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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REPLY IN SUPPORT OF TERM LENDER PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

BofA has failed to come forward with "substantial evidence" sufficient for a reasonable fact finder to rule in its favor.[1] 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. The undisputed facts establish that BofA knew that Lehman, the largest lender under the Retail Facility, filed for bankruptcy and then failed to fund its loan commitments. BofA knew that these failures precluded further disbursements. It nonetheless continued to disburse hundreds of millions of dollars of Term Lender funds, stopping only when its own money was at risk.

BofA argues that because it received all of the right documents from all the right people, it was obligated to disburse Term Lender funds even though it knew that conditions precedent to disbursement had not been satisfied. This Motion focuses on that simple question. Can BofA avoid liability for prohibited disbursements by pointing to borrower certifications that BofA knew to be false?

II. ARGUMENT

A. BofA Could Not Disburse Unless All Conditions Precedent Were Satisfied.

The Disbursement Agreement established twenty-four separate conditions (not including subparts), each of which (consistent with industry practice)[2] had to be "satisfied" before BofA was authorized to disburse. Only two conditioned disbursement on BofA's receipt of documents. (D.A. §§ 3.3.4(a), 3.3.5.)[3] The bulk related to the underlying factual predicates to

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[1] *See Garczynski v. Bradshaw*, 573 F.3d 1158, 1165 (11th Cir. 2009); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

[2] "Credit agreements do not normally allow the mere delivery of a certificate to satisfy the condition itself; rather, the condition will go to the underlying facts . . . ." RICHARD NIGHT, WARREN COOKE & RICHARD GRAY, THE LSTA'S COMPLETE CREDIT AGREEMENT GUIDE 205 (McGraw Hill 2009).

[3] Unless otherwise indicated, capitalized terms used herein refer to the defined terms in the Credit Agreement ("C.A."), Disbursement Agreement ("D.A.") and Retail Facility Agreement ("R.A."). (R.A. § 1.1; C.A., § 1.1; D.A. Ex. A.) The Credit Agreement is attached as Exhibit 658 to the Appendix of Exhibits filed in support of Plaintiffs' Motion for Partial Summary Judgment, the Disbursement Agreement is attached as Exhibit 72 and the Retail Facility Agreement is attached as Exhibit 1510 to the accompanying Supplemental Appendix of

disbursement.[4] Two were expressly based on BofA's own information and awareness.[5] These conditions are strictly construed.[6] BofA was required to fully comply with them.

Unless BofA determined that all conditions precedent had been satisfied, it could not disburse without Required Lender consent. (C.A. § 9.3(b).)[7] It was required to issue a Stop Funding Notice. (D.A. § 2.5.1.) Until the circumstances giving rise to the Stop Funding Notice were resolved, all loan funds were required to remain in the Bank Proceeds Account, beyond the reach of the Borrowers.[8] (C.A. § 2.4(e).)

B. BofA Could Not Rely on Certificates that It Had Reason to Believe Were False.

In the absence of contrary information, BofA was entitled to assume that required borrower certificates were true and to act accordingly. It was not permitted, however, to ignore its own information and act as though a false certification were true.[9]

Testimony and Exhibits. All deposition testimony referenced herein is attached to the Appendix of Testimony filed in support of Plaintiffs' Motion or the Supplemental Appendix.

[4] These included § 3.3.2(a) ("[e]ach representation and warranty of each Project Entity set forth in Article 4 should be . . . true and correct . . . as if made on such date"); § 3.3.3 ("[n]o Default or Event of Default shall have occurred and be continuing"); § 3.3.11 (there has been no "change in the economics or feasibility of constructing and/or operating the Project, or in the financial condition, business or property of the Project Entities, any of which could reasonably [have] be[en] expected to have a Material Adverse Effect"); and § 3.3.23 (each of "the Retail Agent and Retail Lenders" had made the "Advances required of them").

[5] D.A. § 3.3.21 (BofA shall have not become aware "of any information or other matter affecting . . . the Project or the transactions contemplated . . . that taken as a whole [wa]s inconsistent in a material and adverse manner with the information or other matter disclosed to them concerning . . . the Project, taken as a whole.") and § 3.3.24 (BofA shall have "received such other documents and evidence as are customary for transactions of this type" as it "reasonably request[ed] in order to evidence the satisfaction of the other conditions . . . .")

[6] *Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 690-92 (1995).

[7] While BofA had the power to unilaterally waive some conditions, D.A. § 3.7.2, it could not unilaterally waive any of the conditions at issue here. C.A. § 10.1.

[8] *See* BofA's Additional Undisputed Material Facts ("BofA Add'l SS") ¶¶ 42, 44.

[9] BofA cites Sections 2.4.4(a), 9.3.2 and 9.10. BofA Opp. at pp. 1, 2, 18. Neither Section 9.3.2 nor Section 9.10 permitted BofA to disburse despite knowing the certifications were false. BofA's reference to Section 2.4.4(a) is also misplaced. That Section merely states that "[p]romptly after delivery of the Advance Request," BofA had to ensure it received all of the

BofA suggests that Plaintiffs' sole support for this common sense proposition is Section 9.1 of the Disbursement Agreement. Section 9.1 required BofA "to exercise commercially reasonable efforts and utilize commercially prudent practices" in performing its disbursement obligations.[10] But Section 9.1 does not stand alone. Other sections of the Disbursement Agreement and governing case law all prohibited disbursement under these facts.

