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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.

**TERM LENDER PLAINTIFFS' REPLY TO DEFENDANT BANK OF AMERICA, N.A.'S
RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL
FACTS AND TERM LENDER PLAINTIFFS' RESPONSE TO BANK OF
AMERICA, N.A.'S STATEMENT OF ADDITIONAL FACTS RE PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT**

FILED UNDER SEAL

The Term Lender Plaintiffs, in accordance with Federal Rule of Civil Procedure 56 and Local Rule 7.5, respectfully submit this Reply to Defendant Bank of America, N.A.'s ("BofA") Response to Plaintiffs' Statement of Undisputed Material Facts and Plaintiffs' Response to BofA's Statement of Additional Facts re Plaintiffs' Motion for Partial Summary Judgment.¹

Plaintiffs have only replied to BofA's Responses where Plaintiffs deem clarification to be critical. Plaintiffs' lack of reply to any of BofA's Responses is not an admission or indication that BofA's Response and interpretation of the evidence is accurate, complete, or sufficient to cause a disputed issue of material fact.

Plaintiffs have not included in their Response to BofA's Statement of Additional Facts the facts that are undisputed or are immaterial and/or irrelevant to Plaintiffs' Motion or BofA's Opposition thereto. Plaintiffs only accept or dispute the facts presented in BofA's Statement of Additional Facts for purposes of this Response and their Motion for Partial Summary Judgment and for no other purpose. Plaintiffs do not dispute the following additional facts: 1, 2, 6, 7, 10, 12-14, 16, 19, 21-23, 27-30, 32, 34, 39, 40, 42, 43, 47, 48, 50-53, 55-58, 67, 72, 74, 75, 78-84, 86-88, 91, 93, 94, 96, 97, 102, 105-110, 115, 122, 123 and 126-134. Plaintiffs dispute the following additional facts because they are immaterial and irrelevant: 3-5, 8, 9, 11, 15, 17, 18, 25, 99-101, 103, 118, 120, 125, 135 and 137.

Plaintiffs reserve the right to dispute, challenge or otherwise respond to the statements and/or facts presented in BofA's Response to Plaintiffs' Statement of Undisputed Material Facts and BofA's Statement of Additional Facts.

I. PLAINTIFFS' REPLY TO BOFA'S OPPOSITION TO PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS

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-

¹ Plaintiffs' Reply and Response are less than the 30 page limit. However, for the convenience of the Court, Plaintiffs have included a recital of Plaintiffs' facts and BofA's opposition to those facts in their Reply, as well as BofA's additional facts in their Response, which is not required by Local Rule 7.5, thereby resulting in this document exceeding the page limit. If requested, Plaintiffs will provide a copy of this document without including Plaintiffs' facts, BofA's opposition to those facts and BofA's additional facts.

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.)

BofA's Opp. to Paragraph 9: Disputed. The cited evidence does not support the statement. Although BANA's Corporate Debt Products Group ("CDP") was responsible for approving the Advance Requests, disbursing funds to the Borrowers, and deciding what information was disseminated to the Lenders (Cantor Opp. Decl. Exs. 21 (Bolio Dep. at 83:3-7); 16 (Brown Dep. at 49:7-50:19); 26 (Susman Dep. at 49:22-50:15; 52:2-7)), the cited evidence does not reflect that CDP was responsible for "all" of BANA's actions as Disbursement or Bank Agent or that CDP made "all" decisions relating to the disbursement of the loans. Among other things, BANA's Agency Management group and Credit Services and Administration Department also had responsibilities relating to BANA's agent roles. For example, Credit Services reviewed the Borrowers' monthly draw packages to ensure that all required documents were included. (*Id.* Exs. 21 (Bolio Dep. at 30:1-32:20); 16 (Brown Dep. at 39:8-12).)

