II. PLAINTIFFS' RESPONSE TO BOFA'S STATEMENT OF ADDITIONAL UNDISPUTED FACTS

20. BANA was not a party to the Retail Co-Lender Agreement or the Retail Facility Agreement. BANA did not receive a copy of the Retail Co-Lender Agreement. (*See* Retail Agmt.; *see also* Cantor Opp. Decl. Ex. 97 (Susman Decl. ¶ 19).)

Plaintiffs' Response: Disputed to the extent that the statement misleadingly suggests that BANA did not receive a copy of the Retail Facility Agreement, which it did. (Ex. 1510.)

24. Retail Facility Agreement Section 9.7.2 permitted Lehman "to sell … all or any part of [its] right, title, or interest in, and to, and under the Loan … to one or more additional lenders" without limiting how that interest could be divided up. Retail Facility Agreement Section 9.7.2(b) granted any Retail Co-Lender the right "to make the defaulting Co-Lender's pro rata share of such advance pursuant to the Co-Lending Agreement," thereby allowing the defaulting Co-Lender to avoid an actual Lender Default. (Retail Agmt. §§ 9.7.2, 9.7.2(b).)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. It is undisputed that the Retail Facility Agreement contains the quoted language. However, the Agreement is not susceptible to the interpretation BofA advances. The ability of a Co-Lender to make a defaulting Co-Lender's pro rata share did not allow the defaulting Co-Lender to avoid a Lender Default. To the contrary "Lender Default" means "the failure or refusal . . . of a Lender or Co-Lender to make available its portion of any Loan when required to be made by it hereunder." Thus, by the time a Co-Lender exercised its right to make the defaulting Lender's pro rata share, a Lender Default had already occurred. [REDACTED]

[REDACTED] (R.A. § I at p. 15; Exs. 23, 29, 35, 41; [REDACTED][7]

26. The identity of the Retail Co-Lenders was unknown to BANA until the Borrowers revealed the participants in late 2008. (*See id.* Ex. 97 (Susman Decl. at ¶ 10).)

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[7] Unless otherwise indicated, capitalized terms used herein refer to the defined terms in the Retail Facility Agreement ("R.A."), Credit Agreement ("C.A.") and Disbursement Agreement ("D.A."). (R.A. § 1.1; C.A., § 1.1; D.A. Ex. A.) The Retail Facility Agreement is attached as Exhibit 1510 to the Supplemental Appendix, the Credit Agreement is attached as Exhibit 658 to the Appendix of Exhibits and the Disbursement Agreement is attached as Exhibit 72.

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Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement is ambiguous as to "late 2008." BofA knew the identity of the Retail Co-Lenders by, at the latest, October 16, 2008. (Exs. 231, 232.)

31. No more than once per month, Fontainebleau submitted a Notice of Borrowing that, subject to certain terms and conditions, would require Lenders to transfer funds into a designated bank account (the "Bank Proceeds Account"). (*See* Credit Agmt. §§ 2.1(c), 2.4(c).)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement is ambiguous as to which "certain terms and conditions" and which "Lenders" BofA is referencing. The statement is an inaccurate and misleading characterization of the Disbursement Agreement to the extent it suggests that the referenced funding process applied to Initial Term Loans. A Notice of Borrowing was only submitted by the Borrowers when seeking Delay Draw Term Loans and/or Revolving Loans. The Initial Term Loans were funded into the Bank Proceeds Account upon closing of the credit facility. (C.A. §§ 2.1(a), (b) and (c), 2.4, 5.2(a); D.A. § 2.1.1.)

33. BANA was required to confirm that each Advance Request contained all the representations, warranties, and certifications necessary to satisfy Disbursement Agreement Section 3.3's conditions precedent to an Advance. (*See* Disbursement Agmt. § 2.4.6.)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement mischaracterizes the cited evidence, and is misleading to the extent it suggests that BofA's responsibility with respect to an Advance Request set forth in Section 2.4.6 was satisfied by simply confirming the Advance Request contained the necessary information. Rather, BofA was required to determine whether the conditions precedent were satisfied. Section 2.4.6 requires that: "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 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 ...." Similarly, Section 2.5.1 required BofA to identify the conditions precedent it "determined have not been satisfied" in issuing a Stop Funding Notice. Further, certain conditions precedent, e.g., Sections 3.3.21 and 3.3.24, could not be confirmed simply by reference to materials contained in the Advance Request. (D.A. §§ 2.4.6, 2.5.1, 3.3.21, 3.3.24.)