1. BofA's Position Is Contrary to the Express Terms of the Disbursement Agreement.

As a definitional matter, a party may not "rely" upon certificates that it believes are not trustworthy.[11] The parties reinforced this plain meaning by limiting the certificates to those "believed by [BofA] on reasonable grounds to be genuine *and* to have been signed or presented by the proper party or parties." (D.A. § 9.3.2 (emphasis added).) Whether certificates were properly signed was only part of the inquiry. BofA also had to determine that the certificates were "genuine." A document containing a misrepresentation is not "genuine" by any reasonable definition.[12]

The parties agreed upon specific mechanisms to ensure that BofA did not disburse loan proceeds if it was aware of facts inconsistent with representations made in certificates.[13] Under

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"required documentation." It does not limit BofA's obligation to disburse only upon the satisfaction of the conditions precedent in Section 3.3.

[10] Plaintiffs and Plaintiffs' expert, Mr. Pryor, have not asserted that Section 9.1 imposes additional duties on BofA. Nor have Plaintiffs asserted that Section 9.1 supersedes Sections 9.3.2 or 9.10. But Section 9.1 is not limited, as BofA suggests, to those Disbursement Agent duties that are not addressed by more specific provisions. BofA Opp. at p. 23-24. In any event, Sections 9.3.2 and 9.10 do not address whether BofA may rely on false certificates.

[11] "Rely" means "to have confidence; have a feeling of security; place faith without reservation; trust." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 1919 (1993).

[12] *See Stanford Seed Co. v. Balfour, Guthrie & Co.*, 27 Misc. 2d 147, 150 (N.Y. Sup. Ct. 1960) ("We conclude that in this context 'genuine' means more than an authentic document. It means a truthful statement of the commercial transaction which it purports to represent . . . .").

[13] When interpreting a contract "the entire contract must be considered, and all parts of it reconciled, if possible, in order to avoid an inconsistency." *Terwilliger v. Terwilliger*, 206 F.3d 240, 245 (2d Cir. 2000). Where there is an inconsistency, specific provisions govern over more general or boilerplate provisions. *Rocon Mfg., Inc. v. Ferraro*, 605 N.Y.S.2d 591, 593 (N.Y. App. Div. 1993) (citation omitted); *see also County of Suffolk v. Long Island Lighting Co.*, 266 F.3d 131, 139 (2d Cir. 2001) (specific provisions will limit the meaning of general provisions whether or not there is a true conflict between the two provisions).

Section 7.1.3(c) it was an Event of Default under the Disbursement Agreement if any representation, warranty or certification by any of the Project Entities (including any Advance Request or other certificate submitted with respect to this Agreement) was "found to have been incorrect." Such a default in a certificate independently required a Stop Funding Notice.[14]

Section 3.3.21 similarly prohibited disbursements if BofA became "aware" of "any information" concerning the Project or any of the Loan Parties (including the Project Entities) that "taken as a whole" was "inconsistent in a material adverse manner" with other information it had been provided. If BofA had any question regarding the satisfaction of any other condition precedent, Section 3.3.24 permitted BofA to disburse only if it "received such other documents and evidence" as it "may reasonably request in order to evidence the satisfaction of the other conditions set forth above." (D.A. § 3.3.24.)

What BofA was aware of (§ 3.3.21) and what it had received (§ 3.3.24) were facts known to BofA, not the Borrowers; and the Borrowers therefore could not meaningfully certify the satisfaction of these conditions. This is fundamentally inconsistent with BofA's contention that it was entitled blindly to "rely" upon the broad representation by the Borrowers that "all conditions precedent have been satisfied."

Finally, Section 9.10 provides that BofA is liable for damages arising out of "any loss that may occur by reason of . . . false representations" where BofA acts with gross negligence. The fact that BofA could be liable for "false representations" establishes that it could not blindly rely on false certificates, as it now contends.

2. BofA's Position Is Contrary to Settled New York Law.

New York cases uniformly reject a party's claim of reliance upon purported misrepresentations that it knew (or should have known) to be false.[15] Courts have applied this

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[14] D.A. § 2.5.2(a)(ii); *see also* D.A. §§ 2.5.1, 3.3.3, 9.2.3. Similarly, in issuing a Stop Funding Notice, BofA was required to "specify, in reasonable detail, the conditions precedent which the Disbursement Agent *has determined* have not been satisfied." D.A. § 2.5.1 (emphasis added). Whereas, if BofA "later *determine[d]* that the conditions precedent giving rise to [the] Stop Funding Notice [had] been satisfied," it was to deliver the Advance Confirmation Notice to the Project Entities and the Funding Agents. D.A. § 2.5.3 (emphasis added).