Plaintiffs' Response: BofA's response is misleading to the extent it suggests that BofA's Agency Management Group and Credit Services and Administration Department had any independent decision making authority. Rather, Mr. Naval of the Agency Management Group and Ms. Brown of the Credit Services and Administration Department described their roles as ministerial. Both Mr. Naval and Ms. Brown reported to and took direction from the Corporate Debt Products Group. (*See also* Brown Depo., 8:18-25; Naval Depo., 10:5-9.)²

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.,

² Exhibits referenced in this statement refer to exhibits attached to the Appendix of Exhibits filed in support of Plaintiffs' Motion for Partial Summary Judgment. Exhibits that were not marked at a deposition are numbered sequentially beginning with No. 1501. Exhibits that are not included in the Appendix of Exhibits refer: (1) to exhibits attached to the Declaration of Daniel L. Cantor filed in support of BofA's Opposition to Plaintiffs' Motion, to the extent the exhibits are attached thereto; or (2) exhibits attached to the Supplemental Appendix of Testimony and Exhibits filed herewith. All deposition testimony is attached to the Appendix of Testimony filed in support of Plaintiffs' Motion or the accompanying Supplemental Appendix of Testimony and Exhibits.

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.)

BofA's Opp. to Paragraph 10: Disputed. The cited evidence does not support the statement. Mr. Susman did not have "primary responsibility" over BANA's "various agency roles." The cited evidence reflects only that Mr. Susman was involved as a CDP member in connection with BANA's roles as Administrative Agent and Disbursement Agent for the Fontainebleau Las Vegas financing. BANA was involved in multiple transactions as an agent while Mr. Susman was employed by BANA, but there is no evidence that he had "primary responsibility" over all of those "agency roles." BANA does not dispute that Mr. Susman was a CDP Senior Vice President and ceased to be employed by BANA in February 2009.

Plaintiffs' Response: BofA's response is misleading. Mr. Susman had primary responsibility over BofA's agency roles in connection with the Fontainebleau Las Vegas 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])

BofA's Opp. to Paragraph 43: Disputed. The cited evidence does not support this statement. Jim Freeman, in his cited testimony, testified that it was a "concern" when asked "if Lehman didn't fund its obligation and no one stepped up to fund it, that could very well shut down all financing for the project?" (Cantor Opp. Decl. Ex. 17 (Freeman Dep. at 56:24-57:3).)

[REDACTED]

[REDACTED]

Plaintiffs' Response: BofA's response contradicts its own admission. BofA asserts that it is undisputed that "[i]f the Retail Facility did not fund its entire portion of the Advance Request, no funds would be disbursed to Fontainebleau from the Bank Proceeds Account, which could cause Fontainebleau to be unable to pay that month's Project construction costs. It also asserts that it is undisputed that "[i]t was understood that Fontainebleau's failure to remain timely in paying subcontractors could adversely impact the Project." These judicial admissions

are binding on BofA and BofA should be estopped from asserting inconsistent facts.³ (*See* Plaintiffs' Response to BofA's Additional Undisputed Material Facts ("Plts. Resp. to BofA Add'l SS") ¶¶ 54, 55; *see also* Cantor Opp. Decl. at Ex. 97 (Susman Decl. at ¶ 21).)

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.)

BofA's Opp. to Paragraph 45: Disputed. The statement is not supported by the cited evidence. BANA witnesses testified that the funding for the Project would continue if the Retail Lenders continued to advance the Retail Shared Costs. Bret Yunker testified that "I understood there could be complications with funding going forward by virtue of Lehman's bankruptcy.... I don't know if it means that the project must be shut down if the retail funding doesn't occur. I think that would mean that the entity couldn't obtain funds out of the resort facility if the retail funding didn't occur." (Cantor Opp. Decl. Ex. 6 (Yunker Dep. at 36:13-37:6).) Jon Varnell testified: "The issue is whether or not [Lehman] would continue to fund or whether that funding would have to be found somewhere else." (*Id.* Ex. 13 (Varnell Dep. at 162:3-5).) Likewise, Jeff Susman testified that Lehman's bankruptcy "would have an impact if the company was not able to find alternate financing for the retail piece." (*Id.* Ex. 26 (Susman Dep. at 147:23-24).) And the cited David Howard testimony was limited to the implications of the *Retail Lenders* not funding. (*See id.* Ex. 12 (Howard Dep. at 39:13-40:6).)