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35. Each Advance Request required Fontainebleau, among other things, to "represent, warrant and certify" that "the conditions set forth in Section[] 3.3 … of the Disbursement Agreement are satisfied as of the Requested Advance Date." (Cantor Opp. Decl. Ex. 96 (Bolio Decl. at ¶ 6, Ex. 2 (Disbursement Agmt. Ex. C-1, at 8)).)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement is misleading in that it incorrectly implies that submission of a facially conforming Advance Request would satisfy all conditions precedent. (Cantor Opp. Decl. Ex. 96 (Bolio Decl. at ¶ 6, Ex. 2 (Disbursement Agmt. Ex. C-1) at pp. 1-2).)

36. The Advance Request also included multiple specific representations that tracked the substance of Section 3.3's conditions precedent. (*Id.* at 5-8.) In addition, Fontainebleau certified that each of the seventeen Advance Request attachments "is what it purports to be, is accurate in all material respects, . . . and reflects the information required by the Disbursement Agreement to be reflected therein." (*Id.* at 1.)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement is ambiguous as to "generally tracked." The last sentence of the statement is an incomplete and misleading excerpt from the Advance Request, which specifically states: "Each of the following attachments to this Advance Request is what it purports to be, is accurate in all material respects, is consistent with the requirements of the Disbursement Agreement, and reflects the information required by the Disbursement Agreement to be reflected therein, in each case as of the Advance Date specified above." Further, the statement is misleading in that it incorrectly implies that submission of a facially conforming Advance Request would satisfy all conditions precedent. (Cantor Opp. Decl. Ex. 96 (Bolio Decl. at ¶ 6, Ex. 2 (Disbursement Agmt. Ex. C-1) at pp. 1-2).)

37. After receiving the Retail Co-Lenders' funds, TriMont sent a single wire transfer for the entire requested Shared Cost amount to BANA—it did not identify the specific amounts funded by each Retail Co-Lender. (*See* Cantor Opp. Decl. Exs. 5 (Rafeedie Dep. at 40:22-41:9); 26 (Susman Dep. at 204:9-10).)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement is an inaccurate and misleading characterization insofar as TriMont did not always send a single wire transfer, but rather sometimes sent multiple wires. The statement is also misleading because it was TriMont's custom and practice to keep its contact at BofA, Jeanne

Brown, informed about the status of the loans under the Retail Facility. (Exs. 244, 246, 250; Cantor Opp. Decl. Ex. 96 (Bolio Decl. at Ex. 29); Rafeedie Depo., 34:19-35:18.)

38. The Disbursement Agent's receipt of the requested Shared Costs was an Advance Request condition precedent under Disbursement Agreement Section 3.3.23. (*See* Disbursement Agmt. § 3.3.23.)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement mischaracterizes Section 3.3.23 of the Disbursement Agreement and is misleading to the extent it suggests that Section 3.3.23 provides that as long as the entire amount of Shared Costs due under the Retail Facility was funded, regardless of whether the Retail Agent and each Retail Lender funded their respective portions, the funds could be disbursed to Fontainebleau from the Bank Proceeds Account. It does not. Section 3.3.23 requires that the Retail Agent and each Retail Lender fund its portion: "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.)

41. The Advance Confirmation Notice instructed the Bank Agent—BANA in its capacity as Administrative Agent—to transfer the requested funds from the Bank Proceeds Account to payment accounts on the Scheduled Advance Date for further disbursement to the Borrowers. (*See* Disbursement Agmt. § 2.4.6.)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement mischaracterizes the cited evidence and is misleading to the extent it suggests the transfer of funds from the Bank Proceeds Account to payment accounts was not subject to the satisfaction of conditions precedent. BofA as Bank Agent was not permitted to transfer the requested funds unless "the applicable conditions precedent set forth in Article 3 have been satisfied." Further Section 3.3 provides that "[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. §§ 2.4.6, 3.3; *see also* D.A. § 2.1.2.)

44. A Stop Funding Notice temporarily suspended the Lenders' obligations to fund loans under the Credit Agreement. (*See* Disbursement Agmt. § 2.5.2.)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement is not supported by the cited evidence and is a misleading characterization. Upon the issuance of a Stop Funding Notice, the Lenders were relieved of any obligation under the Credit Agreement to make additional Loans until the circumstances giving rise to the Stop Funding Notice were resolved. (C.A. § 2.4(e).)

45. Disbursement Agreement, Section 9.3.2 expressly provides, among other things, that BANA "may rely and shall be protected in acting or refraining from acting upon" certifications and other statements by Fontainebleau and IVI, and that "[n]otwithstanding anything else in this Agreement to the contrary, in ... approving any Advance Requests, ... [BANA] "shall be entitled to rely on certifications from the Project Entities ... as to satisfaction of any requirements and/or conditions imposed by this Agreement." Section 9.3.2 also states that BANA "shall not be required to conduct any independent investigation as to the accuracy, veracity or completeness of any such items [in the Advance Request] or to investigate any other facts or circumstances to verify compliance by the Project Entities with their [Disbursement Agreement] obligations." (Disbursement Agmt. § 9.3.2.)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement is misleading to the extent it suggests that the Disbursement Agent's rights and responsibilities were only set forth in Article 9 of the Disbursement Agreement. Article 9.2.2 provides that the Disbursement Agent's rights and responsibilities are set forth in the entire Agreement: "The Disbursement Agent is authorized to take such actions and to exercise such powers, rights and remedies under this Agreement . . . as are specifically delegated or granted to the Disbursement Agent by the terms hereof . . . , together with such powers, rights and remedies as are reasonably incidental thereto." (D.A. § 9.2.2.)

