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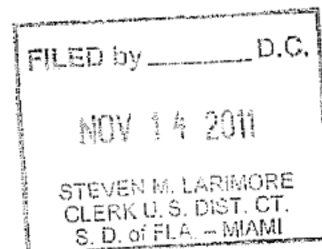
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO 09-MD-02106-CIV-GOLD/GOODMAN



IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to all actions.

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TERM LENDER PLAINTIFFS' REVISED REDLINED REPLY TO DEFENDANT BANK OF AMERICA, N.A.'S RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS AND TERM LENDER PLAINTIFFS' REVISED REDLINED RESPONSE TO BANK OF AMERICA, N.A'S STATEMENT OF ADDITIONAL FACTS RE PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT[1]

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

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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.[2]

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-

[2] 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 is 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.)[3]

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.,

[3] 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. ([REDACTED]

[REDACTED] 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

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are binding on BofA and BofA should be estopped from asserting inconsistent facts.[4] [REDACTED]

The only reasonable inference from this evidence is that "Fontainebleau understood that the Project could not be built without the financing for the Retail Facility." (*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. (Exs. 1512 ([REDACTED] 1513-1515; 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

[4] *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).

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 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. [REDACTED]. The only reasonable inference from this evidence is that "BofA understood that the funding for the Project would have shut down if Lehman's share of the Retail Facility was not paid." (*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.[5] (*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; [redacted] 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].)

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[5] *Lofton*, 157 F. Supp. 2d at 1375, n.3.

<u>Plaintiffs' Response</u>: 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.)

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.

<u>Plaintiffs' Response</u>: 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.*) 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.

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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.[6] 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].)

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.

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,

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[6] *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).

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;

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.*)

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.

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

Plaintiffs' Response:

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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);

BofA's Opp. to Paragraph 64: Disputed.

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.* ; 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.[7]

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.

[7] *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").

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] 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, 1513-1515; Howard Depo., 111:7-113:10, 142:13-146:13, 147:25-148:6; [redacted]; Susman Depo., 273:7-274:1, 277:19-278:9.)

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, [redacted]

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).)

<u>Plaintiffs' Response</u>: 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."

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

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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] (R.A. § I at p. 15; Exs. 23, 29, 35, 41; [REDACTED].)[8]

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).)

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

[8] 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.

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.)

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

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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.)

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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 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).)

Plaintiffs' Response: 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.)

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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).)

Plaintiffs' Response: 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

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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.)

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 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.)

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

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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]

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. (*See* Plts. Resp. to BofA Add'l SS ¶ 89;

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 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.)

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, 1512; 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; Kotite Depo., 18:10-15;

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.

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; [REDACTED] 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]

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. [redacted]

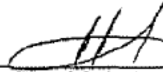
Plaintiffs' Response: Disputed but immaterial and does not create a genuine issue of material fact. [redacted]

139. [redacted]

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

Dated: November 14, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **TERM LENDER PLAINTIFFS' REVISED REDLINED REPLY TO DEFENDANT BANK OF AMERICA, N.A.'S RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS AND TERM LENDER PLAINTIFFS' REVISED REDLINED RESPONSE TO BANK OF AMERICA, N.A'S STATEMENT OF ADDITIONAL FACTS RE PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** was filed with the Clerk of the Court. I also certify that the foregoing document is being electronically served this day on all counsel of record or pro se parties identified on the attached Service List by agreement of all counsel.

Dated: November 14, 2011.

Lorenz M. Prüss, Esq.

SERVICE LIST

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

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to all actions.

_______________________________________ /

TERM LENDER PLAINTIFFS' RESPONSE TO BANK OF AMERICA, N.A.'S EVIDENTIARY OBJECTIONS

Term Lender Plaintiffs hereby respond to the Evidentiary Objections made by Bank of America, N.A. in its Response to Plaintiffs' Statement of Undisputed Material Facts and Statement of Additional Undisputed Material Facts in Opposition to Plaintiffs' Motion for Partial Summary Judgment.