Plaintiffs' Response: BofA's response is misleading because BofA takes the witnesses' testimony out of context. When read in context, the testimony supports the proposition that "BofA understood that the funding for the Project would have shut down if Lehman's share of the Retail Facility was not paid." Mr. Yunker testified that if Lehman's share was not paid, the "financing [for the Project] shuts down," which he "understood that by virtue of macro events occurring at the time would be very challenging for Fontainebleau." He further testified that it was "[c]orrect" that "if there was not funding in place to complete the retail space, in other words, if the project didn't have financing to complete it in its entirety, that the existing lenders on the resort facility would not agree to continue funding into a facility where completion of

³ *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1375 n.3 (S.D. Fla. 2001) (explaining "admissions in pleading are deemed judicial admission, binding on the party who makes them, even if the party offers post-pleading evidence which contradicts the admission") (citations omitted).

construction was not assured.” Mr. Howard testified that he “considered the Lehman bankruptcy . . . to have a potentially material impact, negative impact on” the Project because “if the retail funds were not funded, then . . . the casino resort lenders, everybody else, were not required to fund.” And, “[w]ithout funding, the project doesn’t get built.” Mr. Howard also testified that “[g]iven the state of the markets, [he] didn’t know if there was anybody out there that would” replace Lehman if Lehman reneged on its obligations. (*See also* Howard Depo., 117:17-24; *see also* Plaintiffs’ Response to BofA’s Opposition to Plaintiffs’ Separate Statement of Undisputed Material Facts (“Plts. Resp. to BofA Opp. SS”) ¶ 43.)

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.)

BofA’s Opp. to Paragraph 46: Disputed. The evidence cited does not establish that the Project could not be built without the Retail Facility financing. The cited evidence shows that “the way the documents were constructed, that if retail funds were not funded, then the [resort] lenders were not required . . . to fund.” (*Id.* Exs. 12 (Howard Dep. at 39:24-40:3); 26 (Susman Dep. at 146:10–18).) Bret Yunker testified: “I don’t know if it means that the project must be shut down if the retail funding doesn’t occur. I think that would mean that the entity couldn’t obtain funds out of the resort facility if the retail funding didn’t occur. But I can’t jump to the exact conclusion of the project shutting down at that point. . . . The financing shuts down. That’s different from the project shutting down.” (*Id.* Ex. 6 (Yunker Dep. at 37:2–11).)

Plaintiffs’ Response: BofA’s response is misleading because BofA takes the witnesses’ testimony out of context. When read in context, the testimony supports the proposition that “BofA understood that the Project could not be built without the financing for the Retail Facility.” (*See* Plts. Resp. to BofA Opp. SS ¶¶ 43, 45.)

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.)

BofA’s Opp. to Paragraph 50: Disputed. The cited evidence does not support the statement. BANA’s Bret Yunker and Fontainebleau’s Jim Freeman both testified that they did not recall whether they had a conversation regarding the impact of FBR’s funding on the conditions precedent to disbursement, but left open the possibility that a discussion took place

between Freeman and BANA. (*See* Cantor Opp. Decl. Exs. 17 (Freeman Dep. at 74:12-24, 88:19-91:11); 6 (Yunker Dep. at 96:11-98:14).)

Plaintiffs' Response: BofA's response contradicts its prior admissions. BofA previously asserted that it is undisputed that "[d]uring the phone calls with Fontainebleau after Lehman's bankruptcy filing, BANA listened to Fontainebleau discuss its financing options if Lehman did not fund, but did not make any recommendations." This judicial admission is binding on BofA and BofA should be estopped from now asserting inconsistent facts.⁴ (*See* BofA's Statement of Undisputed Material Facts In Support of its Motion for Summary Judgment dated August 5, 2011 filed under seal at ¶ 70.)