46. If a default occurred under the Disbursement Agreement, Fontainebleau was required to "provide to the Disbursement Agent, the Construction Consultant and the Funding Agents written notice of: Any Default or Event of Default of which the Project Entities have knowledge, describing such Default or Event of Default and any action being taken or proposed to be taken with respect thereto." (Disbursement Agmt. § 5.4.1.)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement mischaracterizes the cited evidence, which provides that Fontainebleau was only required to provide notification of Defaults of which it was aware. Further, the statement is also

ambiguous because it confuses a "default" with a "Default" as defined in the Disbursement Agreement. The statement is misleading to the extent it suggests that the only way the Disbursement Agent received notice of a default or a Default was by written notice from Fontainebleau. Nothing in the Disbursement Agreement prevents the Disbursement Agent from determining the existence of a default or a Default on its own, or from receiving notice of a default or a Default by any other means. For example, the Disbursement Agent can be notified of a Default by a Controlling Person, who is BofA in its role as Bank Agent. As Bank Agent, BofA is deemed to have knowledge of a Default when it receives notice from any Lender or from the Issuing Lender, which is also BofA. (C.A. §§ 1.1, 9.3; D.A. § 2.5.1, Ex. A.)

49. The Credit Agreement contained similar provisions to the Disbursement Agreement that expressly permitted BANA, as Administrative Agent, to rely on representations by Fontainebleau and others, did not require BANA to investigate those representations, placed the burden on Fontainebleau to report defaults, and limited BANA's liability to gross negligence or worse. (*See* Credit Agmt. §§ 6.7, 9.3, 9.4.)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement mischaracterizes the cited provisions and suggests that they are identical to the Disbursement Agreement. The cited provisions and the Credit Agreement as a whole speak for themselves. (*See* Plts. Resp. to BofA Add'l SS ¶¶ 45, 46.)

54. If 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. (Disbursement Agmt. § 3.3.23.)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. (*See* Plts. Resp. to BofA Add'l SS ¶ 38.)

59. BANA believed that it was required to honor Fontainebleau's September 2008 Advance Request if the entire requested Shared Costs were received from TriMont, and the Advance Request certifications remained in effect. (*Id.* Exs. 26 (Susman Dep. at 173:22-174:3); 12 (Howard Dep. at 80:21-81:8).)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement is not supported by the cited evidence and misleadingly suggests that BofA believed it was correct to honor the September 2008 Advance Request. The evidence shows that BofA

knew that Fontainebleau had funded Lehman's share and knew that this did not satisfy the Advance Request's conditions precedent, and so BofA could not approve the September 2008 Advance Request. (*See* Plts. SOUF ¶¶ 44-62, 69, 70; Plts. Resp. to BofA Opp. SS ¶¶ 45, 46, 50, 52, 55, 57, 58, 60-63, 70.)

60. On September 26, 2008, TriMont sent BANA a single wire transfer for the entire Retail Shared Costs requested amount. (*Id.* Ex. 50 [Dep. Ex. 241]; *see also id.* Ex. 16 (Brown Dep. at 78:20-79:5).)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The cited evidence does not indicate that TriMont sent BofA a single wire transfer for the entire Retail Shared Costs on September 26, 2008. The cited e-mail merely indicates the "Lehman portion has arrived." Ms. Brown's testimony is contradictory: she testified that she does not remember writing the email but claims she was referring to the entire amount due under the Retail Facility because, before Lehman's bankruptcy, she was unaware that there were Retail Lenders other than Lehman. However, the email was written on September 26, 11 days after Lehman's bankruptcy, and Ms. Brown does not remember when she learned there were additional Retail Lenders other than it being "at some point after the Lehman bankruptcy." She also does not remember whether it was a day or a month later. Other evidence demonstrates that sometimes TriMont sent individual wires of the Retail Lenders' money. (Cantor Opp. Decl. Ex. 96 (Bolio Decl. at Ex. 29); Brown Depo., 77:4-81:23.)