Plaintiffs' Evidence	BofA's Objection	Plaintiffs' Response
1. Exhibit 1504 (September 2009 filing by Fontainebleau Las Vegas Retail, LLC in the Lehman bankruptcy.)	The document is not in evidence and cannot be introduced to prove the truth of any matter asserted in the filing. *See Autonation, Inc. v. O'Brien*, 347 F. Supp. 2d 1299, 1310 (S.D. Fla. 2004) ("A court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but to establish the fact of such litigation and related filings. (BofA's Opp. to Plts. SOUF ¶ 30.)	The Term Lender Plaintiffs have cited Exhibit 1504 for the fact that the document was filed. *See* Term Lender Plaintiffs' Reply in Support of Request for Judicial Notice.
2. Exhibits 78, 80 and 1502 (e-mails from	There is no foundation for the reports' contents. Moreover, the report's	Exhibits 78 and 80 were produced from BofA's files. At deposition,

Plaintiffs' Evidence	BofA's Objection	Plaintiffs' Response
Highland to BofA forwarding a Merrill Lynch analyst's report that "FBLEAU equity sponsors have funded the amount required from Lehman on the retail credit facility this month ($4 million)").	contents are inadmissible hearsay because the analyst was never deposed and Plaintiffs cite the report for the truth of its contents. *See United States v. Baker*, 432 F.3d 1189, 1211 (11th Cir. 2005) (news report inadmissible as hearsay). (BofA's Opp. to Plts. SOUF ¶ 35.)	BofA's Bret Yunker testified that he received Exhibit 78. Yunker Depo., 149:13-150:1. He also testified that he "may have discussed" Exhibit 80, after receiving it. Yunker Depo., 155:1-20. Exhibit 1502 was also produced from BofA's files. Exhibit 1502 includes all of Exhibit 78, as well as three pages with Bates numbers immediately preceding Exhibit 78. The statements in these Exhibits with respect to Lehman's failure to fund the September 2008 Retail Advance and equity's funding of that Advance are admissible for the truth of the facts asserted (and are not hearsay) as adoptive admissions. By failing to respond or contradict Highland's statements, BofA manifested an adoption or belief in the truth of the matters stated. FED. R. EVID. 801(d)(2)(B). *See* Salzburg, et al., COMMENTARY TO FED. R. EVID. 801 ("If, under the circumstances, a reasonable person would have denied the statement, silence can be deemed an adoption."). *See*

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Plaintiffs' Evidence	BofA's Objection	Plaintiffs' Response
		e.g., United States v. Central Gulf Lines, 974 F.2d 621, 628 (5th Cir. 1992) (holding surveys by third party were admissible as admissions by a party opponent because the opponent met the surveyors and "never objected to the survey reports"); *Hellenic Lines, Ltd. v. Gulf Oil Corp.*, 340 F.2d 398, 401 (2d Cir. 1965) (failure to respond to a letter "under circumstances which reasonably called for a reply, could be found to constitute an admission by silence."). The Exhibits are also admissible because the Term Lender Plaintiffs also cite these Exhibits to show that BofA knew about the analyst report and Highland's statements that Lehman failed to fund and equity funded in September 2008. Plts. SOUF ¶¶ 59, 60; *see* FED. R. EVID. 801(c).
3. Kolben Depo., 76:14-77:5 (	Kolben's cited testimony—a BofA's Opp. to Plts. SOUF ¶ 43.)	Kolben's statement at his deposition

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Plaintiffs' Evidence	BofA's Objection	Plaintiffs' Response
[redacted]		[redacted] The statement, therefore, is not inadmissible hearsay. *See* FED. R. EVID. 801.
4. Exhibit 80 (email from Highland to Bill Scott confirming Highland's "understanding that the agent is unaware of any facts that would support that Lehman, as a 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 disbursements while in bankruptcy.").	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. Mr. Rourke has been deposed, but [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. *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,	The statements in Exhibit 80 are not hearsay. Rather, they are adoptive admissions by BofA through BofA's agent, Mr. Scott. There is no evidence that Mr. Scott contradicted the statement in the email confirming his conversation with Highland. By failing to respond or contradict Highland's statements, BofA through its agent, Mr. Scott, manifested an adoption or belief in the truth of the matters stated. FED. R. EVID. 801(d)(2)(B) & (C). *See* Salzburg, et al., COMMENTARY TO FED. R. EVID. 801 (explaining that "[i]f, under the circumstances, a reasonable person would have denied the statement, silence can be deemed an adoption" and that "[a]substantial trend favors admitting statements related to a matter within the scope of the agency or employment."). *See e.g.*, *Central Gulf Lines*, 974 F.2d at

