

**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.

**STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

The Term Lender Plaintiffs, pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7.5(c), hereby file their Statement of Undisputed Material Facts in Support of their Motion for Partial Summary Judgment and state the following material facts are not in dispute:

I. DEFINITIONS

1. "BofA" means Bank of America, N.A.
2. "Borrowers" means Fontainebleau Las Vegas, LLC and Fontainebleau Las Vegas II, LLC.
3. "Fontainebleau" means Fontainebleau Resorts, LLC and all affiliates and subsidiaries, including the Borrowers.
4. "Lehman" means Lehman Brothers Holdings Inc.
5. "Project" means the Fontainebleau Resort and Casino in Las Vegas, Nevada Project.
6. "Retail Borrower" means Fontainebleau Las Vegas Retail, LLC.

7. “Term Lenders” means the plaintiffs in the case captioned *Avenue CLO Fund, Ltd., et al. v. Bank of America, N.A., et al.*, Case No. 09-cv-23835-GOLD/GOODMAN (S.D. Fla.), and/or their predecessors in interest.

8. “TriMont” means TriMont Real Estate Advisors, Inc.

9. “ULLICO” means Union Labor Life Insurance Company.

II. UNDISPUTED FACTS

A. The Project and Its Financing.

1. In 2007 Banc of America Securities led a syndicate of investment banks to raise \$1.85 billion in bank financing for the development and construction of the Project. (Exs. 3 (3/6/07 Lender Presentation), 4 (3/1/07 Public Offering Memorandum), 5 (3/1/07 Private Offering Memorandum).)¹

2. The financing for the Project was comprised of three facilities: \$675 million 2nd Mortgage Note offering (the “Second Lien Facility”); \$1.85 billion in bank financing provided under a June 6, 2007 Credit Agreement to Fontainebleau; and \$400 million in loans to finance the construction of the retail portion of the Project, comprised of \$315 million under a Retail Facility Agreement and an \$85 million retail mezzanine loan. (Ex. 5 at pp. 28-29; Ex. 8 (Retail Facility Agreement (“R.A.”)) § 2.1; Ex. 884 (Intercreditor Agreement (Retail)) at p. 1.)

3. 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; and (c) an \$800 million Revolving Loan Facility. (Ex. 658 (Credit Agreement (“C.A.”)).)

4. BofA was appointed the Administrative Agent under the Credit Agreement. (C.A. § 9.1(a).)

¹ All exhibits referenced in this Statement are attached to the accompanying Appendix of Exhibits. All deposition testimony is attached to the accompanying Appendix of Testimony.

5. The sale of condominiums and the ongoing operation of the Project were the primary sources of repayment for the loans. (Exs. 3, 4; C.A. § 2.11(a).)

B. The Disbursement Agreement.

6. A Master Disbursement Agreement was executed on June 6, 2007, governing the disbursement of all funds to Fontainebleau under the Credit Agreement, the Second Lien Facility and the Retail Facility. (Ex. 72 (Disbursement Agreement (“D.A.”)).)

7. BofA was appointed as the Disbursement Agent under the Master Disbursement Agreement. (D.A. § 9.1.)

8. BofA executed the Master Disbursement Agreement in its capacity as both Disbursement Agent and Bank Agent (which is defined as the Administrative Agent under the Credit Agreement). (D.A., Ex. A at pp. 3, signature pages.)

9. BofA’s Corporate Debt Products Group was responsible for all of BofA’s actions as Disbursement Agent and Bank Agent, and made all decisions relating to the disbursement of loans. (Bolio Depo., 24:5-12, 26:2-27:25, 28:8-29:2, 30:1-31:15, 32:21-33:4, 71:10-72:9, 83:3-7, 86:3-13, 87:21-88:10, 279:9-18; 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, 49:7-50:19, 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, 58:2-8, 96:8-13, 98:23-99:4; Susman Depo., 18:21-19:18, 39:18-40:5, 49:22-50:15, 52:2-7, 53:10-22, 59:1-25, 62:14-18, 63:24-64:5, 65:6-17, 68:8-14, 70:8-23, 253:12-254:1.)

10. Jeff Susman was the Senior Vice President of Corporate Debt Products with primary responsibility over BofA’s various agency roles until his departure from BofA in February 2009. (Ex. 1 (BofA Organizational Chart); Bolio Depo., 24:5-12, 26:2-27:25, 28:8-29:2, 30:1-31:15, 32:21-33:4, 71:10-72:9, 83:3-7, 86:3-13, 87:21-88:10, 279:9-18; 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, 49:7-50:19, 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, 58:2-8, 96:8-13, 98:23-99:4; Susman Depo., 14:20-15:25, 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.)

11. The Disbursement Agreement contains the following language:

The Disbursement Agent accepts such appointments and agrees to exercise commercially reasonable efforts and utilize commercially prudent practices in the performance of its duties hereunder consistent with those of similar institutions holding collateral, administering construction loans and disbursing disbursement control funds.

(D.A. § 9.1.)

C. Bank of America's Disbursement of Term Lenders' Money.

12. The Term Lenders funded the \$700 million Initial Term Loan Facility into the Bank Proceeds Account upon the closing of the Credit Agreement in June 2007. (Exs. 644 (06/07 bank statement), 1501 at pp. 12-13, V-2 (Flow of Funds Memo).)

13. The Term Lenders funded a majority of the \$350 million Delay Draw Term Loan Facility into the Bank Proceeds Account in early March 2009. (Exs. 636 (3/11/09 BofA email re wire transfer), [REDACTED] 643 (4/9/09 Intralinks Alert re delay draw update).)

14. The Borrowers could not access money in the Bank Proceeds Account. (D.A. §§ 2.2, 2.3.)

15. To access the funds in the Bank Proceeds Account, the Borrowers were required to submit an Advance Request to BofA as Disbursement Agent. (D.A. § 2.4; Ex. 808 at pp. 3-4 (7/2/09 Yu Declaration).)

16. The Disbursement Agreement contains the following language:

When the applicable conditions precedent set forth in Article 3 have been satisfied, the Disbursement Agent shall notify the Project Entities and the Project Entities and the Disbursement Agent shall execute an Advance Confirmation Notice setting forth

the amount of the Advances to be made pursuant to each Financing Agreement on the Advance Date On the Scheduled Advance Date (a) each of the Funding Agents shall make the Advances contemplated by that Advance Confirmation Notice to the relevant Accounts and (b) the Disbursement Agent shall make the resulting transfers amongst the Accounts described in the Advance Confirmation Notice.

(D.A. § 2.4.6.)

17. The Disbursement Agreement contains the following language: “[t]he obligation . . . of the Bank Agent to make Advances from the Bank Proceeds Account are each subject to the prior satisfaction of each of the conditions precedent set forth in this Section 3.3.” (D.A. § 3.3.)

18. The Disbursement Agreement contains the following language in Section 3.3.2(a)

Each Project Entity set forth in Article 4 or in any Material Contract shall be true and correct in all material respects as if made on such date (except that any representation and warranty that relates expressly to an earlier date shall be deemed made only as of such earlier date)

(D.A. § 3.3.2(a).)

19. The Disbursement Agreement contains the following language in Article 4:

The Project Entities make all of the following representations and warranties to and in favor of . . . the Disbursement Agent on each Advance Date . . . :

There is no default or event of default under any of the Financing Agreements; and

There is no Default or Event of Default hereunder.

(D.A. §§ 4, 4.9)

20. The Disbursement Agreement contains the following language in Section 3.3.3:

“No Default or Event of Default shall have occurred and be continuing.” (D.A. § 3.3.3.)

21. The Disbursement Agreement contains the following language in Section 3.3.21:

In the case of each Advance from the Bank Proceeds Account made concurrently with or after Exhaustion of the Second Mortgage Proceeds Account, the Bank Agent shall not have become aware after the date hereof of any information or other

matter affecting any Loan Party, Turnberry Residential, the Project or the transactions contemplated hereby that taken as a whole is inconsistent in a material and adverse manner with the information or other matter disclosed to them concerning such Persons and the Project, taken as a whole.

(D.A. § 3.3.21.)

22. The Disbursement Agreement contains the following language in Section 3.3.23:

In the case of each Advance from the Bank Proceeds Account made concurrently with or after Exhaustion of the Second Mortgage Proceeds Account, the Retail Agent and the Retail Lenders shall, on the date specified in the relevant Advance Request, make any Advances required of them pursuant to that Advance Request.

(D.A. § 3.3.23.)

23. The Disbursement Agreement contains the following language in Section 3.3.24:

In the case of each Advance from the Bank Proceeds Account, the Bank Agent shall have received such other documents and evidence as are customary for transactions of this type as the Bank Agent may reasonably request in order to evidence the satisfaction of the other conditions set forth above.

(D.A. § 3.3.24.)

24. The Disbursement Agreement contains the following language:

In the event that (i) the conditions precedent to an Advance have not been satisfied, or (ii) the Controlling Person notifies the Disbursement Agent that a Default or an Event of Default has occurred and is continuing, then the Disbursement Agent shall notify the Project Entities and each Funding Agent thereof as soon as reasonably possible (a “Stop Funding Notice.”).

(D.A. § 2.5.1.)

25. The Disbursement Agreement contains the following language: “The Disbursement Agent shall not release any Advances to the Project Entities until . . . the Retail Lenders have made any requested Loans under the Retail Facility . . .” (D.A. § 2.6.3.)