61. On September 26, 2008, before disbursing funds to Fontainebleau, BANA received representations from Fontainebleau CFO Jim Freeman re-affirming the Advance Request's certifications that all conditions precedent to funding—including funding by the Retail Lenders—were satisfied. (*Id.* 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).)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement mischaracterizes the cited evidence, and is misleading. According to Mr. Yunker, the primary purpose of BofA's September 26, 2008 request to Mr. Freeman to re-affirm Fontainebleau's representations and warranties was "to quell concerns not only from BofA but other lenders as to compliance with the condition precedent regarding the retail funding." However, the email did not indicate that the Retail Lenders funded. Rather, Mr. Freeman affirmed "that the representations and warranties which the Companies made pursuant to the

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Advance Request and Advance Confirmation Notice" "remain accurate and may be relied upon in making of the Advance . . . ." Further, the statement incorrectly suggests that BofA could blindly rely on Mr. Freeman's representation even in the face of known contradictory evidence. (*See* Plts. SOUF ¶¶ 44-62, 69, 70, 76; Plts. Resp. to BofA Opp. SS ¶¶ 45, 46, 50, 52, 55, 57, 58, 60-63, 70, 76; *see also* Yunker Dep., 111:3-112:12.)

62. As of September 26, 2008, Lehman had not announced that it would reject the Retail Facility Agreement as a result of its bankruptcy and, thus, BANA had no reason to believe that agreement was invalid. (*Id. Ex.* 97 (Susman Decl. at ¶ 19).)

<u>Plaintiffs' Response</u>: Disputed but does not create a genuine issue of material fact. It is undisputed that as of September 26, 2008, Lehman had not announced that it would reject the Retail Facility Agreement as a result of its bankruptcy. By this point, however, BofA had many reasons to believe the Retail Agreement was invalid and Mr. Susman's statement in his declaration conflicts with and is outweighed by other evidence in the record and does not create a factual dispute. On September 26, 2008, one of the Term Lenders, Highland Capital Management ("Highland"), notified BofA and BofA's outside counsel that the Retail Agreement was no longer valid and that "[n]o disbursements may be made under the Loan Facility." BofA also knew that Lehman had breached is obligation under the Retail Agreement by not funding its share of the September 26, 2008 Advance Request. (Exs. 455, 473; Ex. 475 at BANA_FB00846433; Ex. 898; Bolio Depo., 59:15-60:25.)

63. Based on information from Fontainebleau and BANA's own involvement in other syndicated loans, BANA understood in September 2008 and thereafter that Lehman was continuing to honor some loan commitments. (*Id.* Exs. 26 (Susman Dep. at 176:21-177:12); 97 (Susman Decl. at ¶ 20).)

<u>Plaintiffs' Response</u>: Disputed but immaterial and does not create a genuine issue of material fact. Mr. Susman testified that "in September ... there was no consistent response to whether [Lehman] were funding their advance requests or not. ... [S]o our view was, we didn't know if they would fund or not." Mr. Susman's deposition testimony is confirmed by other evidence that BofA understood in September 2008 and thereafter that there were no assurances that Lehman would continue to honor its commitment. (Cantor Opp. Decl. Ex. 72 at FBR01280966 [Depo. Ex. 286]; Exs. 67, 68; Ex. 206 at p. 3; Ex. 251; Ex. 831 at p. 4; Exs. 896, 899, 907; Bolio Depo., 40:17-41:10; Brown Depo., 85:17-86:4, 112:19-113:4, 130:11-19;

Howard Depo., 27:22-28:9, 109:8-112:7; Susman Depo., 145:16-147:24, 176:21-177:12, 213:14-21, 220:22-221:18, 277:19-278:9; Varnell Depo., 69:7-10; Yunker Depo., 24:17-25:6, 52:13-53:4, 63:19-64:10.)

64. BANA concluded that the Lehman bankruptcy did not provide a basis for rejecting Fontainebleau's September 2008 Advance Request. (*Id.* Ex. 97 (Susman Decl. at ¶ 16).)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. It is undisputed that BofA did not reject Fontainebleau's September 2008 Advance Request. Disputed to the extent that it suggests that BofA analyzed the effect of Lehman's bankruptcy on the Project. Among other things, there is no evidence that BofA even considered whether the Lehman bankruptcy had a Material Adverse Effect.

65. Unbeknownst to BANA, Lehman's portion of the September 2008 Advance Request was funded by FBR, which made a $2,526,184 "equity contribution" to "prevent an overall project funding delay and resulting disruption of its Las Vegas project" after Lehman failed to fund its required September 2008 Retail Shared Costs portion. (Cantor Opp. Decl. Ex. 52 [Dep. Ex. 14].)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. It is undisputed that Lehman's portion of the September 2008 Advance Request was funded by FBR. It is disputed that this was unknown to BofA. The evidence BofA cites does not support this proposition. Moreover, the evidence in the record demonstrates that BofA did know the source of the funding for Lehman's portion of the September 2008 Advance Request. (*See* Plts. SOUF ¶¶ 44-62, 69, 70; Plts. Resp. to BofA Opp. SS ¶¶ 45, 46, 50, 52, 55, 57, 58, 60-63, 70.)