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Plaintiffs' Evidence	BofA's Objection	Plaintiffs' Response
	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). (BofA's Opp. to Plts. SOUF ¶ 60.)	628; *Hellenic Lines, Ltd.*, 340 F.2d at 401. In any case, Exhibit 80 is admissible as it is offered in support of the statement that [REDACTED] and confirmed their mutual understanding that Lehman had not made any disbursements while in bankruptcy. Plts. SOUF ¶ 60. Where it is not offered for the truth of the matter asserted, it is not inadmissible hearsay. *See* FED. R. EVID. 801.
5. Exhibit 19 (National City Special Assets Committee Report).	Plaintiffs' Exhibit 19 is inadmissible and should be disregarded. The exhibit, a National City Special Assets Committee Report, was never authenticated. (*See id.* Ex. [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	[REDACTED] BofA's Bret Yunker said that Exhibit 19 was "generally consistent with what I recall from that meeting." Yunker Depo., 174:16-175:9.

FILED UNDER SEAL

Plaintiffs' Evidence	BofA's Objection	Plaintiffs' Response
	inadmissible under Fed. R. of Evid. 802. 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"). (BofA's Opp. to Plts. SOUF ¶ 64.)	

Dated: September 27, 2011

Respectfully submitted,

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Local Counsel for Plaintiff Term Lenders

FILED UNDER SEAL

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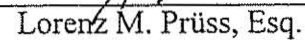
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **TERM LENDER PLAINTIFFS' RESPONSE TO BANK OF AMERICA, N.A.'S EVIDENTIARY OBJECTIONS** 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.



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Attorneys:	**Representing:**
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Kevin Michael Eckhardt, Esq. Jamie Zysk Isani, Esq. **HUNTON & WILLIAMS** 1111 Brickell Avenue Suite 2500 Miami, FL 33131 Tele: (305) 810-2579 Fax: (305) 810-2460	Defendants Bank of America, N.A.

FILED UNDER SEAL

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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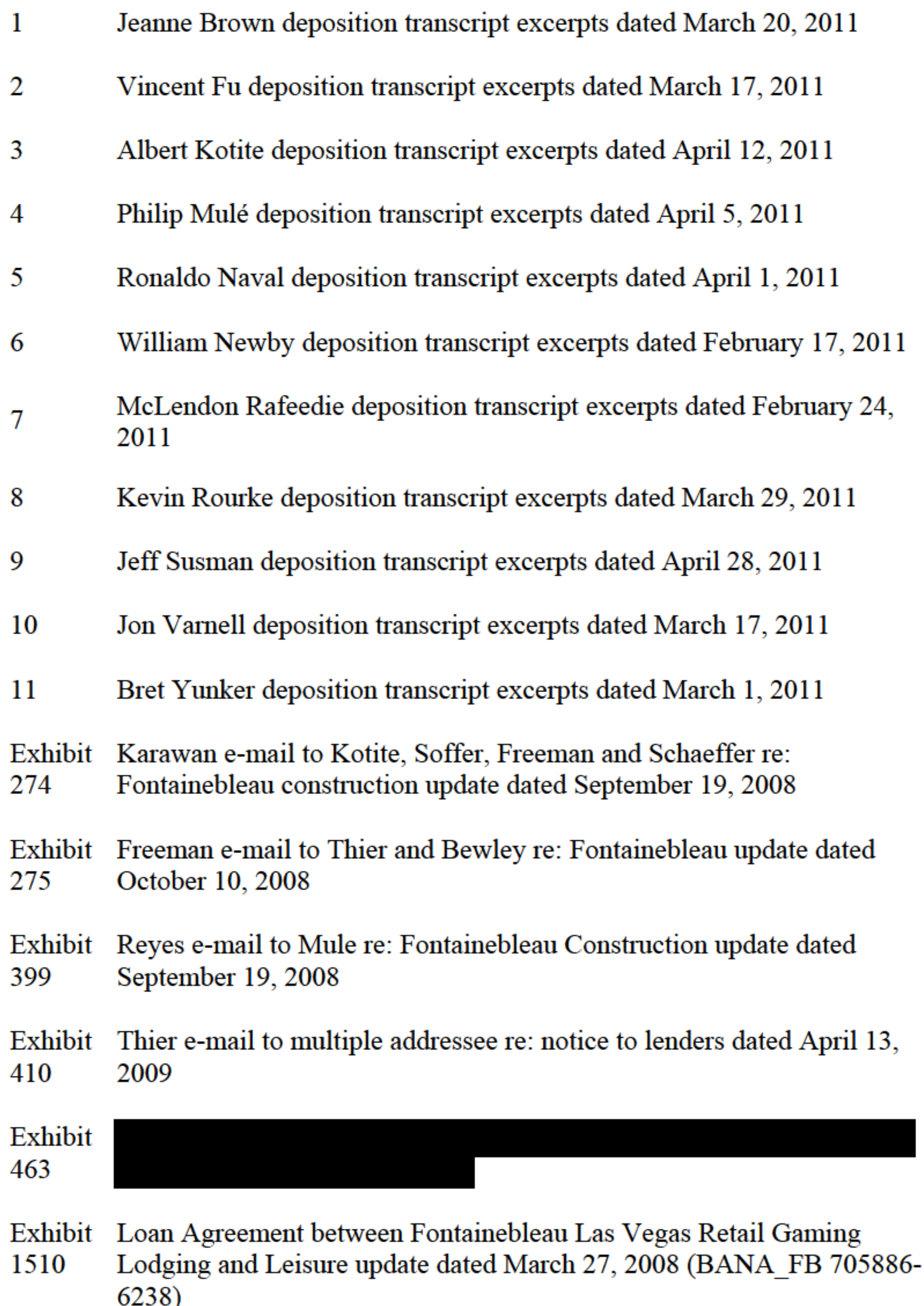
SUPPLEMENTAL APPENDIX OF TESTIMONY AND EXHIBITS IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