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.)

BofA's Opp. to Paragraph 52: Disputed. The cited evidence does not support the statement. Fontainebleau held phone calls with Term Lenders in late September 2008. For example, Jim Freeman held a phone call on September 23, 2008, with Brigade Capital's Doug Pardon regarding the Lehman bankruptcy filing, in response to Pardon's request for a call. (Cantor Opp. Decl. Exs. 7 (Pardon Dep. at 89:17-95:19); 48 [Dep. Ex. 92]; 46 [Dep. Ex. 278].)

Plaintiffs' Response: BofA's response is misleading and is not supported by the cited evidence. The evidence BofA cites only shows that Fontainebleau had a call with one Lender (not multiple Lenders) in late September, whereas the evidence cited by Plaintiffs clearly supports the proposition that "[i]n late September ... Fontainebleau did not return the Term Lenders' phone calls." For example, Mr. Susman testified that "towards the end of September" Fontainebleau was "not returning lenders' calls." Mr. Rourke testified that by early October "[t]he general concern . . . was that the company was not being responsive to requests" Both Mr. Howard and Mr. Yunker testified that Fontainebleau did not want to have a lender call in the September, October 2008 timeframe.

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.)

⁴ *Lofton*, 157 F. Supp. 2d at 1375, n.3.

BofA's Opp. to Paragraph 55: Disputed. This statement is unsupported by the cited evidence. Plaintiffs mischaracterize Mr. Freeman's deposition testimony. Mr. Freeman testified that he was "not sure" whether he told BANA that counsel advised him that there were limitations on what he could say about the Lehman situation. (Cantor Opp. Decl. Ex. 17 (Freeman Dep. at 106:11-20).) In addition, BANA's Brandon Bolio and Jeff Susman both testified that they did not recall ever being told by Mr. Freeman that Fontainebleau was limited in what it could discuss based on advice of counsel. (*Id.* Exs. 21 (Bolio Dep. at 81:13-82:16); 26 (Susman Dep. at 156:9-157:22).) Moreover, the quoted language also does not appear in Deposition Exhibit 254.

Plaintiffs' Response: BofA's response is misleading and mischaracterizes the evidence. While the quoted language is not in Deposition Exhibit 254, the Exhibit supports the statement that "Mr. Freeman told BofA that there were limitations on what we were and weren't allowed to say." The Exhibit is an email from Mr. Freeman to BofA reporting on a conversation with Highland in which he "told them what [he] could." (*See also* Plts. Resp. to BofA Add'l SS ¶ 68.).

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.)

BofA's Opp. to Paragraph 57: Disputed. Mr. Freeman's October 7, 2008 memorandum answered BANA's question whether Lehman funded in September 2008. The memo assured the Lenders that the August and September shared costs had been "funded in full" and that Fontainebleau did not "believe there will be any interruption in the retail funding of the project." (Cantor Opp. Decl. Ex. 59 [Dep. Ex. 77].) The memo also stated that Fontainebleau was "continuing active discussions with Lehman Brothers to ensure that, regardless of the Lehman bankruptcy filing and related acquisition by Barclay's, *there is no slowdown in funding for the project.*" (*Id.* (emphasis added).) In addition, BANA's Brandon Bolio testified that although the memo did not provide "as much detail as would have been ... nice," it adequately "answer[ed] the question." (*Id.* Ex. 21 (Bolio Dep. at 80:19-81:6).) BANA's Bret Yunker also testified that he could not recall any dissatisfaction on the part of BANA employees with

Fontainebleau's memo responses, and that from his personal perspective Fontainebleau's response provided sufficient clarity to resolve the issue. (*Id.* Ex. 6 (Yunker Dep. at 116:6-117:5).)

Plaintiffs' Response: BofA's response is misleading and mischaracterizes the evidence. Fontainebleau's October 7, 2008 memo does not state whether or not Lehman funded its portion and if not, what the other sources were. Therefore, the memo did not directly answer BofA's question. Moreover, other Lenders immediately pointed out to BofA that the October 7 memo did not answer the question. (*See also* Ex. 903.)