66. Internal BANA documents reflect BANA's belief in 2008 that Lehman funded the September 2008 Advance Request. (*See, e.g., id.* Ex. 76 [Dep. Ex. 905].)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The cited evidence is dated December 30, 2008, over three months after the September 26, 2008 Advance, and conflicts with other BofA internal documents that were contemporaneous with the September Advance, including Mr. Bolio's handwritten notes, that demonstrate BofA knew that "Lehman did not fund their share." BofA's ex post and self-serving statement is not sufficient to create a genuine issue of fact. (Ex. 204; Ex. 475 at BANA_FB00846433; Bolio Depo., 59:15-60:25.)

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68. Mr. Freeman testified that he was "not sure" whether he told BANA that Fontainebleau's counsel had advised him that there were limitations on what he could tell them about the Lehman situation. (*Id.* Ex. 17 (Freeman Dep. at 106:11-20).)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement is misleading and mischaracterizes the evidence. Mr. Freeman testified that he was "[n]ot sure" whether he made "it clear to the folks at BofA that [his] limitations on what [he] could and couldn't say to Highland were the result of conversations that [he] had had with counsel." He also testified that when he was talking to BofA scheduling a call with the lenders, his "recollection is that at that point in time we said we don't think – we don't think a call is the right idea; there are limitations upon what we can and can't say." (Freeman Depo., 106:11-110:8; *see also* Exs. 254, 463.)

69. 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 with them about the Lehman situation based on the advice of its counsel. (*Id.* Exs. 21 (Bolio Dep. at 81:13-82:16); 26 (Susman Dep. at 156:9-157:22).)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement is misleading to the extent it implies that Mr. Freeman did not tell BofA that Fontainebleau was limited in what it could discuss regarding the Lehman situation. Mr. Freeman testified that he did. Mr. Bolio only testified that he did not recall at the time of his deposition whether Mr. Freeman was limited in what he could tell BofA. Mr. Susman similarly testified that he didn't "recall if that – if that statement was made or not." (*See also* Plts. Resp. to BofA Add'l SS ¶ 68.)

70. Mac Rafeedie testified that he could not "recall the exact things that were discussed in that call" with BANA but that "consistent with [his] practice," he "could have" told BANA that FBR funded for Lehman; but he also 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 57:13-58:19).)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement mischaracterizes Mr. Rafeedie's testimony by selectively quoting excerpts of the testimony. Mr. Rafeedie also 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

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facility, he would have told Ms. Brown about the fact that Lehman did not fund. (Rafeedie Depo., 34:19-35:18, 53:5-54:5, 54:22-58:19, 62:14-63:9.)

71. BANA's Jeanne Brown (Mr. Rafeedie's main BANA contact) testified that she did not recall ever discussing with Mr. Rafeedie whether Lehman itself funded in September 2008. (*Id.* Ex. 16 (Brown Dep. at 57:1-8; 64:17-65:3; 66:15-24); *see also id.* Ex. 5 (Rafeedie Dep. at 33:2-9).)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement mischaracterizes Ms. Brown's testimony and is misleading. 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. (Brown Depo., 55:6-21, 56:13-22, 66:10-67:2.)

73. There is no evidence that Ms. Brown told the CDP group either that FBR funded for Lehman in September 2008 or that Lehman did not fund in September 2008.

Plaintiffs' Response: The statement is completely unsupported by evidence and therefore violates Local Rule 7.5(c)(2)'s requirement that each statement "[b]e supported by specific references to pleadings, depositions, answers to interrogatories, admissions, and affidavits on file with the Court." Further, evidence in the record suggests that Ms. Brown informed the CDP group that someone other than Lehman funded Lehman's share. On September 26, 2008, Ms. Brown emailed Mr. Bolio and Mr. Susman stating that "[t]he wire for the Lehman portion has arrived," indicating that Lehman did not fund for itself. This interpretation is consistent with other emails Ms. Brown wrote that referred to ULLICO funding "the Lehman piece." Ms. Brown testified that she does not remember writing the September 26 email but claims that she was referring to the entire amount due under the Retail Facility because, before Lehman's bankruptcy, she was unaware that there were Retail Lenders other than Lehman. However, the email was written 11 days after Lehman's bankruptcy, and Ms. Brown does not remember when she learned there were additional Retail Lenders other than it being "at some point after the Lehman bankruptcy." She also does not remember whether it was a day or a month later. (Exs. 239, 241; Brown Depo., 77:4-81:23.)