26. The Second Mortgage Proceeds Account was exhausted concurrently with the September 2008 Advance. (Ex. 890 (10/6/08 Wells Fargo Letter).)

27. The Disbursement Agreement contains the following language: “At such times as the Bank Agent is the Controlling Person, the Bank Agent shall be entitled to waive the conditions precedent under Section 3.3 without the consent of the other Funding Agents.” (D.A. § 3.7.2.)

28. The Disbursement Agreement contains the following language:

Any waiver . . . on the part of any of the Funding Agents, the Lenders, [and] the Disbursement Agent . . . of any Default, Event of Default or other breach or default under this Agreement or any other Financing Agreement, or any waiver on the part of any of the Funding Agents, the Lenders, [and] the Disbursement Agent . . . of any provision or condition of this Agreement or any other Operative Document, must be in writing and shall be effective only to the extent in such writing specifically set forth.

(D.A. § 11.3.)

29. BofA never waived any conditions precedent to disbursement. (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.)

D. The Retail Facility and Lehman’s Bankruptcy.

30. Lehman was the largest Retail Lender, responsible for \$215 million, of which \$189.6 million was to be advanced post-closing. (Exs. 9 at Ex. A (Co-Lending Agreement), [REDACTED] [REDACTED] 831 (4/6/09 Exposure Report), 1504 (9/21/09 Fontainebleau Proof of Claim).)

31. Lehman was the Administrative Agent for the Retail Facility. (R.A. § 9.7.2(d).)

32. Under the Credit Agreement, each Borrower certified that it would “[f]urnish to [BofA as] Administrative Agent” “copies of all amendments to . . . the Retail Facility.” (C.A. § 6.2(f).)

33. Lehman filed for bankruptcy on September 15, 2008. [REDACTED]
[REDACTED]

34. Lehman did not fund its portion of the Retail Advance for September 2008. (Exs. 14 (9/26/08 Kotite email re failure to fund), [REDACTED] 56 (9/26/08 TriMont email re wire), 61 (3/3/09 Retail Lender email re ULLICO funded Lehman's share); Freeman Depo., 75:13-22; [REDACTED] Kotite Depo., 22:13-16; Susman Depo., 264:24-265:3.)

35. Fontainebleau funded Lehman's share of the September 2008 Retail Advance with equity. (Exs. 14, 56, 61, 78 (10/10/08 Rourke email re equity sponsor funding), 80 (10/13/08 Scott email re Lehman's disbursements), 1502 (10/13/08 Scott email re Lehman's disbursement forwarding Merrill Lynch report); Freeman Depo., 75:13-76:4; [REDACTED] [REDACTED] Kotite Depo., 23:13-16; Susman Depo., 264:24-265:3.)

36. Lehman did not fund its portion of the Retail Advances from December 2008 through March 2009. (Exs. [REDACTED] 22 (12/24/08 letter re Advance Request), [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] 57 (12/17/08 TriMont email re Fontainebleau requisition), 59 (1/27/09 TriMont email re letter to Lehman), 61, 804 (2/13/09 BofA email re Fontainebleau); Bolio Depo., 90:1-91:12; Freeman Depo., 117:13-119:2, [REDACTED]
[REDACTED]; Rafeedie Depo., 69:22-70:3, 83:16-21, 97:9-13; Susman Depo., 270:10-19.)

37. Fontainebleau entered into a Guaranty Agreement [REDACTED] with ULLICO, another Retail Lender. (Exs. 24 (12/29/08 Guaranty Agreement), [REDACTED] 42 (Third Amendment to Guaranty Agreement).)

38. [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED], 32 (1/30/09 ULLICO email re letter to Lehman), 35, 36, [REDACTED] 38, 41, 42, [REDACTED] 44 (4/3/09 ULLICO email re Third Amendment to Guaranty Agreement), [REDACTED] 46, 47, [REDACTED] 53, 54, 59, 61, 62 (3/25/09 TriMont email re ULLICO will fund Lehman's share), 63 (4/1/09 ULLICO email re amendment to Guaranty Agreement); [REDACTED] [REDACTED] Rafeedie Depo., 83:16-84:2, 98:19-99:2.)

39. ULLICO did not agree to permanently pay or to assume Lehman's obligations under the Retail Facility. (Exs. 206 (Credit Approval Memo), 609 (3/18/09 Bolio email re Fontainebleau questions), 814 (3/4/09 Yu letter to Freeman); Ex. 831 at p. 4; Ex. 906 at BANA_FB00811830 (1/13/09 email with QAR); Ex. 907 (1/14/09 Susman email re conversation with Turnberry/Fontainebleau); [REDACTED])

40. The Retail Facility Agreement contains the following language:

"Defaulting Lender" shall mean at any time, (i) any Lender or Co-Lender with respect to which a Lender Default is in effect, (ii) any Lender or Co-Lender that as a result of any voluntary action is the subject (as a debtor) or any action or proceeding (A) under any

existing or future law of any jurisdiction, domestic or foreign, relating to bankruptcy, insolvency, reorganization or relief of debtors, seeking to have an order for relief entered with respect to it, or seeking to adjudicate it a bankrupt or insolvent, or seeking reorganization, arrangement, adjustment, winding up, liquidation, dissolution, composition or other relief with respect to it or its debts, or (B) seeking appointment of a receiver, trustee, custodian, conservator or other similar official for it or for all or any substantial part of its assets, (iii) any Lender or Co-Lender that shall make a general assignment for the benefit of its creditors or (iv) any Lender or Co-Lender that shall generally not, or shall be unable to, or shall admit in writing its inability to, pay its debts as they become due.

(R.A. § I at p. 8.)

41. The Retail Facility Agreement includes the following language: “‘Lender Default’ shall mean the failure or refusal (which has not been retracted in writing) of a Lender or Co-Lender to make available its portion of any Loan when required to be made by it hereunder.”

(R.A. § I at p. 15.)

42. The Retail Facility Agreement includes the following language: “The liabilities of Lender and each of the Co-Lenders shall be several and not joint.” (R.A. § 9.7.2(b).)

E. Impact of Lehman’s Bankruptcy and Failure to Fund on the Project.

43. Fontainebleau understood that the Project could not be built without the financing for the Retail Facility. (Freeman Depo., 56:24-57:3; [REDACTED])

44. BofA believed that Lehman’s bankruptcy was a significant event and that there were no assurances that Lehman would continue to fund its commitments under the Retail Facility. (Exs. 67 (9/15/08 Yunker email re Lehman), 68 (9/11/08 Varnell email re Lehman), 206, 251 (2/27/09 Brown email re wires), 831, 896 (9/15/08 Susman email re Lehman), 899 (9/28/08 email re Key Risk Review), 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, 39:3-23, 52:13-53:4, 63:19-64:10.)

45. BofA understood that the funding for the Project would have shut down if Lehman's share of the Retail Facility was not paid. (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.)

46. BofA understood that the Project could not be built without the financing for the Retail Facility. (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.)

F. Bank of America Knew Lehman Failed to Make the September 2008 Retail Advance.

47. BofA knew that Fontainebleau was considering paying Lehman's share of the September Retail Advance. (Exs. 73 (9/19/08 email re Fontainebleau investors), 204 (9/19/08 Yunker email re Fontainebleau investors), 475 at BANA_FB00846432 (Bolio handwritten notes); 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.)

48. BofA analyzed the effect of Fontainebleau paying Lehman's commitment on the conditions precedent to disbursement. (Ex. 204; Bolio Depo., 42:9-43:8, 43:16-44:15, 45:7-22; Howard Depo., 65:4-66:11; Susman Depo., 167:13-23, 168:21-169:20; Yunker Depo., 73:6-75:13, 96:11-20, 110:19-112:12.)

49. BofA concluded that Fontainebleau's payment of Lehman's share of Retail Advances would cause the condition precedent in Section 3.3.23 of the Disbursement Agreement to fail. (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.)

50. BofA did not discuss with Fontainebleau BofA's conclusion that Fontainebleau's payment of Lehman's commitment would cause the condition precedent in Section 3.3.23 to fail. (Freeman Depo., 74:12-24; Yunker Depo., 96:11-98:6.)

51. Following BofA's request dated September 22, 2008, Fontainebleau refused to have a call with BofA and the Lenders to discuss the implications of Lehman's bankruptcy on the Project. (Ex. 901 (9/22/08 Naval email re Fontainebleau); Howard Depo., 104:14-106:23; Susman Depo., 224:25-226:2, 227:7-228:13.)

52. In late September, after Lehman filed for bankruptcy, Fontainebleau did not return the Term Lenders' phone calls. (Howard Depo., 104:14-106:23; ██████████ ██████████ Susman Depo., 224:2-9, 227:7-228:13, 247:4-248:18; Yunker Depo., 167:17-169:6.)

53. On September 30, 2008, BofA again requested a call with Mr. Freeman to discuss issues related to Lehman's bankruptcy, and specifically 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?

(Ex. 76 (9/30/08 BofA letter to Freeman).)

54. Fontainebleau refused to have a call with the Lenders as BofA requested in its September 30, 2008 letter. (Ex. 205 (10/3/08 Howard email re Lender update call); Freeman Depo., 106:11-109:9; Howard Depo., 104:14-106:23; Susman Depo., 247:4-247:18; Yunker Depo., 167:17-169:6.)

