

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division
CASE NO.: 09-2106-MD-GOLD/GOODMAN

IN RE:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.

DEFENDANT BANK OF AMERICA, N.A.'S RESPONSE TO
PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL
FACTS AND STATEMENT OF ADDITIONAL UNDISPUTED
MATERIAL FACTS IN OPPOSITION TO PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT

O'MELVENY & MYERS LLP
Bradley J. Butwin (*pro hac vice*)
Jonathan Rosenberg (*pro hac vice*)
Daniel L. Cantor (*pro hac vice*)
William J. Sushon (*pro hac vice*)
Times Square Tower
7 Times Square
New York, New York 10036
Telephone: (212) 326-2000

-and-

HUNTON & WILLIAMS LLP
Jamie Zysk Isani (Fla. Bar No. 728861)
Matthew Mannering (Fla. Bar No. 39300)
1111 Brickell Avenue, Suite 2500
Miami, Florida 33131
Telephone: (305) 810-2500

Attorneys for Bank of America, N.A.

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CONFIDENTIAL" UNDER PROTECTIVE ORDER

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**BANA'S RESPONSE TO PLAINTIFFS' STATEMENT
OF UNDISPUTED MATERIAL FACTS¹**

I. RESPONSES TO PLAINTIFFS' DEFINITIONS

Response to Definitions 1 through 6, 8 and 9: Undisputed.

Response to Definition 7: Disputed. Whether or not the Plaintiffs' predecessors-in-interest were "Term Lenders" is an issue on which the Plaintiffs bear the burden of proof.

II. RESPONSES TO PLAINTIFFS' PURPORTEDLY UNDISPUTED FACTS

Response to Paragraph 1: Disputed. The cited evidence does not support the statement. The cited evidence reflects that Banc of America Securities, Barclays Bank PLC, Deutsche Bank Trust Company Americas, and Merrill Lynch, Pierce, Fenner & Smith Inc. were engaged as Joint Lead Arrangers and Joint Book Managers to underwrite and arrange a \$1.85 billion credit facility to be used for, among other things, the Project's development and construction. (*See* Decl. of Daniel L. Cantor in Support of BANA's Opp. to Pls.' Mot. for Partial Summ. J. and Request for Judicial Notice (the "Cantor Opp. Decl.") Ex. 41 [Dep. Ex. 4 (March 2007 Offering Memorandum) at BANA_FB00291963].)

Response to Paragraph 2: Disputed. The statement's description of the Project's financing is inaccurate. In addition to the \$675 million Second Mortgage Note offering, the \$1.85 billion in financing under the June 6, 2007 Credit Agreement, the \$315 million Retail Facility Agreement, and the \$85 million retail mezzanine loan, the Project was also financed with an equity contribution from a group of Fontainebleau Resorts subsidiaries. (*See* Cantor Opp. Decl. Ex. 42 [Dep. Ex. 5 (March 2007 Offering Memorandum) at 29].) BANA also disputes that the \$1.85 billion in financing was "bank" financing, as many lenders, including Plaintiffs' predecessors-in-interest, were not banks. (*See id.* Ex. 14 (Fu Dep. at 18:3-14).)

Response to Paragraph 3: Disputed. BANA disputes that the \$1.85 billion in financing was "bank" financing, as many lenders, including Plaintiffs' predecessors-in-interest, were not banks. (Cantor Opp. Decl. Ex. 14 (Fu Dep. at 18:3-14).) Undisputed that the \$1.85 billion under the June 6, 2007 Credit Agreement included (a) a \$700 million Initial Term Loan Facility; (b) a \$350 million Delay Draw Term Loan Facility; and (c) an \$800 million Revolving Loan Facility.

Response to Paragraph 4: Undisputed.

¹ Defined terms are listed in Exhibit A hereto.

Response to Paragraph 5: Disputed. The cited evidence does not support Plaintiffs' statement. The cited evidence refers to "mandatory prepayments" under the Credit Agreement. (*See, e.g.*, Credit Agmt. at § 2.11(a).) Moreover, this statement is not material or relevant to the resolution of Plaintiffs' motion for partial summary judgment.

Response to Paragraph 6: Disputed. The statement is inaccurate because Plaintiffs have defined Fontainebleau as "Fontainebleau Resorts, LLC and all affiliates and subsidiaries, including the Borrowers." The Disbursement Agreement governed the disbursement of Credit Agreement, Second Lien Facility and Retail Facility funds to Fontainebleau Las Vegas Holdings, LLC, Fontainebleau Las Vegas Capital Corp., Fontainebleau Las Vegas Retail, LLC, Fontainebleau Las Vegas, LLC and Fontainebleau Las Vegas II, LLC. (*See* Disbursement Agmt., Art. 2.)

