement Agreement, preventing BofA from disbursing and requiring it to issue Stop Funding Notices.

(1) Lehman's Failure to Make All Required Advances Caused Section 3.3.23 of the Disbursement Agreement to Fail.

To ensure that loan proceeds were not disbursed if funding under the Retail Facility became impaired, Section 3.3.23 provided as an express condition precedent to disbursement that the "the Retail Agent and the Retail Lenders shall . . . make any Advances required of them . . . ."[98] Section 2.6.3 amplified this condition: "The Disbursement Agent shall not release any

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[94] *Int'l Klafter Co. v. Cont. Cas. Co.*, 869 F.2d 96, 100 (2d Cir. 1989).

[95] *Kass v. Kass*, 91 N.Y. 2d 554, 566 (N.Y. 1998) (citation omitted).

[96] *McNamara v. Tourneau, Inc.*, 464 F. Supp. 2d 232, 238 (S.D.N.Y. 2006) (citing *Collins v. Harrison-Bode*, 303 F.3d 429, 433 (2d Cir. 2002)).

[97] *Id.* (citing *Metro. Life Ins. Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d Cir. 1990)).

[98] Section 3.3.23 is applicable "[i]n the case of each Advance from the Bank Proceeds Account made concurrently with or after the Exhaustion of the Second Mortgage Proceeds Account...."

Advances to the Project Entities until . . . the Retail Lenders have made any requested Loans under the Retail Facility."

The "Advances required of" the Retail Lenders were several, not joint.[99] No Retail Lender was required to make any Advance on behalf of any other Retail Lender; and the failure by any Retail Lender to make an Advance required of it created a potential funding gap that could threaten the entire Project. By conditioning disbursement of Loan proceeds to the Borrowers upon the payment by each Retail Lender of the Advances required of it, Section 3.3.23 provided an early-warning system for funding issues under the Retail Facility.

BofA understood the important function of Section 3.3.23. Mr. Yunker, one of the primary drafters of the Disbursement Agreement, testified that funding of Lehman's share by Fontainebleau was a "potential violation" preventing disbursement;[100] and Mr. Susman, the person in charge of BofA's agency responsibilities, testified that he understood that such payments would cause the Section 3.3.23 condition precedent to fail.[101]

Lehman's bankruptcy and subsequent failure to make the Advances required of it violated the plain language of Section 3.3.23 created a funding hole in available funds of more than $120 million, the vast bulk of the remaining Retail Facility.[102] BofA was thus prohibited from disbursing loan proceeds unless and until such violations were cured or otherwise excused by the Lenders, which they never were.

The September 2008 Advance disbursed Initial Term Loans while concurrently exhausting the Second Mortgage Proceeds Account. Ex. 890.

[99] R.A. § 9.7.2(b).

[100] Yunker Depo., 84:18-85:8, 96:11-20; 97:18-98:6, 110:19-112:12.

[101] Susman Depo., 160:1-162:14, 169:17-20; 175:16-23, 250:22-251:20, 258:9-16. Obviously, Fontainebleau was not a Retail Lender.

[102] This breach and probable shortfall also violated the "Material Adverse Effect" clause. D.A. § 3.3.11.

(2) BofA's Knowledge of Information Materially and Adversely Inconsistent With The Borrowers' Certifications Caused Section 3.3.21 of the Disbursement Agreement to Fail.

Section 3.3.21 of the Disbursement Agreement established the following condition precedent to disbursement:

> [BofA as] Bank Agent shall not have become aware … of any information or other matter affecting any Loan Party, Turnberry Residential, the Project or the transactions contemplated hereby that taken as a whole is inconsistent in a material and adverse manner with the information or other matter disclosed to them concerning such Persons and the Project, taken as a whole.

In connection with each Advance Request, the Borrowers were required to and did represent and warrant that all conditions precedent to disbursement, including Lehman's funding of its commitments under the Retail Facility, had been satisfied.[103] BofA knew (or was grossly negligent and studiously ignorant in not knowing) that this was not true: [redacted] BofA also knew that no one else had or was willing to assume Lehman's continuing obligations.[104] Lehman's failure to fund was

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[103] Exs. 263-265, 269-271, 331, 694. These certifications were self-reaffirming on the date of each scheduled Advance.