55. Mr. Freeman told BofA that there were "limitations on what we were and weren't allowed to say, based on our discussions with counsel." (Ex. 254 (10/22/08 Freeman email re Lender Update Memo); Freeman Depo., 106:11-109:9.)

56. Mr. Freeman sent a memo dated 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." (Ex. 77 (10/7/08 Freeman memo re retail loan agreement).)

57. Mr. Freeman's October 7, 2008 memo did not directly answer BofA's question regarding whether Lehman funded in September 2008 and if not, what was the source of

Lehman's payment. (Exs. 77, 903 (10/9/08 Rourke email re Fontainebleau); 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.)

58. BofA did not follow up to confirm with Fontainebleau the source of payment of Lehman's portion of the September 2008 Retail Advance. (Freeman Depo., 92:17-94:3, 97:7-99:25, 109:15-110:8; Varnell Depo., 208:1-210:11.)

59. Highland Capital Management, one of the original Term Lenders, notified BofA of its concerns regarding the implications of Lehman's bankruptcy on the Project, and stated that Lehman's bankruptcy meant that "[n]o disbursements may be made under the Loan Facility." (Exs. 78, 79 (10/1/08 Yunker email re Fontainebleau-Highland), 80, 81 (10/6/08 Rourke email re Lehman), 230 (10/6/08 Howard email re Lehman Chapter 11 filing), 233 (10/16/08 Varnell email to Freeman), 455 (9/26/08 Dorenbaum email re Initial Term Loan), 472 (10/9/08 Rourke email), 473 (9/26/08 Dorenbaum email re Fontainebleau), 898 (9/26/08 BofA email re Fontainebleau), 1502; [REDACTED] Yunker Depo., 150:9-15.)

60. Highland informed BofA of public reports that Fontainebleau had paid Lehman's share of the September Retail Advance and confirmed their mutual understanding "that Lehman has not made any disbursements while in bankruptcy." (Exs. 78-81, 230, 233, 1502.)

61. Highland further informed BofA that Fontainebleau's payment of Lehman's portion of the September Retail Advance caused the condition precedent in Section 3.3.23 to fail. (Exs. 80, 472; [REDACTED])

62. BofA representatives (Mr. Varnell, Mr. Howard and Mr. Yunker) participated in a conference call and a meeting in October 2008 with top Fontainebleau executives (including Mr. Freeman) and the Retail Lenders (other than Lehman) to discuss the impact of Lehman's bankruptcy on the Project. (Exs. 16 (10/7/08 Kotite email re Fontainebleau visit), 18 (10/23/08

meeting agenda), 231 (10/15/08 Varnell email to Howard re conference call), 232 (10/16/08 Freeman email to Varnell re conference call).)

63. [REDACTED]

64. The October Retail meeting participants discussed that the other Retail Lenders were not willing to assume Lehman's commitment under the Retail Facility. (Ex. 19 at p. 3 (4/20/09 National City Special Assets Committee Report); [REDACTED])

65. At the October Retail meeting, Fontainebleau and the Retail Lenders asked BofA to take over Lehman's remaining commitment and fill the funding gap. (Ex. 907; Howard Depo., 112:9-114:4, 143:18-146:13; Susman Depo., 277:19-278:9.)

66. An Intercreditor Agreement between BofA as Administrative Agent, Lehman as Retail Agent and the Retail Borrower includes the following language:

The Retail Agent, acting on behalf of each of the Retail Lenders, hereby 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, but not less than all, of the principal of and interest on the Retail Secured Obligations outstanding at the time of purchase for a purchase price equal to 100% of the principal amount and accrued interest outstanding on the Retail Secured Obligations on the date of purchase The Bank Agent shall assume any remaining obligations (whether for funding of Advances or otherwise) of the Retail Agent and the Retail Lenders under the Retail Financing Agreements in connection with any such purchase.

(Ex. 884 § 7.1.)

67. BofA did not assume Lehman's obligation under the Retail Facility Agreement. (Howard Depo., 112:9-114:9, 143:18-146:13.)

68. Each month, TriMont, the servicer on the Retail Facility, wired the Retail Lenders' funds to BofA. (Ex. 241 (9/26/08 Susman email re Lehman portion); Brown Depo., 42:4-8, 43:18-24; [REDACTED])

69. TriMont knew that Fontainebleau had paid Lehman's share of the September Advance. (Exs. 56, 61; Rafeedie Depo., 52:3-12, 61:16-62:1.)

70. It was TriMont's custom and practice to inform BofA of who funded Retail Advances and to answer BofA's questions regarding payments made pursuant to the Retail Facility Agreement. (Rafeedie Depo., 34:19-35:10, 53:5-58:19, 62:14-63:9, 86:11-88:4.)

71. On February 20, 2009, BofA sent a letter to Mr. Freeman asking Fontainebleau to "comment on the status of the Retail Facility, and the commitments of the Retail Lenders to fund under the Retail Facility, in particular, whether you anticipate that Lehman Brothers Holdings, Inc. will fund its share of requested loans, and whether the other Lenders under the Retail Facility intend to cover any shortfalls." (Exs. 497, 498 (2/20/09 BofA email and letter to Fontainebleau).)

72. On February 23, 2009, Fontainebleau responded to BofA's February 20th letter and did not provide any information about whether it anticipated Lehman or other Retail Lenders would fund Lehman's portion. (Ex. 811 (2/23/09 Fontainebleau letter to BofA); Yu Depo., 125:25-126:14.)

G. Bank of America Knew Leman Failed to Make the December 2008 Through March 2009 Retail Advances.

73. BofA knew that ULLICO funded Lehman's portion of every Advance from December 2008 through March 2009. (Exs. 58 (12/30/08 Brown email re ULLICO funding), 62, 239 (12/30/08 Brown email re advance), 240 (2/25/09 Brown email re ULLICO wire), 479 (12/30/08 Susman email re Fontainebleau funding status), 481 (1/27/09 Brown email re Fontainebleau), 607 at BANA_FB00846453 (Bolio handwritten notes), 804, 905 (12/30/08 Susman email re Lehman bankruptcy), 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.)

74. BofA knew that ULLICO had not and would not agree to assume Lehman's remaining commitment. (Exs. 115 (10/22/08 Freeman memo re Retail Loan Agreement), 206, 251, 493 (1/27/09 Bolio email re Fontainebleau), 609, 814, 831 at p. 4, 906 at BANA_FB00811830, 907; Howard Depo., 111:7-113:10, 142:13-146:13, 147:25-148:6; [REDACTED] [REDACTED] Susman Depo., 273:7-274:1, 277:19-278:9.)

H. Bank of America's Responsibilities When Presented with Inconsistent Information.

75. In connection with each Advance Request, the Borrowers were required to and did represent and warrant that all conditions precedent to disbursement had been satisfied. (Exs. 263-265, 269-271, 331, 694 (Advance Requests for September 2008 through March 2009).)

76. It would be unreasonable for BofA to disregard information that was inconsistent with representations of the Borrowers; it would be reasonable to inquire further to determine the truth prior to disbursing. (D.A. § 3.3.21; Ex. 1503 at ¶¶ 33-38 (Pryor Report); Bolio Depo., 164:20-165:12, 175:6-18; Lupiani Depo., 89:8-90:8, 132:11-19, 151:7-17, 153:7-155:9, 166:20-167:24; Susman Depo. 181:9-19, 182:22-183:20; Varnell Depo., 211:13-212:5.)

I. Terminating Funding.

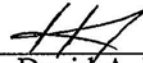
77. On April 20, 2009, BofA on behalf of itself and other Revolver Lenders, terminated the Revolver Loan under the Credit Agreement, citing unspecified conditions of default. (Ex. 827 (4/20/09 BofA letter to Freeman re Credit Agreement).)

78. Between September 2008 and April 20, 2009, BofA had disbursed [REDACTED] of the Term Lenders' money. (Exs. 237, 243-252, 622-629, 634-636, 639-642, 653-655 (Advance Confirmation Notices, emails re disbursement of funds and bank statements).)

79. On June 9, 2009, the Borrowers and certain affiliates filed a Chapter 11 Petition in the United States Bankruptcy Court for the Southern District of Florida. (*In re Fontainebleau Las Vegas Holdings, LLC et al.*, Case No. 09-21481-BKC-AJC.)

Dated: August 5, 2011

Respectfully submitted,



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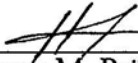
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** 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.



Lorenz M. Prüss, Esq.

Service List

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Sealed

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.

FILED by _____ D.C.
NOV 14 2011
STEVEN M. LARIMORE
CLERK U.S. DIST. CT.
S. D. of FLA. - MIAMI

REVISED REDLINED STATEMENT OF UNDISPUTED MATERIAL FACTS
IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT¹

The Term Lender Plaintiffs, pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7.5(c), hereby file their Statement of Undisputed Material Facts in Support of their Motion for Partial Summary Judgment and state the following material facts are not in dispute:

I. DEFINITIONS

- 1. "BofA" means Bank of America, N.A.
- 2. "Borrowers" means Fontainebleau Las Vegas, LLC and Fontainebleau Las Vegas

II, LLC.

- 3. "Fontainebleau" means Fontainebleau Resorts, LLC and all affiliates and subsidiaries, including the Borrowers.

- 4. "Lehman" means Lehman Brothers Holdings Inc.

- 5. "Project" means the Fontainebleau Resort and Casino in Las Vegas, Nevada

Project.