[15] *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 500 F.3d 171, 182 (2d Cir. 2007) (a party "cannot demonstrate justifiable reliance on representations it knew were false" or to which it was "knowingly blind") (quoting *Banque Franco-Hellinque de Commerce International et Maritime,*

general rule in the specific context of multi-party loan agreements. In *Bank Brussels Lambert v. Chase Manhattan Bank, N.A*,[16] the borrower under a revolving credit facility filed for bankruptcy, and the lenders brought an action against Chase, the agent bank, alleging that Chase breached the credit agreement by performing its duties with negligence, gross negligence, willful misconduct and fraud.[17] Specifically, the lenders alleged that Chase violated an express condition to funding when it issued a letter of credit in purported reliance on documents from the borrower, including financial statements and a certificate representing that no material adverse change had occurred.[18] The lenders claimed that Chase knew (or had reason to know) that the documents were materially inaccurate. Chase did not dispute that the documents were inaccurate but argued, as BofA does here, that the credit agreement relieved it of responsibility for the accuracy of the information the borrower supplied. The Court rejected that argument. "[I]f Chase knew, or was grossly negligent in not knowing, that the materials . . . were materially inaccurate, it cannot argue that those materials were satisfactory in 'substance.'"[19]

Chase Manhattan Bank v. Motorola, Inc. reached a similar result.[20] Motorola had guaranteed a loan by Chase and others to Iridium, a spin-off from Motorola. Iridium issued a certificate in apparent compliance with the loan agreements that, if genuine, extinguished the Guarantee. Chase, the agent bank, questioned the certificate and demanded that the guarantee be reinstated. The court found that the certificate was materially false and rejected Motorola's claim that it could rely on the false certificate to terminate its obligation. The court found that Iridium's issuance of a false certificate was itself an Event of Default under the loan agreement that triggered the guarantee and Motorola "knew, or was on notice of, the false and misleading nature of Iridium's Certificate."[21]

S.A. v. Christopides, 106 F.3d 22 (2d Cir. 1997) (guarantor could not have justifiably relied on false statements he had reason to know were false)).

[16] No. 93 Civ. 5298 (LMM), 1996 U.S. Dist. LEXIS 15631 (S.D.N.Y. Oct. 17, 1996).

[17] *Id.* at *4.

[18] *Id.* at *17-18.

[19] *Id.* at *19-21.

[20] 184 F. Supp. 2d 384 (S.D.N.Y. 2002).

[21] *Id.* at 395.

3. BofA's Position Is Contrary Both to Industry Custom and Practice as Well as BofA's Own Understanding.

BofA witnesses, banking experts, and an industry handbook heavily relied on by BofA's expert agree that it was not commercially reasonable or prudent for BofA to disburse Loan proceeds when it had reason to believe that certificates submitted by the Borrowers were incorrect.[22] BofA argues that such testimony is inadmissible parol evidence.[23] The Disbursement Agreement unambiguously rejects BofA's interpretation, but if it were ambiguous, evidence of custom and practice is admissible.[24]

BofA contends that the LSTA Handbook demonstrates that it was permitted to rely on certificates in the face of contrary information. But the language BofA cites does not address the issue of an agent's obligations when it obtains information contrary to the certificates.[25] The only provision in the Handbook that does address this issue rejects BofA's argument: "Credit agreements do not normally allow the mere delivery of a certificate to satisfy the condition itself; rather, the condition will 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."[26] BofA argues that this provision deals only with lenders, not agents.[27] But as agent, BofA acted on behalf of the Lenders.[28] No Lender reasonably expected that it would be worse off with an agent.

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[22] *See* Motion at pp. 14-15.

[23] BofA Opp. at p. 20.

[24] *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1769 (2010) (explaining that "[u]nder . . . New York law . . . evidence of 'custom and usage' is relevant to determining the parties' intent when an express agreement is ambiguous" and collecting cases).

[25] BofA Opp. at p. 21.

[26] ALLISON TAYLOR & ALICIA SANSONE, THE HANDBOOK OF LOAN SYNDICATIONS & TRADING 274 (McGraw Hill 2007).

[27] BofA Opp. at p. 21.

[28] The Credit Agreement provides: "Each of the Lenders and the Issuing Lender hereby irrevocably appoints Bank of America to act on its behalf as the Administrative Agent hereunder and under the other Loan Documents and authorizes the Administrative Agent to take such actions on its behalf and to exercise such powers as are delegated to the Administrative Agent by the terms hereof or thereof, together with such actions and powers as are reasonably incidental thereto." C.A. § 9.1(a). As Disbursement Agent, BofA further agreed to act on the Lenders'

BofA also quibbles with the testimony of its own witnesses and expert who acknowledged that blind reliance on certificates was contrary to governing customs and practices.[29] Mr. Susman, Mr. Bolio and Mr. Varnell each testified that he would not disburse funds in disregard of information that was inconsistent with representations of the Borrowers.[30] BofA attempts to limit the scope of this testimony by claiming they each qualified his response to what he would have done had he possessed "credible evidence" that a borrower's representations were false."[31] Okay. The evidence in BofA's possession was profoundly credible,[32] and BofA has offered no substantial evidence disputing that it knew them to be false.

BofA's expert testified that "based on the certainty of the reasons or the quality of the reasons [suggesting that a certificate is inaccurate], then it would be commercially reasonable to inquire in certain cases."[33] Specifically, "if an agent possessed definitive evidence that a material adverse event existed," he would "expect" that the agent would not "disburse funds unless some resolution to that issue was achieved with the borrower and all the lenders to the facility."[34] He did not testify, as BofA suggests, that it would be "commercially reasonable" for an agent to disburse without such an inquiry if there was reason to believe that the borrower's certificates were inaccurate.[35]

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behalf and "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.

[29] BofA Opp. at pp. 22-23; *see also* BofA Opp. SS. ¶ 76.