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76. Jim Freeman told BANA's Jeff Susman that Retail Lenders had funded the September 2008 Shared Costs. (*Id.* Ex. 26 (Susman Dep. at 193:20-194:4).)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement mischaracterizes Mr. Susman's testimony and is contrary to other evidence in the record. Mr. Susman only testified that he vaguely recalls someone at Fontainebleau (although he could not recall who or when) saying that the Retail Lenders funded for Lehman. His recollection is contradicted by the fact that BofA, under his direction, continued to ask Mr. Freeman who funded Lehman's share of the September Advance. (Ex. 76; Susman Depo., 193:20-196:25.)

77. Fontainebleau's CEO Glenn Schaeffer told Bill Newby that Lehman itself had funded in September 2008. (*Id.* Ex. 3 (Newby Dep. at 64:11-65:3).)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement misstates Mr. Newby's testimony. Mr. Newby testified that he was simply told that "somebody in the Lehman context was funding their obligations on a as-they-go basis" but that he never knew precisely who funded in Lehman's place. (Newby Depo., 63:22-64:22.)

85. At the time, BANA believed that Fontainebleau's memo had confirmed funding by Lehman. (*Id.* Exs. 21 (Bolio Dep. at 80:19-81:6); 6 (Yunker Depo. at 116:6-117:5).)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement mischaracterizes the testimony and is refuted by other evidence in the record. Fontainebleau's October 7, 2008 memo does not state that Lehman funded its own share, making it impossible that it confirmed funding by Lehman. Mr. Yunker testified that he did not have "any clarity" as a result of the memo "as to whether or not the company had funded Lehman's portion." Even Mr. Bolio admits that the memo did not provide "as much detail as would have been, you know, nice . . . ." Resolving any doubt, Highland immediately brought to BofA's attention the fact that the memo did not answer BofA's question regarding the source of Lehman's payment. (Exs. 77, 903; Yunker Depo., 116:6-118:22.)

89. The October 23, 2008 meeting's purpose was for the Retail Lenders to get a report from BANA (the Resort Lenders' agent) on the Project's overall progress. (*Id.* Exs. 67 [Dep. Ex. 18]; 17 (Freeman Dep. at 110:23-111:9).)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement mischaracterizes the cited testimony and is refuted by other evidence in the record.

The exhibit cited is the meeting agenda that demonstrates that Fontainebleau personnel (not BofA) provided the update on the Project. Mr. Kotite of Fontainebleau then gave an overview of the Retail Loan Status, after which the meeting participants engaged in a discussion of the Retail Loan Status. In addition, Mr. Freeman testified that at the October meeting "[t]here would have been obviously questions amongst the – questions amongst the retail lenders about what happens, what happens with Lehman but also I think generally about the Project." In fact, the discussion at the meeting "centered around whether the remaining bank group would be willing to increase their commitments in order to replace Lehman's remaining commitment." The discussion included both whether the remaining Retail Lenders would replace Lehman and whether BofA would "fill the gap." There is no evidence that BofA participated in the meeting in order to give a progress report [REDACTED] (Ex. 19 at p. 3; Howard Depo., 112:9-114:4, 143:18-146:13; [REDACTED]

90. [REDACTED]

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. [REDACTED] (*See* Plts. Resp. to BofA Add'l SS ¶ 89; [REDACTED]

92. FBR's financial statements represented that "[t]he Company has been working diligently with Lehman Brothers and the co-lenders to ensure that there is no interruption in funding for the retail component." (*Id.*)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement is misleading to the extent it selectively quotes a portion of the document cited and takes the quoted language out of context. FBR's financial statements also include the following language: "[t]here can be no assurances that Lehman Brothers will continue to fund all or any

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portion of its remaining obligation under the Retail Construction Loan, or that the co-lenders will fund any Lehman Brothers shortfall in funding." (Cantor Opp. Decl. Ex. 72 at FBR01280966 [Depo. Ex. 286].)

95. In December 2008, BANA learned that Union Labor Life Insurance Company ("ULLICO") would fund Lehman's Shared Costs portion. (*Id.* Exs. 26 (Susman Dep. at 269:24-270:19); 76 [Dep. Ex. 905].)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement is ambiguous to the extent it suggests that BofA learned that ULLICO would fund Lehman's entire Shared Costs portion. While BofA learned in December 2008 that ULLICO would front Lehman's Shared Cost portion for that month, BofA was aware ULLICO's funding was temporary. Indeed, the lack of assurances that "the co-lenders will fund any Lehman Brothers shortfall in funding" was recognized in BofA's January 16, 2009 Credit Approval Memorandum. (Ex. 206 at p. 3; *see also* Plts. Resp. to BofA Add'l ¶¶ 63, 92; Plts. SOUF ¶¶ 64, 71-74.)

98.