[104] Exs. 115, 206, 251, 493, 609, 814; Ex. 831 at p. 4; Ex. 906 at BANA_FB00811830; Ex. 907; Howard Depo., 111:7-113:10; 142:13-146:13; 147:25-148:6; [redacted]; Susman Depo., 273:7-274:1, 277:19-278:9.

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inconsistent with the information provided by the Borrowers and was, according to BofA's own witnesses, material and adverse to the Project.[105]

BofA's awareness of this information caused Section 3.3.21 to fail and prohibited BofA from disbursing loan proceeds unless and until such violations were cured or otherwise excused by the Lenders, which they never were.

(3) The Borrowers' Refusal to Provide BofA Information Regarding the Source of Lehman's Share of the September Retail Advance Caused Section 3.3.24 of the Disbursement Agreement to Fail.

Section 3.3.24 conditions disbursement on BofA (as Bank Agent) having "received such other documents and evidence as are customary for transactions of this type as the Bank Agent may reasonably request in order to evidence the satisfaction of the other conditions set forth above." But when BofA wrote to Mr. Freeman and specifically requested the *source* of payment of Lehman's share of the September Retail Advance,[106] Mr. Freeman effectively refused to provide any meaningful response.[107]

The Borrowers' failure to provide this information caused the Section 3.3.24 condition precedent to fail and prohibited BofA from disbursing loan proceeds unless and until the requested information was provided, which it never was.

(4) Lehman's Bankruptcy Filing and Its Subsequent Failures To Fund Were Defaults Under the Disbursement Agreement that Caused Section 3.3.3 and 3.3.2(a) of the Disbursement

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[105] Exs. 67, 68, 206, 251, 831, 896, 899, 907; Bolio Depo., 40:17-41:10; Brown Depo., 85:17-86:4, 112:19-113:4, 130:11-19; Howard Depo., 27:22-28:9, 39:13-40:6, 109:8-112:7; Susman Depo., 145:16-147:24, 150:22-151:5, 154:13-155:2, 213:14-21, 220:22-221:18; Varnell Depo., 69:7-10; Yunker Depo., 24:17-25:6, 35:22-38:8, 38:16-39:2, 52:13-53:4, 63:19-64:10.

[106] Ex. 76.

[107] Mr. Freeman continued this pattern in February 2009 when he again failed to provide any meaningful response to BofA's inquiries concerning payment of Lehman's obligations under the Retail Facility. *See* Exs. 497, 498, 811; Yu Depo., 125:25-126:14.

Agreement to Fail.

Section 3.3.3 of the Disbursement Agreement conditions disbursement on the lack of any Default or Event of Default under the Disbursement Agreement. Defaults and Events of Default under the Disbursement Agreement include Defaults and Events of Default under the Facility Agreements,[108] which in turn included the Credit Agreement.[109]

Section 8(j) of the Credit Agreement provides that it is a Default if any person "shall breach or default under any term, condition, provision, covenant, representation or warranty contained in any Material Agreement . . . ." The Material Agreements, listed on Schedule 4.24 to the Credit Agreement, include the Financing Agreements, which includes the Retail Facility Agreement.[110] Accordingly, any breach or default under the Retail Facility Agreement was a Default under both the Credit Agreement and, as a result, the Disbursement Agreement.

The Retail Facility Agreement was executed as part of a unified transaction for the financing of the Project that included the Disbursement Agreement and the Credit Agreement. All three agreements were entered into on the same day, related to the financing of the same Project and contained cross-default provisions. These agreements thus are integrated as a matter of law and must be interpreted together.[111]

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[108] D.A. § 7.1.1, Ex. A, p. 10.

[109] D.A. § 7.1.1, Ex. A, p. 12.

[110] C.A. Schedule 4.24; D.A. at Ex. A, pp. 12, 14.