[30] Bolio Depo., 164:20-165:12, 175:6-18; Susman Depo., 181:9-19, 182:22-183:20; Varnell Depo., 211:13-212:5; *see* Plaintiffs' Separate Statement of Undisputed Material Facts ("Plts. SOUF") ¶ 76.

[31] BofA Opp. at p. 22. *See also* BofA Opp. SS ¶ 76.

[32] *See* Section II.C.1, *infra.*

[33] Lupiani Depo., 131:10–132:19; *see* Plts. Resp. to BofA Opp. SS ¶ 76.

[34] Lupiani Depo., 166:4-11, 166:20-167:24; *see* Plaintiffs' Response to BofA's Opposition to Plaintiffs' Separate Statement of Undisputed Material Facts ("Plts. Resp. to BofA Opp. SS") ¶ 76.

[35] *See* BofA Opp. at pp. 22-23.

4. BofA Did Not Have to Receive a Notice of Default from a Lender, But It Did.

BofA contends that there is no evidence that it "received a notice of a default from Fontainebleau or any Lender."[36] There was no such requirement. The absence of a Default or Event of Default was a condition precedent to disbursement (D.A. § 3.3.3), but BofA cites nothing to suggest that the manner in which it learned of a Default or Event of Default was limited to "notice from Fontainebleau or any Lender." It was an Event of Default if BofA "found" any of the representations made by Fontainebleau to be false. (D.A. § 7.1.3(c).)

BofA knew that Lehman had filed for bankruptcy (the potential "death nail" for the project) and thereafter failed to fund its commitments under the Retail Agreement,[37] both obvious Defaults under the Disbursement, Credit and Retail Agreements.[38] No formal notice was required. BofA's own information and awareness was sufficient.

BofA argues that "the Lenders could have challenged Fontainebleau's representations and prevented BANA from disbursing funds by submitting a notice of default to the Administrative Agent."[39] The provisions it cites do not support this conclusion.[40] But even if individual Term Lenders could have prevented disbursement, it would be beside the point. As the Disbursement Agent, BofA was responsible for determining that all conditions precedent were satisfied before it disbursed.[41]

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[36] BofA Opp. at p. 19.

[37] Plts. SOUF ¶¶ 33, 44-62, 64-70, 73; BofA Opp. SS ¶¶ 44, 46-49, 53, 54, 56, 59, 66-69, 73; Plts. Resp. to BofA Opp. SS ¶¶ 45, 46, 50, 52, 55, 57, 58, 60, 61, 63, 64, 70; BofA Add'l SS ¶¶ 54, 55.

[38] Motion at pp. 22-25.

[39] BofA Opp. at pp. 20-21.

[40] BofA Opp. at p. 22, n.15. Section 9.3 of the Credit Agreement simply provides that the Bank Agent was not "deemed" to have notice of a Default until it received written notice from the "Borrowers, a Lender or the Issuing Lender." Nothing in Section 9.3 provides the Lenders any ability to prevent BofA from disbursing. Sections 2.5.1 and 2.5.2 of the Disbursement Agreement identify the circumstances in which BofA was obligated to issue a Stop Funding Notice. Nothing in those Sections provides the Lenders the ability to cause BofA to do so. The Term Lenders were completely at BofA's mercy when it came to disbursement of their Loans.

[41] D.A. §§ 2.1.2, 2.4.6, 2.5.1, 3.3. It was not up to the Lenders to do BofA's job. The fact one Plaintiff testified that it did not "want [to] open ourselves up to liabilities . . . by not funding our draws or allowing – or requesting that advances not be approved" is irrelevant. *See* BofA Opp.

In any event, BofA did receive notice. Highland, a Term Lender, sent BofA emails notifying it that Lehman's bankruptcy prohibited further disbursements,[42] that it had a Material Adverse Effect on the Project,[43] [redacted].[44] BofA claims that Highland's emails were insufficient "notice" because BofA "correctly determined that the e-mails contained facially inaccurate information."[45] But BofA agreed with many of Highland's conclusions. For instance, it agreed that Lehman's bankruptcy was a potential "death nail" and that "there were no assurances that Lehman would continue to fund its commitments under the Retail Facility."[46] It also agreed that financing for the Project would shut down if Lehman did not fund[47] (an obvious potential Material Adverse Effect). [redacted] Fontainebleau's payment of Lehman's share of the September Advance prevented satisfaction of

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at p. 22; BofA Add'l SS ¶ 135. [redacted] BofA Opp. at p. 22; *see* Plaintiffs' Response to BofA's Additional Undisputed Material Facts ("Plts. Resp. to BofA Add'l SS") ¶ 138.

[42] Plts. SOUF ¶ 59; BofA Opp. SS ¶ 59; BofA Add'l SS ¶ 106.

[43] BofA Add'l SS ¶ 110.

[44] Plts. SOUF ¶¶ 60, 61; Plts. Resp. to BofA Opp. SS ¶¶ 60, 61; BofA Add'l SS ¶¶ 112, 113. [redacted] BofA Add'l SS ¶ 119. BofA has no grounds for this argument. [redacted] Plts. Resp. to BofA Add'l SS ¶ 119.

[45] BofA Opp. at p. 19.

[46] Plts. SOUF ¶ 44; BofA Opp. SS ¶ 44; *see also* Plts. Resp. to BofA Add'l SS ¶ 117. This undisputed fact contradicts BofA's assertion that it concluded that Highland's claim was incorrect because "there was no indication that there would be a shortfall in Retail Funds, or that Lehman would be able to honor its obligation under the Retail Facility." BofA Add'l SS ¶ 111; *see* Plts. Resp. to BofA Add'l SS ¶ 111.