¹ Plaintiffs submit this Revised Redlined Statement to account for additional evidence produced by BofA after the summary judgment motions were briefed. Plaintiffs have redlined the statement for ease of the Court.

6. "Retail Borrower" means Fontainebleau Las Vegas Retail, LLC.

7. "Term Lenders" means the plaintiffs in the case captioned *Avenue CLO Fund, Ltd., et al. v. Bank of America, N.A., et al.*, Case No. 09-cv-23835-GOLD/GOODMAN (S.D. Fla.), and/or their predecessors in interest.

8. "TriMont" means TriMont Real Estate Advisors, Inc.

9. "ULLICO" means Union Labor Life Insurance Company.

II. UNDISPUTED FACTS

A. The Project and Its Financing.

1. In 2007 Banc of America Securities led a syndicate of investment banks to raise \$1.85 billion in bank financing for the development and construction of the Project. (Exs. 3 (3/6/07 Lender Presentation), 4 (3/1/07 Public Offering Memorandum), 5 (3/1/07 Private Offering Memorandum).)²

2. The financing for the Project was comprised of three facilities: \$675 million 2nd Mortgage Note offering (the "Second Lien Facility"); \$1.85 billion in bank financing provided under a June 6, 2007 Credit Agreement to Fontainebleau; and \$400 million in loans to finance the construction of the retail portion of the Project, comprised of \$315 million under a Retail Facility Agreement and an \$85 million retail mezzanine loan. (Ex. 5 at pp. 28-29; Ex. 8 (Retail Facility Agreement ("R.A")) § 2.1; Ex. 884 (Intercreditor Agreement (Retail)) at p. 1.)

3. 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; and (c) an \$800 million Revolving Loan Facility. (Ex. 658 (Credit Agreement ("C.A.")).)

² All exhibits referenced in this Statement are attached to the accompanying Appendix of Exhibits. All deposition testimony is attached to the accompanying Appendix of Testimony.

4. BofA was appointed the Administrative Agent under the Credit Agreement.

(C.A. § 9.1(a).)

5. The sale of condominiums and the ongoing operation of the Project were the primary sources of repayment for the loans. (Exs. 3, 4; C.A. § 2.11(a).)

B. The Disbursement Agreement.

6. A Master Disbursement Agreement was executed on June 6, 2007, governing the disbursement of all funds to Fontainebleau under the Credit Agreement, the Second Lien Facility and the Retail Facility. (Ex. 72 (Disbursement Agreement (“D.A.”)).)

7. BofA was appointed as the Disbursement Agent under the Master Disbursement Agreement. (D.A. § 9.1.)

8. BofA executed the Master Disbursement Agreement in its capacity as both Disbursement Agent and Bank Agent (which is defined as the Administrative Agent under the Credit Agreement). (D.A., Ex. A at pp. 3, signature pages.)

9. BofA’s Corporate Debt Products Group was responsible for all of BofA’s actions as Disbursement Agent and Bank Agent, and made all decisions relating to the disbursement of loans. (Bolio Depo., 24:5-12, 26:2-27:25, 28:8-29:2, 30:1-31:15, 32:21-33:4, 71:10-72:9, 83:3-7, 86:3-13, 87:21-88:10, 279:9-18; 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, 49:7-50:19, 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, 58:2-8, 96:8-13, 98:23-99:4; Susman Depo., 18:21-19:18, 39:18-40:5, 49:22-50:15, 52:2-7, 53:10-22, 59:1-25, 62:14-18, 63:24-64:5, 65:6-17, 68:8-14, 70:8-23, 253:12-254:1.)

10. Jeff Susman was the Senior Vice President of Corporate Debt Products with primary responsibility over BofA’s various agency roles until his departure from BofA in February 2009. (Ex. 1 (BofA Organizational Chart); Bolio Depo., 24:5-12, 26:2-27:25, 28:8-

29:2, 30:1-31:15, 32:21-33:4, 71:10-72:9, 83:3-7, 86:3-13, 87:21-88:10, 279:9-18; 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, 49:7-50:19, 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, 58:2-8, 96:8-13, 98:23-99:4; Susman Depo., 14:20-15:25, 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.)

11. The Disbursement Agreement contains the following language:

The Disbursement Agent accepts such appointments and agrees to exercise commercially reasonable efforts and utilize commercially prudent practices in the performance of its duties hereunder consistent with those of similar institutions holding collateral, administering construction loans and disbursing disbursement control funds.

(D.A. § 9.1.)

C. Bank of America's Disbursement of Term Lenders' Money.

12. The Term Lenders funded the \$700 million Initial Term Loan Facility into the Bank Proceeds Account upon the closing of the Credit Agreement in June 2007. (Exs. 644 (06/07 bank statement), 1501 at pp. 12-13, V-2 (Flow of Funds Memo).)

13. The Term Lenders funded a majority of the \$350 million Delay Draw Term Loan Facility into the Bank Proceeds Account in early March 2009. (Exs. 636 (3/11/09 BofA email re wire transfer), [REDACTED] 643 (4/9/09 Intralinks Alert re delay draw update).)

14. The Borrowers could not access money in the Bank Proceeds Account. (D.A. §§ 2.2, 2.3.)

15. To access the funds in the Bank Proceeds Account, the Borrowers were required to submit an Advance Request to BofA as Disbursement Agent. (D.A. § 2.4; Ex. 808 at pp. 3-4 (7/2/09 Yu Declaration).)

16. The Disbursement Agreement contains the following language:

When the applicable conditions precedent set forth in Article 3 have been satisfied, the Disbursement Agent shall notify the Project Entities and the Project Entities and the Disbursement Agent shall execute an Advance Confirmation Notice setting forth the amount of the Advances to be made pursuant to each Financing Agreement on the Advance Date On the Scheduled Advance Date (a) each of the Funding Agents shall make the Advances contemplated by that Advance Confirmation Notice to the relevant Accounts and (b) the Disbursement Agent shall make the resulting transfers amongst the Accounts described in the Advance Confirmation Notice.

(D.A. § 2.4.6.)

17. The Disbursement Agreement contains the following language: “[t]he obligation . . . of the Bank Agent to make Advances from the Bank Proceeds Account are each subject to the prior satisfaction of each of the conditions precedent set forth in this Section 3.3.” (D.A. § 3.3.)

18. The Disbursement Agreement contains the following language in Section 3.3.2(a)

Each Project Entity set forth in Article 4 or in any Material Contract shall be true and correct in all material respects as if made on such date (except that any representation and warranty that relates expressly to an earlier date shall be deemed made only as of such earlier date)

(D.A. § 3.3.2(a).)

19. The Disbursement Agreement contains the following language in Article 4:

The Project Entities make all of the following representations and warranties to and in favor of . . . the Disbursement Agent on each Advance Date . . . :

There is no default or event of default under any of the Financing Agreements; and

There is no Default or Event of Default hereunder.

(D.A. §§ 4, 4.9)

20. The Disbursement Agreement contains the following language in Section 3.3.3:
“No Default or Event of Default shall have occurred and be continuing.” (D.A. § 3.3.3.)

21. The Disbursement Agreement contains the following language in Section 3.3.21:

In the case of each Advance from the Bank Proceeds Account made concurrently with or after Exhaustion of the Second Mortgage Proceeds Account, the Bank Agent shall not have become aware after the date hereof of any information or other matter affecting any Loan Party, Turnberry Residential, the Project or the transactions contemplated hereby that taken as a whole is inconsistent in a material and adverse manner with the information or other matter disclosed to them concerning such Persons and the Project, taken as a whole.

(D.A. § 3.3.21.)

22. The Disbursement Agreement contains the following language in Section 3.3.23:

In the case of each Advance from the Bank Proceeds Account made concurrently with or after Exhaustion of the Second Mortgage Proceeds Account, the Retail Agent and the Retail Lenders shall, on the date specified in the relevant Advance Request, make any Advances required of them pursuant to that Advance Request.

(D.A. § 3.3.23.)

23. The Disbursement Agreement contains the following language in Section 3.3.24:

In the case of each Advance from the Bank Proceeds Account, the Bank Agent shall have received such other documents and evidence as are customary for transactions of this type as the Bank Agent may reasonably request in order to evidence the satisfaction of the other conditions set forth above.

(D.A. § 3.3.24.)

24. The Disbursement Agreement contains the following language:

In the event that (i) the conditions precedent to an Advance have not been satisfied, or (ii) the Controlling Person notifies the Disbursement Agent that a Default or an Event of Default has occurred and is continuing, then the Disbursement Agent shall notify the Project Entities and each Funding Agent thereof as soon as reasonably possible (a "Stop Funding Notice.").

(D.A. § 2.5.1.)

25. The Disbursement Agreement contains the following language: "The Disbursement Agent shall not release any Advances to the Project Entities until . . . the Retail Lenders have made any requested Loans under the Retail Facility . . ." (D.A. § 2.6.3.)

26. The Second Mortgage Proceeds Account was exhausted concurrently with the September 2008 Advance. (Ex. 890 (10/6/08 Wells Fargo Letter).)

27. The Disbursement Agreement contains the following language: "At such times as the Bank Agent is the Controlling Person, the Bank Agent shall be entitled to waive the conditions precedent under Section 3.3 without the consent of the other Funding Agents." (D.A. § 3.7.2.)