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.)

BofA's Opp. to Paragraph 58: Undisputed that on September 26, 2008, before disbursing funds to Fontainebleau, BANA requested and received representations from Fontainebleau CFO Jim Freeman re-affirming the Advance Request's certifications that all conditions precedent to funding—including funding by the Retail Lenders—were satisfied. (Cantor Opp. Decl. Ex. 51 [Dep. Ex. 75]; *see also id.* Exs. 6 (Yunker Dep. at 143:23-145:2); 17 (Freeman Dep. at 215:18-217:14).) In addition, the cited evidence does not support the statement. The cited portions of Mr. Freeman's testimony do not address the question of whether BANA followed up or not. (*Id.* Ex. 17 (Freeman Dep. at 92:10-95:24).) Disputed to the extent the word "notified" is intended as an assertion that Highland's September 26, 2008 e-mail was a notice of default under Disbursement or Credit Agreements.

Plaintiffs' Response: BofA's response is misleading and not responsive to Plaintiffs' Undisputed Fact. The statement also mischaracterizes the cited evidence to the extent it suggests the cited email indicates that the Retail Lenders funded.

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.)

BofA's Opp. to Paragraph 60: Disputed. The cited evidence does not support this statement. On October 6, 2008, Highland sent BANA an e-mail claiming that there were unidentified "public reports" that "equity sponsors" had funded Lehman's September 2008 Retail Advance portion. (Cantor Opp. Decl. Ex. 58 [Dep. Ex. 81].) Then, on October 13,

Highland sent BANA a Merrill Lynch research analyst's e-mail that stated: "We understand that FBLEAU equity sponsors have funded the amount required from Lehman on the retail credit facility due this month (\$4 million)." (*Id.* Ex. 62 [Dep. Ex. 80].) The Merrill Lynch report did not identify a source or basis for the statement, and overstated Lehman's Shared Costs portion. (*Id.*) [REDACTED]

[REDACTED] BANA also disputes that Highland confirmed a "mutual understanding" that Lehman had not made disbursements while in bankruptcy. Plaintiffs mischaracterize the quoted e-mail. The e-mail simply listed Highland's position on several Lehman-related issues and asked BANA to confirm them. (*Id.* Ex. 62 [Dep. Ex. 80].) Plaintiffs fail to identify any evidence that Mr. Scott or anyone from BANA subsequently confirmed those self-serving assertions or came to any kind of "mutual understanding" with Highland. Moreover, the statement quoted by Plaintiffs is hearsay and is inadmissible as evidence of the truth of the matters asserted therein. The statement at issue was made in Mr. Dorenbaum's e-mail to Mr. Scott, copied to Highland's Brad Means and Kevin Rourke, and purports to recount a prior conversation between Messrs. Dorenbaum and Scott. Messrs. Scott, Dorenbaum, and Means have not been deposed in this case. [REDACTED]

[REDACTED] Because no witnesses with personal knowledge of the conversation have testified about it, the statements contained in Deposition Exhibit 80 purporting to describe the conversation are inadmissible hearsay.⁵ Lastly, BANA did not understand that Lehman had made no disbursements while in bankruptcy. For example, internal BANA documents reflect BANA's belief in 2008 that Lehman funded in September 2008. (*See, e.g., id.* Ex. 76 [Dep. Ex. 905].)

⁵ *See* Fed. R. Evid. 801-802; *see also Read v. Teton Springs Golf & Casting Club, LLC*, 08 Civ. 99, 2010 WL 5158882 at *6 (D. Idaho Dec. 14, 2010) (striking e-mail attached to the plaintiff's opposition to the defendant's motion for summary judgment because although the e-mail was authenticated in a deposition, it "contains hearsay statements not based on the affiant's personal knowledge"); *Design X Mfg., Inc. v. ABF Freight Sys., Inc.*, 584 F. Supp. 2d 464, 468 (D. Conn. 2008) (refusing to consider on summary judgment an e-mail recounting what one non-deponent witness purportedly told another non-deponent witness because the e-mail was inadmissible hearsay within hearsay).