[47] *See* BofA Opp. SS ¶ 46. At the very least, Lehman's bankruptcy reasonably could be expected to "materially and adversely affect[] the ability of the . . . Project Entities to construct the Project," preventing the satisfaction of Section 3.3.11.

Section 3.3.23's requirement that each of "the Retail Agent and Retail Lenders" make the "Advances required of them."[48]

C. Plaintiffs Have Demonstrated That BofA Improperly Disbursed Term Lender Loan Proceeds Despite Failures of Conditions Precedent.

1. BofA Knew that Lehman Failed to Make Its Required Retail Advances, Causing Section 3.3.23 to Fail.

BofA agrees that Fontainebleau funded for Lehman in September 2008, violating Section 3.3.23. BofA claims it did not breach the Disbursement Agreement, however, because it did not know. The evidence establishes otherwise.[49] BofA has presented no substantial evidence to the contrary.

BofA makes much of the fact that it asked the Borrowers to reaffirm all prior representations and warranties before BofA disbursed funds in September.[50] This was a meaningless gesture. The certifications were self-reaffirming on the date of each scheduled Advance. (D.A. § 4, Ex. C-1.) According to Mr. Yunker, the primary purpose of the requested reaffirmation was "to quell concerns not only from BofA but other lenders as to compliance with the condition precedent regarding the retail funding."[51] If so, BofA hardly could have fashioned

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[48] Plts. SOUF ¶ 49; BofA Opp. SS ¶ 49.

[49] Motion at p. 10-13; *see also* Plts. Plts. SOUF ¶¶ 44-62, 64-70; BofA Opp. SS ¶¶ 44, 46-49, 53, 54, 56, 59, 66-69, 73; Plts. Resp. to BofA Opp. SS ¶¶ 45, 46, 50, 52, 55, 57, 58, 60,61, 63, 64; BofA Add'l SS ¶¶ 54, 55. [redacted] *See also* Plts. Resp. to BofA Opp. SS ¶ 63; Plts. Resp. to BofA Add'l SS ¶ 90.

[50] *See* BofA Opp. at p. 28; BofA Add'l SS ¶ 61.

[51] Yunker Depo., 111:3-112:12; *see* Plts. Resp. to BofA Add'l SS ¶ 61. *See also United States v. Nektalov*, 461 F.3d 309, 315 (2d Cir. 2006) (court applied "conscious avoidance" concept to charge defendant with knowledge where he "suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge").

a request less likely to produce that information. It conceded as much when, four days later, it expressly asked Fontainebleau who funded Lehman's share of the September Retail Advance.[52]

BofA asserts that contemporaneous documents establish that it believed Lehman had funded in September.[53] In fact, Mr. Bolio's notes from September 2008 reflect that "Lehman didn't fund their share."[54] It is challenging to imagine how BofA might have attempted to prove that each of its key people believed that Lehman had funded. What is important here is that they made no attempt to do so.[55]

It is also undisputed that Highland [redacted] sent BofA one such report from John Maxwell at Merrill Lynch.[56] The Merrill Lynch report was widely disseminated within BofA and to Fontainebleau.[57] Mr. Maxwell was a reputable analyst followed by a number of Lenders and had been in direct communication with Fontainebleau prior to October 2008.[58] BofA asserts that it disregarded the report because the source for the statements was not specifically identified.[59] This may have been a basis for clarifying the report, but not disregarding it. BofA also asserts that it believed that the report overstated Lehman's share of

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[52] Plts. SOUF ¶ 53; BofA Opp. SS ¶ 53. Fontainebleau carefully refused to answer the direct question, further confirming what BofA already knew: Lehman did not fund. *See* Plts. SOUF ¶¶ 56, 57; BofA Opp. SS ¶ 56; Plts. Resp. to BofA Opp. SS ¶ 57.

[53] The only evidence BofA offers in support of this proposition is a general statement by Mr. Susman in late December 2008, some three months after the fact. *See* BofA Opp. at p. 10; BofA Add'l SS ¶ 66.

[54] Plts. Resp. to BofA Add'l SS ¶ 66.

[55] BofA has offered no evidence that anyone at BofA believed at the time BofA disbursed in September that Lehman had funded its share of the September Retail Advance. The only testimony BofA cites is that of Mr. Susman and Mr. Newby. BofA Add'l SS ¶¶ 76, 77. But neither could recall anything about their supposed conversations, including who they talked with or when (Plts. Resp. to BofA Add'l SS ¶¶ 76, 77), and BofA has cited no contemporaneous emails or other writings to support this vague testimony. Plts. Resp. to BofA Add'l SS ¶ 66. Certainly, if BofA believed that it had information establishing that Lehman had funded, there would have been no need to ask the question in the September 30 letter to Mr. Freeman.

[56] Plts. SOUF ¶ 60; Plts. Resp. to BofA Opp. SS ¶ 60; BofA Add'l SS ¶¶ 112, 113.

[57] Plts. Resp. to BofA Add'l SS ¶ 113.

[58] Plts. Resp. to BofA Add'l SS ¶ 113.