28. The Disbursement Agreement contains the following language:

Any waiver . . . on the part of any of the Funding Agents, the Lenders, [and] the Disbursement Agent . . . of any Default, Event of Default or other breach or default under this Agreement or any other Financing Agreement, or any waiver on the part of any of the Funding Agents, the Lenders, [and] the Disbursement Agent . . . of any provision or condition of this Agreement or any other Operative Document, must be in writing and shall be effective only to the extent in such writing specifically set forth.

(D.A. § 11.3.)

29. BofA never waived any conditions precedent to disbursement. (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.)

D. The Retail Facility and Lehman's Bankruptcy.

30. Lehman was the largest Retail Lender, responsible for \$215 million, of which \$189.6 million was to be advanced post-closing. (Exs. 9 at Ex. A (Co-Lending Agreement), [REDACTED] 831 (4/6/09 Exposure Report), 1504 (9/21/09 Fontainebleau Proof of Claim).)

31. Lehman was the Administrative Agent for the Retail Facility. (R.A. § 9.7.2(d).)

32. Under the Credit Agreement, each Borrower certified that it would "[f]urnish to [BofA as] Administrative Agent" "copies of all amendments to . . . the Retail Facility." (C.A. § 6.2(f).)

33. Lehman filed for bankruptcy on September 15, 2008. [REDACTED]
[REDACTED]

34. Lehman did not fund its portion of the Retail Advance for September 2008. (Exs. 14 (9/26/08 Kotite email re failure to fund), [REDACTED] 56 (9/26/08 TriMont email re wire), 61 (3/3/09 Retail Lender email re ULLICO funded Lehman's share); Freeman Depo., 75:13-22; [REDACTED] Kotite Depo., 22:13-16; Susman Depo., 264:24-265:3.)

35. Fontainebleau funded Lehman's share of the September 2008 Retail Advance with equity. (Exs. 14, 56, 61, 78 (10/10/08 Rourke email re equity sponsor funding), 80 (10/13/08 Scott email re Lehman's disbursements), 1502 (10/13/08 Scott email re Lehman's disbursement forwarding Merrill Lynch report); Freeman Depo., 75:13-76:4; [REDACTED] [REDACTED] Kotite Depo., 23:13-16; Susman Depo., 264:24-265:3.)

36. Lehman did not fund its portion of the Retail Advances from December 2008 through March 2009. (Exs. [REDACTED] 22 (12/24/08 letter re Advance Request), [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] 57 (12/17/08 TriMont email re Fontainebleau requisition), 59 (1/27/09 TriMont email re letter to Lehman), 61, 804 (2/13/09 BofA email re Fontainebleau), [REDACTED]
[REDACTED] Bolio Depo., 90:1-91:12; Freeman Depo., 117:13-119:2, [REDACTED]

[REDACTED] Rafeedie Depo., 69:22-70:3, 83:16-21, 97:9-13; Susman Depo., 270:10-19.)

37. Fontainebleau entered into a Guaranty Agreement [REDACTED] [REDACTED] with ULLICO, another Retail Lender. (Exs. 24 (12/29/08 Guaranty Agreement), [REDACTED] [REDACTED] [REDACTED]), 42 (Third Amendment to Guaranty Agreement).)

38. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED] 32 (1/30/09 ULLICO email re letter to Lehman), [REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] 44 (4/3/09 ULLICO email re Third Amendment to Guaranty Agreement), 45 (3/25/09 Wire Transfer), [REDACTED] 53, 54, 59, 61, 62

(3/25/09 TriMont email re ULLICO will fund Lehman's share), 63 (4/1/09 ULLICO email re amendment to Guaranty Agreement); [REDACTED]

[REDACTED] Rafeedie Depo., 83:16-84:2, 98:19-99:2.)

39. ULLICO did not agree to permanently pay or to assume Lehman's obligations under the Retail Facility. (Exs. 206 (Credit Approval Memo), 609 (3/18/09 Bolio email re Fontainebleau questions), 814 (3/4/09 Yu letter to Freeman); Ex. 831 at p. 4; Ex. 906 at BANA_FB00811830 (1/13/09 email with QAR); Ex. 907 (1/14/09 Susman email re conversation with Turnberry/Fontainebleau); [REDACTED])

40. The Retail Facility Agreement contains the following language:

“Defaulting Lender” shall mean at any time, (i) any Lender or Co-Lender with respect to which a Lender Default is in effect, (ii) any Lender or Co-Lender that as a result of any voluntary action is the subject (as a debtor) or any action or proceeding (A) under any existing or future law of any jurisdiction, domestic or foreign, relating to bankruptcy, insolvency, reorganization or relief of debtors, seeking to have an order for relief entered with respect to it, or seeking to adjudicate it a bankrupt or insolvent, or seeking reorganization, arrangement, adjustment, winding up, liquidation, dissolution, composition or other relief with respect to it or its debts, or (B) seeking appointment of a receiver, trustee, custodian, conservator or other similar official for it or for all or any substantial part of its assets, (iii) any Lender or Co-Lender that shall make a general assignment for the benefit of its creditors or (iv) any Lender or Co-Lender that shall generally not, or shall be unable to, or shall admit in writing its inability to, pay its debts as they become due.

(R.A. § I at p. 8.)

41. The Retail Facility Agreement includes the following language: “Lender Default” shall mean the failure or refusal (which has not been retracted in writing) of a Lender or Co-Lender to make available its portion of any Loan when required to be made by it hereunder.”

(R.A. § I at p. 15.)

42. The Retail Facility Agreement includes the following language: “The liabilities of Lender and each of the Co-Lenders shall be several and not joint.” (R.A. § 9.7.2(b).)

E. Impact of Lehman’s Bankruptcy and Failure to Fund on the Project.

43. Fontainebleau understood that the Project could not be built without the financing for the Retail Facility. [REDACTED]

[REDACTED] Freeman Depo., 56:24-57:3; [REDACTED]

44. BofA believed that Lehman’s bankruptcy was a significant event and that there were no assurances that Lehman would continue to fund its commitments under the Retail Facility. (Exs. 67 (9/15/08 Yunker email re Lehman), 68 (9/11/08 Varnell email re Lehman), 206, 251 (2/27/09 Brown email re wires), 831, 896 (9/15/08 Susman email re Lehman), 899 (9/28/08 email re Key Risk Review), 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, 39:3-23, 52:13-53:4, 63:19-64:10.)

45. BofA understood that the funding for the Project would have shut down if Lehman's share of the Retail Facility was not paid. [REDACTED]
[REDACTED]; 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.)

46. BofA understood that the Project could not be built without the financing for the Retail Facility. (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.)

F. Bank of America Knew Lehman Failed to Make the September 2008 Retail Advance.

47. BofA knew that Fontainebleau was considering paying Lehman's share of the September Retail Advance. (Exs. 73 (9/19/08 email re Fontainebleau investors), 204 (9/19/08 Yunker email re Fontainebleau investors), 475 at BANA_FB00846432 (Bolio handwritten notes); 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.)

48. BofA analyzed the effect of Fontainebleau paying Lehman's commitment on the conditions precedent to disbursement. (Ex. 204; Bolio Depo., 42:9-43:8, 43:16-44:15, 45:7-22; Howard Depo., 65:4-66:11; Susman Depo., 167:13-23, 168:21-169:20; Yunker Depo., 73:6-75:13, 96:11-20, 110:19-112:12.)

49. BofA concluded that Fontainebleau's payment of Lehman's share of Retail Advances would cause the condition precedent in Section 3.3.23 of the Disbursement Agreement to fail. (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.)

50. BofA did not discuss with Fontainebleau BofA's conclusion that Fontainebleau's payment of Lehman's commitment would cause the condition precedent in Section 3.3.23 to fail. (Freeman Depo., 74:12-24; Yunker Depo., 96:11-98:6.)

51. Following BofA's request dated September 22, 2008, Fontainebleau refused to have a call with BofA and the Lenders to discuss the implications of Lehman's bankruptcy on the Project. (Ex. 901 (9/22/08 Naval email re Fontainebleau); Howard Depo., 104:14-106:23; Susman Depo., 224:25-226:2, 227:7-228:13.)

52. In late September, after Lehman filed for bankruptcy, Fontainebleau did not return the Term Lenders' phone calls. (Howard Depo., 104:14-106:23; ██████████ Susman Depo., 224:2-9, 227:7-228:13, 247:4-248:18; Yunker Depo., 167:17-169:6.)

53. On September 30, 2008, BofA again requested a call with Mr. Freeman to discuss issues related to Lehman's bankruptcy, and specifically 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?

(Ex. 76 (9/30/08 BofA letter to Freeman).)

54. Fontainebleau refused to have a call with the Lenders as BofA requested in its September 30, 2008 letter. (Ex. 205 (10/3/08 Howard email re Lender update call); Freeman Depo., 106:11-109:9; Howard Depo., 104:14-106:23; Susman Depo., 247:4-247:18; Yunker Depo., 167:17-169:6.)

55. Mr. Freeman told BofA that there were "limitations on what we were and weren't allowed to say, based on our discussions with counsel." (Ex. 254 (10/22/08 Freeman email re Lender Update Memo); Freeman Depo., 106:11-109:9.)

56. Mr. Freeman sent a memo dated 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." (Ex. 77 (10/7/08 Freeman memo re retail loan agreement).)

57. Mr. Freeman's October 7, 2008 memo did not directly answer BofA's question regarding whether Lehman funded in September 2008 and if not, what was the source of Lehman's payment. (Exs. 77, 903 (10/9/08 Rourke email re Fontainebleau); 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.)