Plaintiffs' Response: BofA's response is misleading to the extent it suggests that the fact equity sponsors funded Lehman's September 2008 Shared Costs portion was only a rumor. Fontainebleau did in fact fund Lehman's September 2008 Shared Costs portion and Mr. Maxwell reported that he understood that fact. The evidence BofA cites does not support the statement that no other analysts reported that fact. Nor does the evidence BofA cites state that Mr. Maxwell did not offer any corroboration for the statement. [REDACTED]

[REDACTED] Further, Highland's email did not, as BofA misleadingly claims, "simply list[] Highland's position on several Lehman-related issues and ask[] BANA to confirm them." Rather, the email states that Highland is "unaware and understand that the agent is unaware of any facts that would support that Lehman, as Retail Lender, made any disbursements while in bankruptcy. In fact, as we discussed, it is both your understanding and our understanding that Lehman has not made any disbursement while in bankruptcy." There is no evidence that BofA ever disputed this statement. The email is not inadmissible hearsay. (See Plts. Response to BofA's Evidentiary Objections.) Finally, BofA's claim that "internal BANA documents reflect BANA's belief in 2008 that Lehman funded in September 2008" mischaracterizes the evidence. The only evidence BofA cites is dated December 30, 2008, over three months after the September 26, 2008 Advance. It conflicts with other BofA internal documents that were contemporaneous with the September Advance, including Mr. Bolio's handwritten notes, which demonstrate that BofA knew that "Lehman did not fund their share." (See also Plts. Resp. to BofA Add'l SS ¶¶ 66, 114, 116.)

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])

BofA's Opp. to Paragraph 61: Disputed to the extent that the word "informed" is intended as an assertion that Highland provided BANA with evidence of an existing fact. At most, Highland brought to BANA's attention an unsubstantiated and facially unreliable market rumor, and claimed that it caused the condition precedent in Section 3.3.23 to fail. (Cantor Opp. Decl. Ex. 62 [Dep. Ex. 80].) The Merrill Lynch research e-mail that Highland forwarded to BANA did not identify a source or basis for the statement, and it erroneously overstated Lehman's Shared Costs portion. (*Id.*) [REDACTED]

[REDACTED]

As discussed in its response to paragraph 60, BANA was unaware that Fontainebleau paid Lehman's portion of the September 2008 Retail Shared Costs.

Plaintiffs' Response: BofA's response mischaracterizes the cited evidence and is misleading. (See Plts. Resp. to BofA Opp. SS ¶ 60.)

63. [REDACTED]

[REDACTED]

BofA's Opp. to Paragraph 63: Disputed. Plaintiffs mischaracterize the evidence.

[REDACTED]

Plaintiffs' Response: [REDACTED]

[REDACTED]

[REDACTED] See also Plts. Resp. to BofA Add'l SS ¶ 89.)

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])

BofA's Opp. to Paragraph 64: Disputed. [REDACTED]

[REDACTED]

[REDACTED] In addition, Plaintiffs' Exhibit 19 is inadmissible and should be disregarded. The exhibit, a National City Special Assets Committee Report, was never authenticated. (See *id.* [REDACTED])

██████████ Ex. 6 (Yunker Dep. at 174:16-175:5).) The exhibit is apparently an internal memorandum prepared by non-party National City and obtained through non-party discovery from PNC Bank. The document's contents are hearsay. Because the document is being offered for the truth of its contents, it is inadmissible under Fed. R. of Evid. 802.⁶

Plaintiffs' Response: BofA's response is misleading and mischaracterizes the evidence. Sumitomo and ULLICO did not indicate they would increase their commitments by the amount needed to cover Lehman's entire commitment. Exhibit 19 is not inadmissible. (See Plts. Response to BofA's Evidentiary Objections.)

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.)