VOLUME 1

Table of Contents

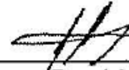


1	Jeanne Brown deposition transcript excerpts dated March 20, 2011
2	Vincent Fu deposition transcript excerpts dated March 17, 2011
3	Albert Kotite deposition transcript excerpts dated April 12, 2011
4	Philip Mulé deposition transcript excerpts dated April 5, 2011
5	Ronaldo Naval deposition transcript excerpts dated April 1, 2011
6	William Newby deposition transcript excerpts dated February 17, 2011
7	McLendon Rafeedie deposition transcript excerpts dated February 24, 2011
8	Kevin Rourke deposition transcript excerpts dated March 29, 2011
9	Jeff Susman deposition transcript excerpts dated April 28, 2011
10	Jon Varnell deposition transcript excerpts dated March 17, 2011
11	Bret Yunker deposition transcript excerpts dated March 1, 2011
Exhibit 274	Karawan e-mail to Kotite, Soffer, Freeman and Schaeffer re: Fontainebleau construction update dated September 19, 2008
Exhibit 275	Freeman e-mail to Thier and Bewley re: Fontainebleau update dated October 10, 2008
Exhibit 399	Reyes e-mail to Mule re: Fontainebleau Construction update dated September 19, 2008
Exhibit 410	Thier e-mail to multiple addressee re: notice to lenders dated April 13, 2009
Exhibit 463	
Exhibit 1510	Loan Agreement between Fontainebleau Las Vegas Retail Gaming Lodging and Leisure update dated March 27, 2008 (BANA_FB 705886-6238)

Exhibit 1511	Defendant Bank of America, N.A.'s Responses and Objections to Plaintiff Term Lenders' Second Set of Rule 26.1.G Interrogatories

Dated: September 27, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **SUPPLEMENTAL APPENDIX OF TESTIMONY AND EXHIBITS IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT—VOLUME 1** 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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Attorneys:	Representing:
Bradley J. Butwin Daniel L. Cantor Jonathan Rosenberg William J. Sushon Ken Murata Asher Rivner O'MELVENY & MYERS LLP Times Square Tower 7 Times Square New York, NY 10036 Tele: (212) 326-2000 Fax: (212) 326-2061	Defendant Bank of America, N.A.
Kevin Michael Eckhardt HUNTON & WILLIAMS 1111 Brickell Avenue Suite 2500 Miami, FL 33131 Tele: (305) 810-2579 Fax: (305) 810-2460	Defendant Bank of America, N.A.

BROWN

Sealed

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

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

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to all actions.