58. BofA did not follow up to confirm with Fontainebleau the source of payment of Lehman's portion of the September 2008 Retail Advance. (Freeman Depo., 92:17-94:3, 97:7-99:25, 109:15-110:8; Varnell Depo., 208:1-210:11.)

59. Highland Capital Management, one of the original Term Lenders, notified BofA of its concerns regarding the implications of Lehman's bankruptcy on the Project, and stated that Lehman's bankruptcy meant that "[n]o disbursements may be made under the Loan Facility." (Exs. 78, 79 (10/1/08 Yunker email re Fontainebleau-Highland), 80, 81 (10/6/08 Rourke email re Lehman), 230 (10/6/08 Howard email re Lehman Chapter 11 filing), 233 (10/16/08 Varnell email to Freeman), 455 (9/26/08 Dorenbaum email re Initial Term Loan), 472 (10/9/08 Rourke email), 473 (9/26/08 Dorenbaum email re Fontainebleau), 898 (9/26/08 BofA email re Fontainebleau), 1502; [REDACTED]; Yunker Depo., 150:9-15.)

60. Highland informed BofA of public reports that Fontainebleau had paid Lehman's share of the September Retail Advance and confirmed their mutual understanding "that Lehman has not made any disbursements while in bankruptcy." (Exs. 78-81, 230, 233, 1502.)

61. Highland further informed BofA that Fontainebleau's payment of Lehman's portion of the September Retail Advance caused the condition precedent in Section 3.3.23 to fail. (Exs. 80, 472; [REDACTED])

62. BofA representatives (Mr. Varnell, Mr. Howard and Mr. Yunker) participated in a conference call and a meeting in October 2008 with top Fontainebleau executives (including Mr. Freeman) and the Retail Lenders (other than Lehman) to discuss the impact of Lehman's bankruptcy on the Project. (Exs. 16 (10/7/08 Kotite email re Fontainebleau visit), 18 (10/23/08 meeting agenda), 231 (10/15/08 Varnell email to Howard re conference call), 232 (10/16/08 Freeman email to Varnell re conference call).)

63. [REDACTED]
[REDACTED]

64. The October Retail meeting participants discussed that the other Retail Lenders were not willing to assume Lehman's commitment under the Retail Facility. (Ex. 19 at p. 3 (4/20/09 National City Special Assets Committee Report); [REDACTED])

65. At the October Retail meeting, Fontainebleau and the Retail Lenders asked BofA to take over Lehman's remaining commitment and fill the funding gap. (Ex. 907; Howard Depo., 112:9-114:4, 143:18-146:13; Susman Depo., 277:19-278:9; *see also* Exs. 1513, 1515.)

66. An Intercreditor Agreement between BofA as Administrative Agent, Lehman as Retail Agent and the Retail Borrower includes the following language:

The Retail Agent, acting on behalf of each of the Retail Lenders, hereby 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, but not less than all, of the principal of and interest on the Retail Secured Obligations outstanding at the time of purchase for a purchase price equal to 100% of the principal amount and accrued interest outstanding on the Retail Secured Obligations on the date of purchase The Bank Agent shall assume any remaining obligations (whether for funding of Advances or otherwise) of the Retail Agent and the Retail Lenders

under the Retail Financing Agreements in connection with any such purchase.

(Ex. 884 § 7.1.)

67. BofA did not assume Lehman's obligation under the Retail Facility Agreement.

(Howard Depo., 112:9-114:9, 143:18-146:13.)

68. Each month, TriMont, the servicer on the Retail Facility, wired the Retail Lenders' funds to BofA. (Ex. 241 (9/26/08 Susman email re Lehman portion); Brown Depo., 42:4-8, 43:18-24; [REDACTED])

69. TriMont knew that Fontainebleau had paid Lehman's share of the September Advance. (Exs. 56, 61; Rafeedie Depo., 52:3-12, 61:16-62:1.)

70. It was TriMont's custom and practice to inform BofA of who funded Retail Advances and to answer BofA's questions regarding payments made pursuant to the Retail Facility Agreement. (Rafeedie Depo., 34:19-35:10, 53:5-58:19, 62:14-63:9, 86:11-88:4.)

71. On February 20, 2009, BofA sent a letter to Mr. Freeman asking Fontainebleau to "comment on the status of the Retail Facility, and the commitments of the Retail Lenders to fund under the Retail Facility, in particular, whether you anticipate that Lehman Brothers Holdings, Inc. will fund its share of requested loans, and whether the other Lenders under the Retail Facility intend to cover any shortfalls." (Exs. 497, 498 (2/20/09 BofA email and letter to Fontainebleau).)

72. On February 23, 2009, Fontainebleau responded to BofA's February 20th letter and did not provide any information about whether it anticipated Lehman or other Retail Lenders would fund Lehman's portion. (Ex. 811 (2/23/09 Fontainebleau letter to BofA); Yu Depo., 125:25-126:14.)

G. Bank of America Knew Lehman Failed to Make the December 2008 Through March 2009 Retail Advances.

73. BofA knew that ULLICO funded Lehman's portion of every Advance from December 2008 through March 2009. (Exs. 58 (12/30/08 Brown email re ULLICO funding), 62, 239 (12/30/08 Brown email re advance), 240 (2/25/09 Brown email re ULLICO wire), 479 (12/30/08 Susman email re Fontainebleau funding status), 481 (1/27/09 Brown email re Fontainebleau), 607 at BANA_FB00846453 (Bolio handwritten notes), 804, 905 (12/30/08 Susman email re Lehman bankruptcy), 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.)

74. BofA knew that ULLICO had not and would not agree to assume Lehman's remaining commitment. (Exs. 115 (10/22/08 Freeman memo re Retail Loan Agreement), 206, 251, 493 (1/27/09 Bolio email re Fontainebleau), 609, 814, 831 at p. 4, 906 at BANA_FB00811830, 907, Exs. 1513-1515; 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.)

74(a). [REDACTED]

H. Bank of America's Responsibilities When Presented with Inconsistent Information.

75. In connection with each Advance Request, the Borrowers were required to and did represent and warrant that all conditions precedent to disbursement had been satisfied. (Exs. 263-265, 269-271, 331, 694 (Advance Requests for September 2008 through March 2009).)

76. It would be unreasonable for BofA to disregard information that was inconsistent with representations of the Borrowers; it would be reasonable to inquire further to determine the truth prior to disbursing. (D.A. § 3.3.21; Ex. 1503 at ¶¶ 33-38 (Pryor Report); Bolio Depo.,

164:20-165:12, 175:6-18; Lupiani Depo., 89:8-90:8, 132:11-19, 151:7-17, 153:7-155:9, 166:20-167:24; Susman Depo. 181:9-19, 182:22-183:20; Varnell Depo., 211:13-212:5.)

I. Terminating Funding.

77. On April 20, 2009, BofA on behalf of itself and other Revolver Lenders, terminated the Revolver Loan under the Credit Agreement, citing unspecified conditions of default. (Ex. 827 (4/20/09 BofA letter to Freeman re Credit Agreement).)

78. Between September 2008 and April 20, 2009, BofA had disbursed [REDACTED] of the Term Lenders' money. (Exs. 237, 243-252, 622-629, 634-636, 639-642, 653-655 (Advance Confirmation Notices, emails re disbursement of funds and bank statements).)

79. On June 9, 2009, the Borrowers and certain affiliates filed a Chapter 11 Petition in the United States Bankruptcy Court for the Southern District of Florida. (*In re Fontainebleau Las Vegas Holdings, LLC et al.*, Case No. 09-21481-BKC-AJC.)

J. BofA and Fontainebleau Relationship

80. [REDACTED]

[REDACTED]

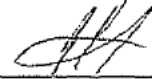
81. [REDACTED]

[REDACTED]

[REDACTED]

Dated: November 14, 2011

Respectfully submitted,



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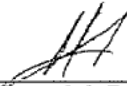
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **REVISED REDLINED STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** 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: November 14, 2011.



Lorenz M. Prüss, Esq.

Service List

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**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.

**DECLARATION OF ROBERT W. MOCKLER AND REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF TERM LENDER PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT**

I, Robert W. Mockler, declare as follows:

1. I am a partner in the firm of Hennigan Dorman LLP, counsel for Plaintiffs in the above-captioned action. Except where otherwise indicated, I have personal knowledge of the facts stated herein and, if called as a witness, could and would competently testify thereto. I submit this declaration in support of Plaintiffs' Motion for Partial Summary Judgment.

2. True and correct copies of excerpts of the deposition testimony of the individuals identified therein are attached to the Appendix of Testimony in Support of Plaintiffs' Motion for Partial Summary Judgment.

3. True and correct copies of the identified deposition exhibits (in the range from Exhibit 1 to Exhibit 907) are attached to the Appendix of Exhibits in Support of Plaintiffs' Motion for Partial Summary Judgment ("Appendix of Exhibits").

4. A true and correct copy of the "Flow of Funds Memo," Exhibit T to the Master Disbursement Agreement, which was produced by Bank of America, N.A. ("BoFA") in this action, is attached as Exhibit 1501 to the Appendix of Exhibits.