BofA's Opp. to Paragraph 70: Disputed. The cited evidence does not support this statement. Far from describing a "custom and practice," TriMont's Mac Rafeedie testified that he could not "recall the exact things that were discussed" with BANA, but that "consistent with [his] practice," he "could have" told BANA that FBR funded for Lehman. (Cantor Opp. Decl. Ex. 5 (Rafeedie Dep. at 57:13-58:19; *see also* Rafeedie Dep. at 112:6-20).) Mr. Rafeedie testified that the discussion "could have been just that Lehman's dollars were funded, not necessarily who funded what." (*Id.* Ex. 5 (Rafeedie Dep. at 58:1-9).) BANA's Jeanne Brown (Mr. Rafeedie's principal contact at BANA) testified that she did not remember TriMont telling her that Lehman was not funding in September 2008. (*Id.* Ex. 16 (Brown Dep. at 57:1-8).) In addition, in responding to Advance Requests, it was TriMont's practice to send a single wire transfer to BANA for the entire requested Retail Shared Cost without identifying the specific amounts funded by each Retail Co-Lender. (*Id.* Exs. 5 (Rafeedie Dep. at 39:18-41:9); 26 (Susman Dep. at 204:9-10).) BANA further disputes that it was TriMont's "custom and practice" to answer BANA's "questions regarding payments made pursuant to the Retail Facility Agreement." The cited evidence does not support this statement, and Ms. Brown recalled that, at times, she was "chasing" TriMont down, and would have to "call [TriMont], e-mail [TriMont]

⁶ See Fed. R. Evid. 801(c), 802; *see also Cortezano v. Salin Bank & Trust Co.*, 2011 WL 573755, at *11 (S.D. Ind. Feb. 15, 2011) (ruling that e-mail containing excerpts of meeting minutes sent by a non-party to plaintiff was inadmissible hearsay because "there was no indication of who prepared these notes, when they were prepared, or whether they were taken in the normal course of business").

asking where's my wire, what's the status of the wire." (*Id.* Ex. 16 (Brown Dep. at 59:4–60:4; 60:16–61:14).)

Plaintiffs' Response: BofA's response is misleading and mischaracterizes the evidence. The statement selectively quotes excerpts of Mr. Rafeedie's and Ms. Brown's testimony. Mr. Rafeedie testified that it was "[c]orrect" that consistent with his general practice and custom of keeping BofA apprised of significant events with respect to the retail facility, he would have told Ms. Brown about the fact that Lehman did not fund. Ms. Brown testified that she does not recall whether she did or did not discuss with Mr. Rafeedie whether Lehman itself funded in September 2008. However, she also testified that she does recall learning that Lehman stopped funding "[w]hen the market crashed and they filed for bankruptcy" and that Mr. Rafeedie "was having problems getting the money" starting from the time Lehman filed for bankruptcy. Further, TriMont did not always send a single wire transfer, but rather sometimes sent multiple wires. (*See also* Plts. Resp. to BofA Add'l SS ¶¶ 37, 70, 71.)

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.)

BofA's Opp. to Paragraph 72: Disputed. The cited evidence contradicts the statement. Fontainebleau's February 23, 2009 response to BANA's February 20, 2009 letter provided assurances regarding the continued funding of Lehman's portion of the Retail Shared Costs by Lehman and the Retail Lenders. The letter stated, among other things, that "[a]s relates to the Retail Facility, we are continuing active discussions with Lehman Brothers and the co-lenders to ensure that funding for the Project will continue on a timely basis. The Retail Facility is in full force and effect, there has not been an interruption in the retail funding of the Project to date." (Cantor Opp. Decl. Ex. 82 [Dep. Ex. 811].)

Plaintiffs' Response: BofA's response is misleading. BofA asked Fontainebleau "whether you anticipate that Lehman . . . will fund its share of requested loans, and whether the other Lenders under the Retail Facility intend to cover any shortfalls." Fontainebleau's response did not answer the question. (*See also* Plaintiffs' Separate Statement of Undisputed Material Facts ("Plts. SOUF") ¶ 71.)