Plaintiffs' Response: The statement is completely unsupported by evidence and therefore violates Local Rule 7.5(c)(2)'s requirement that each statement "[b]e supported by specific references to pleadings, depositions, answers to interrogatories, admissions, and affidavits on file with the Court." (*See* Rafeedie Depo., 34:19-35:18, 55:16-24.)

104.

Plaintiffs' Response: The statement is completely unsupported by evidence and therefore violates Local Rule 7.5(c)(2)'s requirement that each statement "[b]e supported by specific references to pleadings, depositions, answers to interrogatories, admissions, and affidavits on file with the Court." (*See* Plts. Resp. to BofA Add'l SS ¶ 98.)

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111. BANA concluded that Highland's September 30, 2008 claim was incorrect because there was no indication that there would be a shortfall in Retail Funds, or that Lehman would be unable to honor its obligations under the Retail Facility. (*Id.* at ¶ 23.)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. This fact is refuted by the undisputed fact that "BofA believed . . . that there were no assurances that Lehman would continue to fund its commitments . . . ." (Plts. SOUF ¶ 44; BofA Opp. SS ¶ 44.) In addition, Mr. Susman's declaration is outweighed by the contemporaneous evidence that shows that BofA knew that there would be a shortfall in Retail Funds due to Lehman's bankruptcy. Lehman was the largest Retail Lender; Lehman's bankruptcy rendered uncertain the availability of its committed funds; conditions in the credit markets made it unlikely that a replacement lender could be found; and the existing Retail Lenders had refused to take over Lehman's commitment. Further, BofA knew Lehman failed to fund its share of the September 2008 Advance. (Exs. 9, 16, 18; Ex. 19 at p. 3; Exs. 23, 67, 68, 76-78, 80, 115; Ex. 206 at p. 3; Exs. 230-233, 241, 251, 254; Ex. 475 at BANA_FB00846433; Exs. 493, 497, 498, 609, 811, 814; Ex. 831 at p. 4; Exs. 896, 899, 903; Ex. 906 at BANA_FB00811830; Exs. 907, 1502, 1504; Cantor Opp. Decl. Ex. 72 at FBR01280966 [Depo. Ex. 286]; Bolio Depo., 40:17-41:10, 59:15-60:25, 79:18-81:6; Brown Depo., 42:4-8, 43:18-24, 85:17-86:4, 112:19-113:4, 130:11-19; Freeman Depo., 56:24-57:3, 74:12-24, 92:17-94:3, 106:11-109:9, 226:24-227:20; Howard Depo., 10:16-23, 21:3-23, 27:22-28:9, 39:13-40:6, 104:14-106:23, 109:8-114:4, 117:17-24, 142:13-146:13, 147:25-148:6; [REDACTED] Kotite Depo., 18:10-15; [REDACTED] Susman Depo., 145:16-148:9, 150:22-151:5, 154:13-155:5, 213:14-21, 220:22-221:18, 247:4-248:18, 252:2-10, 273:7-275:10, 277:19-278:9; Varnell Depo., 69:7-10, 192:19-193:1; Yu Depo., 125:25-126:14; Yunker Depo., 24:17-25:6, 35:22-38:8, 38:16-39:23, 52:13-53:4, 63:19-64:10, 96:11-98:6, 111:3-112:12, 147:19-148:7, 167:17-169:6; *see also* Exs. 205, 463.)

112. [REDACTED]

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. At least one public report was identified as the report by Merrill Lynch analyst John Maxwell, dated October 3, 2008. (Cantor Opp. Decl. Ex. 61 [Depo. Ex. 459]; *see also* Ex. 230.)

113. On October 13, 2008, Highland forwarded to BANA a Merrill Lynch research analyst's e-mail that discussed nine industry developments and, in the only sentence referring to Fontainebleau, stated: "We understand that FBLEAU equity sponsors have funded the amount required from Lehman on the retail credit facility due this month ($4 million)." (Cantor Opp. Decl. Ex. 61 [Dep. Ex. 459].) The Merrill Lynch report that Highland forwarded to BANA cited no source or basis for the statement, and overstated Lehman's Shared Costs portion. (*Id.*)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement is misleading to the extent is suggests that the analyst's report on Fontainebleau was only one sentence. The analyst's email provided the "highlights" of an attached report.

The statement is also misleading to the extent it suggests that the analyst's report was not credible. The report was widely disseminated within BofA and to Fontainebleau. John Maxwell, the research analyst was a reputable analyst followed by a number of Lenders and had been in direct communication with Fontainebleau prior to October 2008. BofA agreed to acquire Merrill Lynch & Co., Inc. in September 2008 and the transaction closed as of January 1, 2009. In addition, $4 million was approximately the total amount requested under the Retail Facility in September 2008. (Exs. 78, 80, 233; Ex. 237 at BANA_FB00180360; Exs. 274, 275, 399, 1502; Howard Depo., 116:5-117:7; Freeman Depo., 228:12-229:12; Fu Depo., 155:3-8, 184:24-185:11; Mulé Depo., 50:10-18; Varnell Depo., 18:7-13; Yunker Depo., 39:3-23.)