______________________________________ /

PLAINTIFFS' NOTICE OF SUBMISSION OF RECENTLY PRODUCED DOCUMENTS IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO BANK OF AMERICA, N.A.'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs hereby give notice of their submission of additional documents, which were produced only recently by Bank of America, N.A. ("BofA"), in support of Plaintiffs' Motion for Partial Summary Judgment and in opposition to BofA's Motion for Summary Judgment. Plaintiffs' submission is a result of two supplemental productions made by BofA after the summary judgment motions were fully briefed.[1]

The additional evidence is attached to Plaintiffs' Second Supplemental Appendix of Exhibits filed concurrently herewith. To take account of this additional evidence, Plaintiffs have revised their: (i) Statement of Undisputed Material Facts in support of Plaintiffs' Motion for Partial Summary Judgment; (ii) Reply to Defendant Bank of America, N.A.'s Response to Plaintiffs' Statement of Undisputed Material Facts and Term Lender Plaintiffs' Response to

---

[1] BofA's productions were made on October 28 and November 4, 2011 and received by Plaintiffs' counsel on October 31 and November 7, 2011, respectively. Mockler Decl. ¶ 2. BofA's counsel has notified Plaintiffs' counsel that BofA made another production on November 11, 2011 which substantially completed BofA's supplemental productions. *Id.* at ¶ 3. BofA did not confirm that the November 11 production was its final production. *Id.* Plaintiffs have not yet received the final production. *Id.*

Bank of America, N.A.'s Statement of Additional Facts re Plaintiffs' Motion for Partial Summary Judgment, and (iii) Response to Defendant Bank of America, N.A.'s Statement of Undisputed Material Facts and Statement of Additional Material Facts in Opposition to BofA's Motion for Summary Judgment (collectively, the "Revised Statements"). Redlined versions of the Revised Statements are being filed concurrently herewith.

The following documents are being submitted and are relevant to Plaintiffs' Motion for Partial Summary Judgment and their Opposition to BofA's Motion for Summary Judgment:

1. Exhibit 1512.

The document has been included in support of the following separate statements of fact:

- Plaintiffs' Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Partial Summary Judgment No. 45.
- Plaintiffs' Response to BofA's Statement of Additional Undisputed Facts re Plaintiffs' Motion for Partial Summary Judgment No. 111.

- Plaintiffs' Response to BofA's Statement of Undisputed Facts in Opposition to BofA's Motion for Summary Judgment No. 115.
- Plaintiffs' Statement of Additional Material Facts in Opposition to BofA's Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment Nos. 28-29, 38, 76, and 78.

2. Exhibit 1513

The document has been included in support of the following separate statements of fact:

- Plaintiffs' Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Partial Summary Judgment Nos. 36, 43, 45, 65, and 74.
- Plaintiffs' Response to BofA's Statement of Additional Undisputed Facts re Plaintiffs' Motion for Partial Summary Judgment No. 98.
- Plaintiffs' Response to BofA's Statement of Undisputed Facts in Opposition to BofA's Motion for Summary Judgment No. 103.

- Plaintiffs' Statement of Additional Material Facts in Opposition to BofA's Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment Nos. 27, 29, 55, 61, 63, 113, and 134.

3. <u>Exhibit 1514</u>

The document has been included in support of the following separate statements of fact:

- Plaintiffs' Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Partial Summary Judgment Nos. 43, 45, 74, 80, and 81.
- Plaintiffs' Response to BofA's Statement of Additional Undisputed Facts re Plaintiffs' Motion for Partial Summary Judgment No. 98.
- Plaintiffs' Response to BofA's Statement of Undisputed Facts in Opposition to BofA's Motion for Summary Judgment No. 103.
- Plaintiffs' Statement of Additional Material Facts in Opposition to BofA's Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment Nos. 55, 61, 63, 113, 144, and 145.

4. Exhibit 1515

The document has been included in support of the following separate statements of fact:

- Plaintiffs' Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Partial Summary Judgment Nos. 36, 43, 45, 65, 74, 74(a), and 80.
- Plaintiffs' Response to BofA's Statement of Additional Undisputed Facts re Plaintiffs' Motion for Partial Summary Judgment No. 98.
- Plaintiffs' Response to BofA's Statement of Undisputed Facts in Opposition to BofA's Motion for Summary Judgment No. 103.
- Plaintiffs' Statement of Additional Material Facts in Opposition to BofA's Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment Nos. 29, 38, 55, 61, 63, 67(a), 113, 134, and 144.

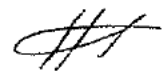
5. Exhibit 1516

The document has been included in support of the following separate statements of fact:

- Plaintiffs' Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Partial Summary Judgment No. 80.
- Plaintiffs' Statement of Additional Material Facts in Opposition to BofA's Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment No. 144.

Dated: November 14, 2011

Respectfully submitted,



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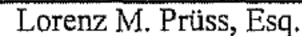
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **PLAINTIFFS' NOTICE OF SUBMISSION OF RECENTLY PRODUCED DOCUMENTS IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO BANK OF AMERICA, N.A.'S MOTION FOR SUMMARY JUDGMENT** was filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically the Notice of Electronic Filing.