5. A true and correct copy of an e-mail dated October 13, 2008, from Scott to Susman, Yunker, Varnell, Howard, Fuad, Brunette and Puglisi re: Lehman disbursements, which was produced by BofA in this action, is attached as Exhibit 1502 to the Appendix of Exhibits. Exhibit 1502 is the same e-mail chain as Exhibit 80, except that Exhibit 1502 includes the attachment referenced in the e-mail chain. The attachment is also included as Exhibit 78.

6. A true and correct copy of the Expert Report of Shepherd G. Pryor IV dated May 23, 2011, which the Plaintiffs submitted in this action, is attached as Exhibit 1503 to the Appendix of Exhibits.

7. A true and correct copy of a proof of claim submitted by Fontainebleau Las Vegas Retail, LLC in the Lehman bankruptcy, *In re Lehman Brothers Holdings, Inc., et al.*, United States Bankruptcy Court for the Southern District of New York, Case No. 08-13555, is attached as Exhibit 1504 to the Appendix of Exhibits. The Term Lender Plaintiffs request that the Court take judicial notice of Exhibit 1504 pursuant to Federal Rule of Evidence 201. It is proper to take judicial notice of documents filed in other courts. *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: August 5, 2011



ROBERT W. MOCKLER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **DECLARATION OF ROBERT W. MOCKLER AND REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF TERM LENDER PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** 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.

Lorenz M. Prüss, Esq.

Service List

Attorneys:	Representing:
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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.

APPENDIX OF EXHIBITS IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY
JUDGMENT, VOLUME 1, EXHIBITS 1 TO 8

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Volume No. 1	Exhibit 1: ¹	Global Gaming Team Organizational Chart
	Exhibit 3:	\$1.85 Billion Senior Secured Credit Facilities Lenders' Presentation dated March 6, 2007
	Exhibit 4:	\$1,850,000,000 Senior Secured Credit Facilities Offering Memorandum dated March 1, 2007 (Public)
	Exhibit 5:	\$1,850,000,000 Senior Secured Credit Facilities Offering Memorandum dated March 1, 2007 (Private)
	Exhibit 8:	Loan Agreement between Fontainebleau Las Vegas Retail LLC and Lehman Brothers Holdings Inc. dated June 6, 2007
Volume No. 2	Exhibit 9:	Co-Lending Agreement for Loan Agreement between Lehman Brothers Holdings, Inc. dated September 24, 2007
	Exhibit 14:	Kotite e-mail to Rafeedie re: Lehman failure to fund its share dated September 26, 2008.
	Exhibit 16:	
	Exhibit 18:	Meeting agenda dated October 23, 2008
	Exhibit 19:	National City Special Assets Committee (SAC) Report dated April 20, 2009
	Exhibit 21:	
	Exhibit 22:	Cunningham letter to National City Bank re: FBLVR advance request dated December 24, 2008
	Exhibit 23:	

¹ All exhibits attached to this Appendix of Exhibits that were identified at depositions are listed by their deposition exhibit number. Exhibits that were not identified during depositions are listed sequentially beginning with number 1501.

Exhibit 24: Guaranty Agreement between Fontainebleau Resorts LLC, Turnberry Residential Limited Partner, LP, Jeffrey Soffer and The Union Labor Life Insurance Company dated December 29, 2008

Exhibit 26: [REDACTED]

Exhibit 28: [REDACTED]

Exhibit 29: [REDACTED]

Exhibit 30: [REDACTED]

Exhibit 31: [REDACTED]

Exhibit 32: Johnson e-mail to Rustgi and Rafeedie re: letter to Lehman dated January 30, 2009

Exhibit 34: [REDACTED]

Exhibit 35: [REDACTED]

Exhibit 36: [REDACTED]

Exhibit 37: [REDACTED]

Exhibit 38: [REDACTED]

Exhibit 40: [REDACTED]

Exhibit 41: [REDACTED]

Exhibit 42: Third Amendment to Guaranty Agreement between Fontainebleau Resorts LLC, Turnberry Residential Limited Partner, LP, Jeffrey Soffer and The Union Labor Life Insurance Company dated March 25, 2009

Exhibit 43: [REDACTED]

Exhibit 44: Johnson e-mail to Rustgi and Rafeedie re: ULLICO third amendment to guaranty agreement dated April 3, 2009

Exhibit 45: [REDACTED]

Exhibit 46: [REDACTED]

Exhibit 47: [REDACTED]

Exhibit 48: [REDACTED]

Exhibit 50: [REDACTED]

Exhibit 53: [REDACTED]

Exhibit 54: [REDACTED]

Exhibit 56: Nicholson e-mail to Rustgi and Rafeedie re: another wire expected dated September 26, 2008

Exhibit 57: Rafeedie e-mail to Picallo, Battle and Rustgi re: Fontainebleau requisition dated December 17, 2008


Exhibit 58: Brown e-mail to Rafeedie re: ULLICO funding dated December 30, 2008

Exhibit 59: Rafeedie e-mail to Picallo and Rustgi re: letter to Lehman dated January 27, 2009


Exhibit 61: Leshner e-mail to Rustgi re: ULLICO funded Lehman share dated March 3, 2009

- Exhibit 62: Rafeedie e-mail to Brown and Rustgi re: ULLICO will fund Lehman share dated March 25, 2009
- Exhibit 63: Johnson e-mail to Rustgi and Rafeedie re: amendment to Guaranty Agreement
- Exhibit 67: Yunker e-mail to Varnell re: Lehman may be the death nail for FB dated September 15, 2008
- Exhibit 68: Varnell e-mail to Yunker re: Lehman Brothers bonds trade sharply lower; CDS off wide point dated September 11, 2008
- Volume No. 3 Exhibit 72: Master Disbursement Agreement among Fontainebleau Las Vegas Holdings, LLC, Fontainebleau Las Vegas Capital Corp., Fontainebleau Las Vegas Retail LLC, Fontainebleau Las Vegas II LLC, Bank of America, NA, Wells Fargo Bank, NA, and Lehman Brothers Holdings Inc. dated June 6, 2007
- Exhibit 73: Kotzin e-mail to Yunker re: Fontainebleau investors dated September 19, 2008
- Exhibit 76: Naval letter to Freeman re: anticipated questions for bank conference call dated September 30, 2008
- Exhibit 77: Freeman memorandum to Las Vegas Bank Group re: retail loan agreement dated October 7, 2008
- Exhibit 78: Rourke e-mail to Dorenbaum and Means re: Fontainebleau equity sponsor funding for retail commitment dated October 10, 2008
- Exhibit 79: Yunker e-mail to Varnell and Bender re: Fontainebleau – Highland dated October 1, 2008
- Exhibit 80: Scott e-mail to Susman, Yunker, Varnell, Howard, Fuad, Brunette and Puglisi re: Lehman disbursements dated October 13, 2008
- Exhibit 81: Rourke e-mail to Howard and Dorenbaum re: Lehman's commercial paper subsidiary chapter 11 filing dated October
- Exhibit 115: Freeman memorandum to Las Vegas Bank Group re: Retail Loan Agreement dated October 22, 2008
- Exhibit 204: Yunker e-mail to Susman, Howard, Varnell, Bolio, and Bender re: Fontainebleau investors dated September 19, 2008
- Exhibit 205: Howard e-mail to Blanton, Roof and Susman regarding Lender update call dated October 3, 2008

- Exhibit 206: Credit Approval Memorandum
- Volume No. 4 Exhibit 230: Howard e-mail to Susman, Yunker, Bender, Scott and Fuad re: Lehman chapter 11 filing dated October 6, 2008
- Exhibit 231: Varnell e-mail to Howard re: dial in for conference call dated October 15, 2008
- Exhibit 232: Freeman e-mail to Varnell re: dial in for conference call dated October 16, 2008
- Exhibit 233: Varnell e-mail to Freeman dated October 16, 2008
- Exhibit 237: Brown e-mail to Rafeedie, Freedman, Rustgi, Naval, Phalen, Dycus and Bolio re: IVI certification dated September 17, 2008
- Exhibit 239: Brown e-mail to Susman re: advance dated December 30, 2008
- Exhibit 240: Brown e-mail to Bolio re: ULLICO wire dated February 25, 2009
- Exhibit 241: Susman e-mail to Varnell, Yunker, Bender, Howard, Fuad, Scott and Bolio re: Lehman portion dated September 26, 2008
- Exhibit 243: Brown e-mail to Rafeedie, Freedman, Rustgi, Naval, Phalen, Dycus, Bolio, Camejo and Crifo re: approved draw request dated October 20, 2008
- Exhibit 244: Brown e-mail to Rafeedie, Freedman, Rustgi, Naval, Phalen, Dycus, Bolio, Camejo and Crifo re: wires dated November 19, 2008
- Exhibit 245: Brown e-mail to Neely re: wire transfer dated December 2, 2008
- Exhibit 246: Brown e-mail to Rafeedie, Freedman, Rustgi, Naval, Phalen, Dycus, Bolio, Camejo and Crifo re: wires dated December 18, 2008
- Exhibit 247: Brown e-mail to Brown, Bolio, Susman, Naval, Crifo, Camejo and Neely re: wires dated December 30, 2008
- Exhibit 248: Brown e-mail to Brown re: wires dated January 14, 2009
- Exhibit 249: Brown e-mail to Bolio, Susman, Naval, Crifo, Camejo and Brown re: wires dated January 27, 2009