114. Highland claimed that the market rumor created "a breach concern under the Disbursement Agreement" and that "Lehman [was] in breach of the [Retail] [A]greement because it failed to fund and thus the agreement [was] not in full force and effect." (*Id.*)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement 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. BofA also knew that Fontainebleau had funded for Lehman in September 2008. (Exs. 14, 56, 61, 78, 80, 1502; Cantor Opp. Decl. Ex. 61 [Depo. Ex., 459]; Freeman Depo., 75:13-76:4; [REDACTED] Kotite Depo., 22:13-16; Susman Depo., 264:24-265:3; *see also* Plts. SOUF ¶¶ 44-62, 69, 70; Plts. Resp. to BofA Opp. SS ¶¶ 45, 46, 50, 52, 55, 57, 58, 60-63, 70.)

116. [REDACTED]

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. [REDACTED] (*See* Plts. Resp. to BofA Add'l SS ¶ 114.)

117. BANA evaluated Highland's claim, but rejected it in view of the numerous representations and warranties made by Fontainebleau in the September and October 2008 Advance Requests, the continued receipt of the requested Shared Costs from TriMont, and the other statements by Fontainebleau. (*Id.* Ex. 97 (Susman Decl. at ¶ 24).)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. Mr. Susman's statement in his declaration is outweighed by the contemporaneous evidence that shows that BofA did not evaluate Highland's claims but turned a blind eye to them. Indeed, one of the drafters of the Disbursement Agreement, Mr. Yunker, viewed Lehman's bankruptcy as the "death nail" for the Project. Further, BofA could not rely on the representations and warranties made by Fontainebleau in light of the known contradictory information it had. (Exs. 67, 79; Yunker Depo., 39:3-23; *see* Plts. SOUF ¶¶ 44-62, 69-70, 76; Plts. Resp. to BofA Opp. SS ¶¶ 45, 46, 50, 52, 55, 57, 58, 60-63, 70, 76.)

119. [REDACTED]

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Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. [redacted]

. (*See* Plts. Resp. to BofA Add'l SS ¶ 118; [redacted]

121. On October 22, 2008, Highland had a one-on-on phone call with Freeman and asked him numerous questions about Lehman. (*Id.* Exs. 65 [Dep. Ex. 254]; 66 [Dep. Ex. 465].)

Plaintiffs' Response: Disputed but does not create a genuine issue of material fact. The statement is misleading to the extent is suggests that Mr. Freeman provided Highland with information regarding Lehman. Rather, the cited evidence shows Mr. Freeman reported to BofA regarding his phone call with Highland and that he "told them what [he] could."

124. There is no evidence that Highland ever submitted a formal Notice of Default or raised any further concerns with BANA regarding Lehman's bankruptcy.

Plaintiffs' Response: The statement is completely unsupported by evidence and therefore violates Local Rule 7.5(c)(2)'s requirement that each statement "[b]e supported by specific references to pleadings, depositions, answers to interrogatories, admissions, and affidavits on file with the Court." Further, Highland raised the Lehman bankruptcy numerous times with BofA and specifically identified it as a default under the credit facility. There is no reference or requirement under the Disbursement Agreement or Credit Agreement for a "formal Notice of Default." Rather, the Agreements contemplated that BofA would know of a Default without a formal notice. Under the Disbursement Agreement, when BofA was "notified that an Event of Default or a Default has occurred and is continuing," BofA was required to "use the same degree of care and skill in their exercise, as a prudent person would exercise or use under the circumstances in the reasonable administration of its own affairs." Under the Credit Agreement, BofA was deemed to have knowledge of a Default upon receipt of "notice describing such Default . . . ." Notices under both Agreements could be delivered via e-mail. (D.A. §§ 9.2.3, 11.1; C.A. §§ 9.3, 10.2; Exs. 79, 455, 456, 473, 898.)

136. There is no evidence that any Lender sent a notice of default to BANA based on the Retail Co-Lenders funding for Lehman.

Plaintiffs' Response: The statement is completely unsupported by evidence and therefore violates Local Rule 7.5(c)(2)'s requirement that each statement "[b]e supported by specific references to pleadings, depositions, answers to interrogatories, admissions, and affidavits on file with the Court."

138.

Plaintiffs' Response: Disputed but immaterial and does not create a genuine issue of material fact.

139.

Plaintiffs' Response: Disputed but immaterial and does not create a genuine issue of material fact.

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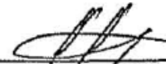
Dated: September 27, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **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** 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.

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