Dated: November 14, 2011.



Lorenz M. Prüss, Esq.

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Kevin Michael Eckhardt, Esq. Jamie Zysk Isani, Esq. **HUNTON & WILLIAMS** 1111 Brickell Avenue Suite 2500 Miami, FL 33131 Tele: (305) 810-2579 Fax: (305) 810-2460	Defendants Bank of America, N.A.

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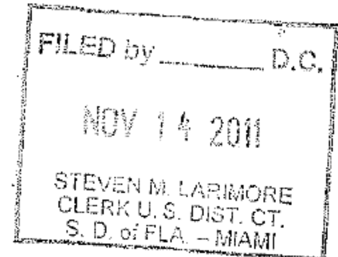
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO 09-MD-02106-CIV-GOLD/GOODMAN



IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to all actions.

______________________________________ /

DECLARATION OF ROBERT W. MOCKLER IN SUPPORT OF PLAINTIFFS' NOTICE OF SUBMISSION OF RECENTLY PRODUCED DOCUMENTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO BANK OF AMERICA, N.A.'S MOTION FOR SUMMARY JUDGMENT

I, Robert W. Mockler, declare as follows:

1. I am a principal with the firm McKool Smith, P.C., counsel for Plaintiffs in the above-captioned action. Except where otherwise indicated, I have personal knowledge of the facts stated herein and, if called as a witness, could and would competently testify thereto. I submit this declaration in support of Plaintiffs' Notice of Submission of Recently Produced Documents in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Bank of America, N.A.'s Motion for Summary Judgment.

2. On October 28 and November 4, 2011, Bank of America, N.A. ("BofA") made two supplemental document productions, which were received by Plaintiffs' counsel on October 31 and November 7, 2011, respectively.

3. BofA's counsel has notified Plaintiffs' counsel that BofA made a supplemental production on November 11, 2011 which substantially completed BofA's supplemental productions, but BofA did not confirm that the November 11 production was its final production. Plaintiffs have not yet received and reviewed the final production.

4. A true and correct copy of [REDACTED]

which was produced by BofA in this action on November 4, 2011, is attached as Exhibit 1512 to the Second Supplemental Appendix of Exhibits in Support of Plaintiffs' Motion for Partial Summary Judgment and in Opposition to BofA's Motion for Summary Judgment ("Second Supplemental Appendix").

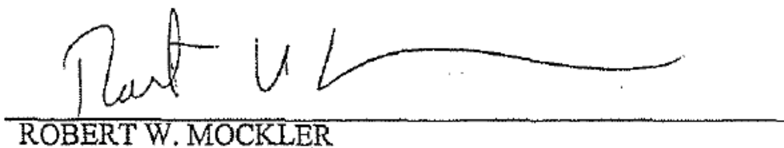
5. A true and correct copy of [REDACTED] which was produced by BofA in this action on November 4, 2011, is attached as Exhibit 1513 to the Second Supplemental Appendix.

6. A true and correct copy of [REDACTED] which was produced by BofA in this action on October 28, 2011, is attached as Exhibit 1514 to the Second Supplemental Appendix.

7. A true and correct copy of [REDACTED] which was produced by BofA in this action on November 4, 2011, is attached as Exhibit 1515 to the Second Supplemental Appendix.

8. A true and correct copy of [REDACTED] which was produced by BofA in this action on October 28, 2011, is attached as Exhibit 1516 to the Second Supplemental Appendix.

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



DATED: November 14, 2011

ROBERT W. MOCKLER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **DECLARATION OF ROBERT W. MOCKLER IN SUPPORT OF PLAINTIFFS' NOTICE OF SUBMISSION OF RECENTLY PRODUCED DOCUMENTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO BANK OF AMERICA, N.A.'S MOTION FOR SUMMARY JUDGMENT** was filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically the Notice of Electronic Filing.

Dated: November 14, 2011

Lorenz M. Prüss, Esq.

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Attorneys:	Representing:
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Kevin Michael Eckhardt, Esq. Jamie Zysk Isani, Esq. **HUNTON & WILLIAMS** 1111 Brickell Avenue Suite 2500 Miami, FL 33131 Tele: (305) 810-2579 Fax: (305) 810-2460	Defendants Bank of America, N.A.