- Exhibit 250: Bolio e-mail to Yu, Fuszard, Corum, Scott, Martin, Swenson, Sieki, Howard, Varnell, Dsouza, Duong, Brown and Naval re: advance confirmation notice dated February 24, 2009
- Exhibit 251: Brown e-mail to Bolio re: wires dated February 27, 2009
- Exhibit 252: Bolio e-mail to Yu, Martin, Scott, Sieke, Howard, Varnell, Corum, Naval Brown and Camejo re: retail shared costs dated March 26, 2009
- Exhibit 254: Freeman e-mail to Howard, Susman, Scott and Varnell re: Lehman Update Memo dated October 22, 2008
- Exhibit 263: Advance Request dated 2-25-2009
- Exhibit 264: Advance Request dated 3-25-2009
- Exhibit 265: Advance Request dated 3-25-2009
- Exhibit 269: Hernandez e-mail to Camejo, Brown, Bolio, Naval, Rafeedie, Freedman, Freeman, Steiner, Rubin, Twellman and Bonvicino re: Las Vegas Draw dated October 16, 2008
- Exhibit 270: Hernandez e-mail to Camejo, Brown, Bolio, Naval, Rafeedie, Freedman, Freeman, Steiner, Rubin, Twellman and Bonvicino re: Las Vegas Draw dated November 17, 2008
- Volume No. 5 Exhibit 271: Miller e-mail to Camejo, Brown, Bolio, Naval, Freeman, Rafeedie, Freedman, Steiner, Twellman, McNamee and Bonvicino re: Las Vegas Draw dated December 15, 2008
- Exhibit 331: Advance Request dated 09-25-2008
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- Exhibit 456: 
- Exhibit 472: Rourke e-mail to Howard re: Fontainebleau Resorts dated October 9, 2008
- Exhibit 473: Dorenbaum e-mail Scott, Susman, Means, Moore and Rourke re: Fontainebleau Resorts dated September 26, 2008
- Exhibit 475: Bolio handwritten notes

- Exhibit 479: Susman e-mail to Freeman, Howard, Bolio and Scott re: Fontainebleau Las Vegas Funding Status dated December 30, 2008
- Exhibit 481: Brown e-mail to Susman and Bolio re: Fontainebleau – Las Vegas dated January 27, 2009
- Exhibit 493: Bolio e-mail to Bonvicino and Susman re: Fontainebleau Las Vegas project status dated December 22, 2008
- Exhibit 497: Washington e-mail to Freeman, Bolio, Howard, Varnell and Corum re: letter to Fontainebleau Nevada dated February 20, 2009
- Exhibit 498: Washington letter to Freeman re: Credit Agreement dated June 6, 2007
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- Exhibit 622: Neely e-mail to Brown, Bolio, Corum, Naval and others re: transactions and wired funds dated February 27, 2009
- Exhibit 623: Brown e-mail to Phalen, Corum, Bolio Crifo, Camejo and Naval re: revolver amount account transfer dated February 27, 2009
- Exhibit 624: Phalen e-mail to Corum, Brown, Martin, Scott, Yu, Bolio, Fuszard, Sieke, Swenson, Howard and Naval re: Barclays dated February 27, 2009
- Exhibit 625: Neely e-mail to Brown, Susman, Naval and Bolio re: redemption transactions dated September 26, 2008
- Exhibit 626: Neely e-mail to Brown, Bolio, Susman, Naval, Crifo and Camejo re: wire transfer dated October 28, 2008
- Exhibit 627: Brown e-mail to Brown re: wires dated November 26, 2008
- Exhibit 628: Brown e-mail to Brown, Bolio, Susman, Naval, Crifo, Camejo and Neely re: wires dated December 30, 2008
- Exhibit 629: Neely e-mail to Brown, Bolio, Susman, Naval, Crifo and Camejo re: wire transfer dated January 28, 2009


- Exhibit 634: Bolio e-mail to Yu, Scott, Martin, Sieke, Naval, Corum, Phalen, Howard and Brown re: Las Vegas updates dated March 10, 2009
- Exhibit 635: Phalen e-mail to Bolio, Yu, Naval, Sieke, Corum and Neely re: wire instructions dated March 10, 2009
- Volume No. 6 Exhibit 636: Phalen e-mail to Bolio, Yu, Scott, Martin, Sieke, Naval, Corum, Neely and Brown re: wire transfer dated March 11, 2009
- Exhibit 639: Brown e-mail to Phalen, Bolio, Corum, Crifo, Camejo, Naval and Yu re: fund transfer dated March 26, 2009
- Exhibit 640: Phalen e-mail to Bolio, Corum, Scott, Yu, Martin, Sieke, Varnell, Naval, Brown and Camejo re: funds transferred dated March 26, 2009
- Exhibit 641: Intralinks E-mail Alert re: second revised 3/25/09 draw documents dated March 26, 2009
- Exhibit 642: 
- Exhibit 643: Intralinks E-mail Alert re: delay draw update 4/9/09
- Exhibit 644: Monthly Columbia Funds Statement for the period 6/1/07 to 6/30/07
- Exhibit 653: Monthly Columbia Funds Statement for the period 10/1/08 to 10/31/08
- Exhibit 654: Monthly Columbia Funds Statement for the period 12/1/08 to 12/31/08
- Exhibit 655: Monthly Columbia Funds Statement for the period 1/1/09 to 1/31/09
- Exhibit 658: Credit Agreement among Fontainebleau Las Vegas LLC, Fontainebleau Las Vegas II, LLC and Bank of America, NA, Banc of America Securities LLC, Deutsche Americas, Barclays Bank PLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated, Deutsche Bank Trust Company Americas, Barclays Bank PLC and Merrill Lynch, Pierce, Fenner & Smith Inc. dated June 6, 2007
- Volume No. 7 Exhibit 694: Miller e-mail to Brown, Camejo, Bolio, Naval and others re: Las Vegas Draw dated January 12, 2009

- Exhibit 804: Wampler e-mail to Fuszard, Biaggi, Yu and Keyston re: Fontainebleau dated February 13, 2009
- Exhibit 808: Declaration of Henry Yu dated July 2, 2009
- Exhibit 811: Freeman letter to Bank of America re: Credit Agreement dated February 23, 2009
- Exhibit 814: Yu letter to Freeman re: Credit Agreement dated March 4, 2009
- Exhibit 827: Naval letter to Freeman re: Credit Agreement dated April 20, 2009
- Exhibit 831: Schedule Exposure Report (GCIB) dated April 6, 2009
- Exhibit 884: Intercreditor Agreement (Retail) between Bank of America, N.A., Wells Fargo Bank, National Association, Lehman Brothers Holdings, Inc., and Fontainebleau Las Vegas Retail, LLC
- Exhibit 890: Bolio e-mail to Scott, Susman and Naval re: Wells Fargo 10/6/08 letter dated October 17, 2008
- Exhibit 896: Susman e-mail to Keyston re: Lehman to Declare Bankruptcy; BofA Buys Merrill Lynch dated September 15, 2008
- Exhibit 898: Scott e-mail to Susman, Varnell, Yunker, Bender and others re: conference call with Fontainebleau Las Vegas dated September 26, 2008
- Exhibit 899: Keyston e-mail to Susman re: Key Risk Review dated September 28, 2008
- Exhibit 901: Naval e-mail to Freeman, Their, Scott, Susman and others re: Fontainebleau Las Vegas letter dated September 22, 2008
- Exhibit 903: Rourke e-mail to Susman, Howard, Dorenbaum, Moore and others re: Fontainebleau Las Vegas follow-up
- Exhibit 905: Susman e-mail to Lynch and Keyston re: Lehman bankruptcy and retail funds dated December 30, 2008
- Exhibit 906: Lynch e-mail to Susman and Keyston re: QAR questions dated January 13, 2009
- Exhibit 907: Susman e-mail to Howard re: conversation on Turnberry/FB dated January 14, 2009

- Exhibit 1501: Exhibit T to the Master Disbursement Agreement, Flow of Funds Memo.
- Exhibit 1502: Scott e-mail to Susman, Yunker, Varnell, Howard, Fuad, Brunette and Puglisi re: Lehman disbursements, forwarding email from Dorenbaum that attached Merrill Lynch analyst report, dated October 13, 2008 (BANA_FB00904981-86)
- Exhibit 1503: Expert Report of Shepherd G. Pryor IV dated May 23, 2011
- Exhibit 1504: Fontainebleau Las Vegas Retail LLC Proof of Claim dated September 21, 2009

Dated: August 5, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **APPENDIX OF EXHIBITS IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, VOLUME 1, EXHIBITS 1 TO 8** 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.



Lorenz M. Prüss, Esq.

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**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.

**APPENDIX OF TESTIMONY IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY
JUDGMENT**

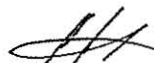
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1. Brandon Bolio deposition transcript excerpts dated March 30, 2011
2. Jeanne Brown deposition transcript excerpts dated March 20, 2011
3. James Freeman deposition transcript excerpts dated March 23, 2011
4. David Howard deposition transcript excerpts dated March 11, 2011
5. Herbert Kolben deposition transcript excerpts dated February 22, 2011
6. Albert Kotite deposition transcript excerpts dated April 12, 2011
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13. Jon Varnell deposition transcript excerpts dated March 17, 2011
14. Henry Yu deposition transcript excerpts dated April 7, 2011
15. Bret Yunker deposition transcript excerpts dated March 1, 2011

Dated: August 5, 2011

Respectfully submitted,



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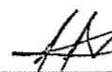
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **APPENDIX OF TESTIMONY IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** 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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