[111] *See This Is Me, Inc. v. Taylor,* 157 F.3d 139, 143 (2d Cir. 1998) ("Under New York law, all writings forming part of a single transaction are to be read together," even where they are not all between the same parties); *Manufacturers and Traders Trust Company v. Erie County Industrial Development Agency*, 703 N.Y.S.2d 636, 638 (N.Y. 2000) ("While Empire is not a party to the indenture agreement, and M&T is not a party to the letter of credit and reimbursement agreement, both agreements are integral parts of the same business transaction to which M&T and Empire are parties, and each agreement refers to the other. The subordination agreement is a contemporaneous agreement between M&T and Empire relating to the same subject matter. Thus, all of those agreements must be read together and reconciled, if possible.").

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BofA was a party to the Disbursement and Credit Agreements as well as the Intercreditor Agreement for the Retail Facility.[112] As Disbursement Agent, BofA was responsible for ensuring that all conditions precedent, including the absence of Defaults or Events of Default under the Retail Facility, were satisfied before disbursing funds to the Borrowers. Indeed, in the event of a default by Lehman as the Retail Agent, BofA had the "Default Purchase Option" to assume the Lenders' outstanding obligations of the defaulting Retail Lender.[113] Accordingly, BofA is charged with knowledge of the related Retail Facility Agreement.

When Lehman filed for bankruptcy, it became a "Defaulting Lender" under the Retail Facility Agreement.[114] Its failures to fund Advances as they came due in breach of its obligations[115] were additional "Lender Defaults."[116] Lehman's defaults were not cured by Fontainebleau's payment of Lehman's share in September 2008 [redacted][117] Even after such payments, Lehman remained a Defaulting Lender.[118]

Lehman's breaches and defaults under the Retail Facility constituted a Default under the Disbursement Agreement. These breaches and defaults prevented the satisfaction of the

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[112] Ex. 884.

[113] *Id.* at § 7.1. As the Bank Agent, BofA also received all amendments to the Retail Facility Agreement. C.A. § 6.2(f).

[114] R.A. § I, p. 8.

[115] R.A. § 2.1.2(c), (e)(ii).

[116] R.A.§ I, p. 15.

[117] [redacted] *See* R.A. § 2.1.2(e)(iii).

[118] [redacted] Exs. 23, 29, 35, 41.

condition of Section 3.3.3 that "no Default or Event of Default shall have occurred and be continuing." They also prevented the satisfaction of the condition of Section 3.3.2(a) that all representations and warranties "set forth in Article 4 . . . shall be true and correct in all material respects . . . ." Pursuant to Article 4, the Borrowers represented and warranted in each Advance Request that "[t]here is no default or event of default under any of the Financing Agreements [including the Retail Agreement]"[119] and further represented that "[t]here is no Default or Event of Default hereunder."[120] Both of these representations and warranties were rendered false by Lehman's defaults.[121]

Despite these known defaults and failed conditions, BofA continued to disburse.

C. BofA's Disbursement of Term Lender Funds in the Face of Known Failures of Conditions Precedent to Disbursement Was, at a Minimum, Grossly Negligent.

BofA is liable for all loss, including any "loss that may occur by reason of . . . false representations," caused by BofA's gross negligence in the performance of its obligations under the Disbursement Agreement.[122] Gross negligence under New York law is "conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing."[123] A defendant is grossly negligent if it "not only acted carelessly in making a mistake, but that it was so extremely careless that it was equivalent to recklessness."[124]

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[119] D.A. § 4.9.1, Ex. A, pp. 12, 14.

[120] D.A. § 4.9.2.

[121] False certifications by the Borrowers were additional Events of Default under the Disbursement Agreement. D.A. § 7.1.3(c).

[122] D.A. § 9.10.

[123] *Colnaghi, USA. v. Jewelers Protection Servs., Ltd.*, 81 N.Y.2d 821, 823-824 (N.Y. 1993) (internal quotations omitted).

[124] *Travelers Indemnity Company of Connecticut v. The Losco Group, Inc.*, 204 F. Supp. 2d 639, 644 (S.D.N.Y. 2002) (internal citation and quotations omitted).