[59] BofA Opp. at p. 28; *see also* BofA Add'l SS ¶ 113.

the September Shared Costs.[60] But BofA also contends that it did not know what Lehman's share was.[61] Both statements cannot be true.

BofA concedes that it knew that ULLICO funded Lehman's portion of the Advances from December 2008 through March 2009.[62] BofA's assertion that Section 3.3.23 was satisfied despite ULLICO funding contorts the plain language of the provision that required "the Retail Agent [Lehman] . . . [to] make any Advances required . . . ." As explained in Plaintiffs' moving papers, it also required each Retail Lender make any Advances required of it. The "Advances required of" the Retail Lenders were several, not joint. (R.A. § 9.7.2(b).) BofA's concession that payment by non-Retail Lenders violated Section 3.3.23 establishes that the critical question was not simply whether all of the Retail Advances were made but also who made them. If receipt of the Retail Advances from any source was sufficient, Section 3.3.23 would have read, simply: "receipt of the Retail Advance."[63]

BofA knew that Lehman's bankruptcy caused a funding gap and that ULLICO would not agree to assume Lehman's remaining commitment.[64] The Lenders did not bargain for payment of Lehman's share on an ad hoc basis. Such an arrangement gave them no assurance that the

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[60] BofA Opp. at p. 28; *see also* BofA Add'l SS ¶ 113.

[61] BofA Opp. at p. 29.

[62] Plts. SOUF ¶ 73; BofA Opp. SS ¶ 73.

[63] BofA attempts to avoid the clear language of Section 3.3.23 by claiming that the Retail Facility was syndicated under a confidential process and that BofA thus had no ability to determine the amount of each Co-Lender's contribution. BofA Opp. at p. 29. This misses the point. BofA knew that ULLICO was funding on behalf of Lehman. Plts. SOUF ¶ 73; BofA Opp. SS ¶ 73. Therefore, it could not disburse.

[64] Plts. SOUF ¶¶ 44, 74; BofA Opp. SS ¶ 44; Plts. Resp. to BofA Opp. SS. ¶ 74. BofA's claim that there was no funding hole because "TriMont wired BANA the full requested Shared Costs" every month ignores reality. BofA Opp. at p. 28; *see also* BofA Add'l SS ¶ 97. Despite BofA's unsupported assertion that Fontainebleau consistently reassured BofA that there would be no disruption in funding (BofA Opp. at pp. 12-14, 30), Fontainebleau's financial statements clearly stated that "there can be no assurances that Lehman Brothers will continue to fund all or any portion of its remaining obligation under the Retail Construction Loan, or that the co-lenders will fund any Lehman Brothers shortfall in funding." Plts. Resp. to BofA Opp. SS ¶ 74; Plts. Resp. to BofA Add'l SS ¶ 92. BofA's own internal credit memos reflected the same. Plts. Resp. to BofA Opp. SS ¶ 74. Indeed, on April 13, 2009, the Borrowers notified the Lenders that the April Retail Advance "may not be fully funded." Plts. Resp. to BofA Opp. SS ¶ 74.

loan commitments would be fully funded. Whether it was Fontainebleau, ULLICO or any other person stepping in for Lehman on a month by month basis, Section 3.3.23 failed.

2. BofA was Aware of Materially and Adversely Inconsistent Information to Fontainebleau's Certifications, Causing Section 3.3.21 to Fail.

BofA misreads Section 3.3.21.[65] BofA did not have to "know" facts demonstrating that Fontainebleau's certifications were false. BofA simply had to "have become aware . . . of any information . . . taken as a whole [that was] inconsistent in a material and adverse manner with the information . . . disclosed to them" by Fontainebleau. Even considering only those facts that BofA does not even attempt to dispute, Section 3.3.21 failed.[66]

3. BofA Knew that Lehman's Bankruptcy Had a Material Adverse Effect, Causing Section 3.3.11 to Fail.

Lehman's bankruptcy was a "change in the economics or feasibility of constructing and/or operating the Project . . . which could reasonably be expected to have a Material Adverse Effect." That was all that was needed in order to cause the failure of Section 3.3.11.[67] BofA

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[65] BofA Opp. at pp. 29-30.

[66] BofA does not dispute that it knew Lehman filed for bankruptcy on September 15, 2008 and that it believed that this was a potential "death nail" that "was a significant event and [meant] that there were no assurances that Lehman would continue to fund its commitments under the Retail Facility." Plts. SOUF ¶ 44; BofA Opp. SS ¶ 44; *see also* Plts. Resp. to BofA Add'l SS ¶ 117. BofA does not dispute that Highland informed BofA that Lehman's bankruptcy had a Material Adverse Effect on the Project. BofA Add'l SS ¶ 110. BofA concedes that Fontainebleau informed BofA that it was considering funding Lehman's share of the September 2008 Advance, which BofA determined was impermissible under the Disbursement Agreement. Plts. SOUF ¶¶ 47-49; BofA Opp. SS ¶¶ 47-49; BofA Add'l SS ¶ 57. [redacted] Plts. SOUF ¶¶ 60, 61; BofA Opp. SS ¶¶ 60, 61; BofA Add'l SS ¶¶ 112-114. Finally, BofA admits that it knew that ULLICO funded Lehman's portion of every Advance from December 2008 through March 2009. Plts. SOUF ¶ 73; BofA Opp. SS ¶ 73. These were all materially inconsistent with the Borrowers' certificates that all conditions precedent had been satisfied.