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; ██████████ ██████████ Susman Depo., 273:7-274:1, 277:19-278:9.)

BofA's Opp. to Paragraph 74: Disputed. BANA did not know whether ULLICO would assume Lehman's remaining commitment. In fact, Fontainebleau consistently reported that the Retail Co-Lenders might fund for Lehman after Lehman's bankruptcy. For example, on October 7, 2008, Fontainebleau sent a memorandum to BANA and the Lenders, stating that it was "actively talking with the co-lenders under the retail construction facility ... [and it did] not believe there will be any interruption in the retail funding of the project." (Cantor Opp. Decl. Ex. 59 [Dep. Ex. 77].) Fontainebleau provided similar assurances on October 22, 2008 and February 23, 2009. (*Id.* Exs. 64 [Dep. Ex. 285]; 82 [Dep. Ex. 811].) Moreover, Jeff Susman explained in his testimony that while he understood that ULLICO's funding for Lehman was a short-term arrangement "[a]s it was initially presented to [BANA]," he added that "Ullico could decide to fund it on a long-term basis." (*Id.* Ex. 26 (Susman Dep. at 273:23-275:7).)

Plaintiffs' Response: BofA's response is misleading and mischaracterizes the evidence. Fontainebleau did not provide BofA with "assurance." To the contrary, Fontainebleau's financial statements stated: "[t]here 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." BofA's January 16, 2009 Credit Approval Memorandum reported the same fact. Further, Mr. Susman testified that "ULLICO said they would [fund] on a short-term basis until a permanent solution could be found." He also testified that Jeff Soffer was trying to get BofA to step in for Lehman. Indeed, ultimately, on April 13, 2009, Fontainebleau notified the Lenders that the Retail Loan may not be fully funded. (*See also* Exs. 206 at p. 3; 410; Cantor Opp. Decl. Ex. 72 at FBR01280966 [Dep. Ex. 286]; Cantor Opp. Decl. Ex. 26 (Susman Dep., 273:23-275:10).)

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.)

BofA's Opp. to Paragraph 76: Disputed. This statement is a legal conclusion, not a factual statement. Moreover, it is unsupported by the cited evidence. To the extent a response is required, the question of whether BANA would inquire further regarding information that was allegedly inconsistent with the Borrowers' representations would depend on, among other things, the reliability of the inconsistent information and the degree to which the information conflicted with the Borrowers' representations. BANA's Jeff Susman testified that if he had information that contradicted the Borrowers' representations he would not allow funds to be disbursed, but he also testified that the decision "would depend on the degree of inconsistency." (Cantor Opp. Decl. Ex. 26 (Susman Dep. at 181:9-19; 182:22-183:20).) BANA's Jon Varnell testified only that he believed that Mr. Susman "would undertake whatever he needed to satisfy himself that he had a legitimate draw" including obtaining additional information if necessary. (*Id.* Ex. 13 (Varnell Dep. at 211:13-212:5).) BANA's Brandon Bolio testified that he "would think" he would ask the Borrowers about discrepancies, but also testified that he was unaware of any obligation under loan documents to do so. (*Id.* Ex. 21 (Bolio Dep. at 164:20-165:12; 175:6-18).)

Plaintiffs' Response: The applicable standard of care is an issue of fact that may be established through expert testimony. *Gans v. Mundy*, 762 F.2d 338, 342 (3d Cir. 1985). Here, the expert testimony, as well as the admissions of BofA witnesses who drafted the Disbursement Agreement, establish the undisputed fact that, under the applicable standard of care, "[i]t 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." BofA's response is also misleading as BofA neglects to note the cited evidence includes Section 3.3.21 of the Disbursement Agreement, which conditions BofA's disbursement on BofA not being aware of any material and adverse inconsistent information, as well as the testimony of Mr. Pryor and Mr. Lupiani, both of which further support the statement. Mr. Lupiani 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." 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 of to the facility."