DRS Optronics, Inc. v. North Fork Bank is instructive.[125] *DRS* involved a custodial agreement governing the disbursement of payments from the US Army Aviation & Missile Command ("AMCOM") under a prime contract with defendant Electro Design Manufacturing, Inc. ("EDM"). DRS was a subcontractor to EDM. DRS and EDM entered into a custodial agreement with North Fork Bank by which the bank agreed to hold payment deposits made by AMCOM and to disburse such payments only pursuant to joint written instructions from EDM and DRS. The custodial agreement provided that the bank's responsibilities were "purely ministerial" and that its liability was limited to conduct constituting "willful misconduct or gross negligence." When the bank disbursed funds to EDM without DRS's approval or knowledge, DRS sued.

Following discovery, DRS moved for summary judgment on its cause of action against North Fork Bank for breach of the custodial agreement. The trial court denied the motion. The Appellate Division of the New York Supreme Court reversed, concluding that the undisputed facts established that the bank not only had breached the custodial agreement but that "its breach was grossly negligent, because North Fork failed to 'exercise even slight care' or 'slight diligence'" in performing its contractual obligations.[126] In reaching its conclusion, the Court stated:

> Knowing that the plaintiff was relying on the establishment of a secure custodial account to protect its right to receive payment under the subcontract, with EDM, North Fork wholly failed to fulfill its contractual obligations to establish such an account as custodian on behalf of EDM and DRS, or to implement any

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[125] 843 N.Y.S.2d 124 (N.Y. 2007).

[126] *Id.* at 127.

procedure to ensure that the two-signature requirement would be enforced.[127]

BofA's conduct here is far worse. BofA was the gatekeeper for more than a billion dollars of Term Lender Loans, entrusted with the responsibility to disburse such funds to the Borrowers only if each of the express conditions precedent to disbursement was satisfied. BofA did not simply fail to "exercise even slight diligence" when it disbursed Term Lender Loans, it did so knowing full well that these disbursements were not permitted under the Disbursement Agreement:

- BofA knew in September 2008 that Lehman had filed for bankruptcy and knew that this represented the potential "death nail" for the Project;[128]
- BofA understood that Lehman's payment of its share of Advances under the Retail Facility was a condition precedent to disbursement and that payment of Lehman's share by others would cause this condition precedent to fail;[129]
- BofA knew that Lehman did not pay its share of Advances under the Retail Facility in September 2008 and from December 2008 through March 2009;[130]
- BofA was warned by one of the Term Lenders, Highland Capital Management, that Lehman's bankruptcy and its failure to pay its Advances under the Retail Facility meant that "[n]o disbursements may be made under the Loan Facility";[131]

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[127] *Id.* at 127-128.

[128] Ex. 67.

[129] Exs. 204, 475, 804; Bolio Depo., 46:10-47:2, 57:14-58:1, Brown Depo., 72:16-73:1; Howard Depo., 118:19-119:22; Susman Depo., 159:2-162:14, 169:17-20; 175:16-23, 250:22-251:20, 258:9-16; Yunker Depo., 96:11-20, 97:18-98:6, 110:19-112:12.

[130] *See* Section II.D, *supra*.

[131] Ex. 455.

BofA elected to disregard the knowledge it had and the warnings it had received and instead disbursed hundreds of millions of dollars of Term Lender Loans in the face of the numerous failed conditions precedent created by Lehman's bankruptcy and its failures to fund its commitments under the Retail Facility. Under these circumstances, BofA's conduct was knowing and intentional. At a minimum it was recklessly indifferent to the rights and interests of the Term Lenders to have their Term Loans disbursed to the Borrowers only if all conditions precedent to disbursement were satisfied.

IV. CONCLUSION

For all of the reasons set forth herein, the Term Lenders respectfully request that the Court grant their motion for partial summary judgment and determine that BofA breached its obligations under the June 6, 2007 Master Disbursement Agreement and was grossly negligent in disbursing loan proceeds to the Borrowers from September 2008 through March 2009 at times when BofA knew that Lehman's bankruptcy and its failure to fund its commitment under the related Retail Facility Agreement caused numerous conditions precedent to disbursement under the Disbursement Agreement to fail.

Dated: August 5, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **TERM LENDER PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF** was filed with the Clerk of the Court. I also certify that the foregoing document is being electronically served this day on all counsel of record or pro se parties identified on the attached Service List by agreement of all counsel.

Dated: August 5, 2011.

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