[67] A Material Adverse Effect is defined as, among other things, any event or circumstance which: "materially and adversely affects the ability of the Companies and their Subsidiaries, taken as a whole, to perform their respective obligations under the Financing Agreements or of the Project Entities to construct the Project." D.A., Ex. A at p. 18.

recognized that any failure to fund by Lehman created a hole in the financing that could have caused the entire Project to shutdown.[68] Mr. Yunker, Vice President of the Global Gaming Team at Banc of America Securities and one of the architects of the Disbursement Agreement, characterized Lehman's bankruptcy as the potential "death nail" of the Project.[69] The retail portion of the Project was critical to its completion.[70] Lehman was the largest Retail Lender.[71] Lehman's bankruptcy rendered uncertain the availability of its committed funds.[72] Conditions in the credit markets and in Las Vegas made it unlikely that a replacement lender could be found.[73] The existing Retail Lenders refused to take over Lehman's commitment,[74] and Fontainebleau ultimately conceded that the Retail Facility would not be funded in full.[75] BofA does not even attempt to present evidence that any of its key executives did not believe that Lehman's bankruptcy "could reasonably be expected to have a Material Adverse Effect."

4. BofA was Aware that Fontainebleau Refused to Provide BofA Information Regarding the Source of Lehman's Share of the September Retail Advance, Causing Section 3.3.24 to Fail.

Fontainebleau's evasive use of the passive voice in its October 7, 2008 memorandum in response to BofA's direct question requesting the source of payment of Lehman's share of the September Retail Advance was plain to any intelligent reader. Lehman had not made the advance, and the lack of the advance was evidence of a breach of the agreement. At the very least, Fontainebleau had refused to answer. BofA nonetheless claims that it considered the answer satisfactory at the time.[76] It could not have. Highland immediately brought to BofA's

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[68] Plts. SOUF ¶¶ 45, 46; Plts. Resp. to BofA Opp. SS ¶¶ 45, 46; BofA Add'l SS ¶¶ 54, 55.

[69] Plts. SOUF ¶ 44; BofA Opp. SS ¶ 44; *see also* Plts. Resp. to BofA Add'l SS ¶ 117.

[70] Plts. SOUF ¶¶ 43, 45, 46; Plts. Resp. to BofA Opp. SS ¶¶ 45, 46; BofA Add'l SS ¶¶ 54, 55.

[71] Plts. SOUF ¶ 30; BofA Opp. SS ¶ 30.

[72] Plts. SOUF ¶ 44; BofA Opp. SS ¶ 44.

[73] Plts. Resp. to BofA Add'l SS ¶ 111.

[74] Plts. SOUF ¶ 39; BofA Opp. SS ¶ 39.

[75] Plts. Resp. to BofA Opp. SS ¶ 74.

[76] BofA Opp. at p. 30; BofA Add'l SS ¶ 85.

attention Fontainebleau's failure to answer the question.[77] The fact BofA did not receive an answer to its question caused Section 3.3.24 to fail.

5. BofA Knew Lehman Defaulted Under the Retail Facility, Causing Sections 3.3.2(a) and 3.3.3 to Fail.

BofA admits that Lehman's failure to fund in September 2008 caused a Lender Default which resulted in Sections 3.3.2(a) and 3.3.3 failing.[78] BofA claims it is not liable because it did not know that Fontainebleau funded for Lehman in September 2008.[79] As discussed, the evidence established it did. It has presented no substantial evidence that it did not.

Plaintiffs do not argue that the Lehman bankruptcy alone was a breach or a defined Default. It had, by definition, a Material Adverse Effect. In addition, following its bankruptcy and failure to fund, as BofA acknowledges,[80] Lehman became a "Defaulting Lender." (R.A. § 1.1 at p. 8.)

BofA claims that it was unable to determine whether ULLICO was permitted to fund for Lehman thereby preventing a Lender Default.[81] It was not. [redacted].[82] BofA had the Retail Agreement and thus could have answered that question for itself.[83] It could not, however, disburse Term Lender Loans in light of the information it had.

D. Plaintiffs Have Established That BofA Was Grossly Negligent.

BofA acknowledges that gross negligence under New York law is "conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing."[84] BofA suggests that gross negligence also requires intent to inflict harm. Intent to harm is required under the

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[77] Plts. Resp. to BofA. Add'l SS ¶ 85.

[78] BofA Opp. at p. 31.

[79] BofA Opp. at p. 31.

[80] BofA Opp. at p. 31.

[81] BofA Opp. at p. 31.

[82] [redacted] Plts. Resp. to BofA Add'l SS ¶ 24.

[83] Plts. Resp. to BofA Add'l SS ¶ 20.

[84] BofA Opp. at p. 25.

"willful misconduct" prong of the Agreement, not the "gross negligence" prong. BofA does not cite any authority to the contrary.

BofA asserts that there is "no evidence in the record" that it recklessly disregarded Plaintiffs' rights.[85] There is:

- 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.[86]
- BofA knew that Lehman filed for bankruptcy and knew that this "was a significant event and [meant] that there were no assurances that Lehman would continue to fund its commitments under the Retail Facility."[87]
- BofA knew that Lehman's bankruptcy was a potential "death nail" for the Project that "reasonably could be expected to have a Material Adverse Effect" causing the condition precedent in Section 3.3.11 to fail.[88]
- BofA knew that Lehman did not pay its share of the Retail Advance in September 2008 or from December 2008 through March 2009.[89]
- BofA knew that Lehman's failure to pay its share of the Retail Advances caused the condition precedent in Section 3.3.23 to fail.[90]
- BofA knew that the Borrowers submitted certificates falsely representing that the conditions precedent to disbursement had been satisfied, itself a failure of the condition precedent in Section 3.3.2(a).[91]

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[85] BofA Opp. at p. 25.

[86] D.A. §§ 2.4.6, 2.5.1, 3.3; Plts. SOUF ¶¶ 4, 7; BofA Opp. SS ¶¶ 4, 7; BofA Add'l SS ¶ 42.

[87] Plts. SOUF ¶ 44; BofA Opp. SS ¶ 44.

[88] Plts. SOUF ¶ 44; BofA Opp. SS ¶ 44; BofA Add'l SS ¶ 110; *see also* Plts. Resp. to BofA Add'l SS ¶ 117.

[89] Plts. SOUF ¶¶ 44-62, 64-70, 73; BofA Opp. SS ¶¶ 44, 46-49, 53, 54, 56, 59, 66-69, 73; Plts. Resp. to BofA Opp. SS ¶¶ 45, 46, 50, 52, 55, 57, 58, 60, 61, 63, 64, 70; BofA Add'l SS ¶¶ 54, 55.

[90] Plts. SOUF ¶ 49; BofA Opp. SS ¶ 49.

[91] Plts. SOUF ¶¶ 47-74; Plts. Resp. to BofA Opp. SS ¶¶ 50-74; BofA Add'l SS ¶ 61; Plts. Resp. to BofA Add'l SS ¶¶ 60-123.

- [redacted][92]
- BofA disregarded the knowledge it had and the warnings it received and instead improperly disbursed hundreds of millions of dollars of Term Lender Loans.[93]

The Lenders hired BofA to protect their interests and to act on their behalf. BofA failed them. None of the cases BofA cites in support of its claim that courts "routinely deny summary judgment" on issues of gross negligence involve comparable conduct.[94]

BofA responds that it took "additional steps." But these were mere eye wash:

- The effect of Lehman's bankruptcy on the Project was clear. It was a potential "death nail." Additional "discussions" did nothing to change this.[95]
- BofA did not respond to Highland's concerns. It sidestepped them. Nor is there any evidence that BofA "analyzed" much of anything, other than the requirements of Section 3.3.23, which it concluded were not satisfied by someone other than Lehman paying its share of Retail Advances.
- As noted above, asking the Borrowers to reaffirm all prior representations and warranties was a meaningless gesture.
- The fact that BofA received the Retail Advances is only part of the story. Who paid the Advances is the more important part, as BofA well knew.
- BofA did not "push" Fontainebleau to provide information. To the contrary, it sought broad and unspecific "reaffirmations" and refused to demand from Fontainebleau a

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[92] Plts. SOUF ¶¶ 59-61; Plts. Resp. to BofA Opp. SS ¶¶ 60, 61; BofA Add'l SS ¶¶ 106, 110, 112.

[93] Plts. SOUF ¶ 78.

[94] BofA Opp. at p. 25, nn.24, 27. *See Colnaghi U.S.A., Ltd. v. Jewelers Protection Services, Ltd.*, 81 N.Y.2d 821 (1993) (failure to properly install burglar alarm); *David Gutter Furs v. Jewelers Protection Services, Ltd.*, 79 N.E.2d 1027 (N.Y. 1992) (same); *Stuart Rudnick, Inc. v. Jewelers Protection Services, Ltd.*, 598 N.Y.S.2d 235 (N.Y. App. Div. 1993) (failure to maintain video camera); *Global Crossing Telecommunications, Inc. v. CCT Communications, Inc. (In re CCT Communications, Inc.)*, 2011 Bankr. LEXIS 2738, at *42-44, 2011 WL 3023501 (S.D.N.Y. July 22, 2011) (termination of service); *EJS-Asoc Ticaret Ve Danismanlik Ltd. Sti. v. AT&T Co.*, 92 Civ. 3038 (PNL), 1993 U.S. Dist. LEXIS 10344, *8-9 (S.D.N.Y. July 28, 1993) (erroneously including additional product in shipment).

[95] BofA asserts that it discussed Lehman's bankruptcy with counsel. BofA Opp. at p. 26. However, BofA has waived any defense premised on the reliance of counsel. Ex. 1511.

straight answer to the question of who funded Lehman's September Retail Advance, even after Highland noted that Mr. Freeman's October 7 memo was evasive.

- BofA was responsible for ensuring that all conditions precedent to disbursement were satisfied. Its "facilitation" of calls between Fontainebleau and certain Lenders is of no moment.

BofA made little effort to meet its obligations and a good deal to avoid them. It failed to protect the interests of the Lenders on whose behalf it was supposed to be acting, opting instead for a studied indifference to known facts that would have caused any reasonable agent to stop funding. Only after its money was at risk did it step up and stop funding. By that time, however, Plaintiffs' money was already gone.

III. CONCLUSION

Plaintiffs respectfully request that the Court grant their motion for partial summary judgment.

Dated: September 27, 2011

Respectfully submitted,

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FILED UNDER SEAL

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **REPLY 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: September 27, 2011.

Lorenz M. Prüss, Esq.