Response to Paragraphs 7 and 8: Undisputed.

Response 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).)

Response 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.

Response to Paragraph 11: Undisputed.

Response to Paragraph 12: Disputed. The evidence does not support this statement. The Term Lenders—*i.e.*, Plaintiffs in this action—did not fund all of the Initial Term Loan Facility. The cited evidence reflects that \$700 million was funded at closing, but it does not establish that Plaintiffs funded that amount. Nor have Plaintiffs cited any evidence reflecting that they funded the entire \$700 million Initial Term Loan Facility at closing. Dep. Ex. 644 is a bank statement reflecting funding of the Bank Proceeds Account, but does not identify the entities that funded. And Plaintiffs' Exhibit 1501—a Disbursement Agreement exhibit—does not identify the entities that funded on closing.

Response to Paragraphs 13 through 25: Undisputed.

Response to Paragraph 26: Undisputed that the Second Mortgage Proceeds Account was exhausted after \$17,643.02 was requested and funded in response to the September 2008 Advance Request. (*See* Cantor Opp. Decl. Exs. 45 [Dep. Ex. 237]; 63 [Dep. Ex. 890].)

Response to Paragraphs 27 through 29: Undisputed.

Response to Paragraph 30: Disputed. The cited evidence does not support this statement. Lehman was not responsible for the "entire" \$189.6 million portion of the Retail Loan to be advanced after closing. Approximately \$125.4 million of the \$315 million Retail Facility was advanced at closing, leaving \$189.6 million to be advanced after closing. (Cantor Opp. Decl. Ex. 88 [Dep. Ex. 831].) Post-closing, \$100 million of the Retail Facility was syndicated by Lehman to other lenders. The Retail Facility was subdivided into eight notes—A1 through A8. (*See id.* Ex. 49 [Dep. Ex. 9, Ex. A].) [REDACTED]

[REDACTED] (*See id.* Ex. 74 [Dep. Ex. 23].) BANA does not dispute that Lehman was responsible for \$215 million of the \$315 million Retail Loan after taking into account the syndication. Moreover, Plaintiffs' citation to Exhibit 1504 is improper as its contents are inadmissible hearsay. Exhibit 1504 is a September 2009 filing by non-party 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.²

Response to Paragraph 31: Disputed. "Administrative Agent" is not a defined term

² *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." (citations omitted)).

under the Retail Facility Agreement. Section 9.7.2(d) of the Retail Facility Agreement states that Lehman was the “administrative agent” for the Retail Lenders. (*See* Retail Agmt. § 9.7.2(d).)

Response to Paragraphs 32 and 33: Undisputed.

Response to Paragraph 34: Disputed. BANA does not dispute that Lehman did not fund its \$2,526,184 portion of the September 2008 Retail Advance. (Cantor Opp. Decl. Ex. 52 [Dep. Ex. 14].) But the cited Susman deposition testimony does not support the statement. The testimony reflects Mr. Susman’s understanding at the time of his deposition that Lehman did not fund its portion of the Retail Advance for September 2008, and not his knowledge in September 2008. (*Id.* Ex. 26 (Susman Dep. at 264:24-265:3).)

Response to Paragraph 35: Disputed. This statement mischaracterizes the events because it does not specify which Fontainebleau-related entity funded Lehman’s share of the September 2008 Retail Advance with equity. FBR funded Lehman’s \$2,526,184 portion of the September 2008 Retail Advance with equity. (*See* Cantor Opp. Decl. Ex. 52 [Dep. Ex. 14].) In addition, most of the cited evidence does not support the statement. Deposition Exhibits 78 and 80, and Plaintiffs’ Exhibit 1502 should be disregarded because they contain inadmissible hearsay. These exhibits are e-mails forwarding a Merrill Lynch analyst’s unsubstantiated rumor that “FBLEAU equity sponsors have funded the amount required from Lehman on the retail credit facility due this month (\$4 million).” There is no foundation for the reports’ contents. Moreover, the report’s contents are inadmissible hearsay because the analyst was never deposed and Plaintiffs cite the report for the truth of its contents.³ Moreover, the unreliability of the report’s contents are evident, as it exaggerates the amount of Lehman’s Retail Advance by more than 50%. Nor does the cited Susman deposition testimony support the statement. It reflects Mr. Susman’s understanding at the time of his deposition that FBR wired to Trimont Lehman’s portion of the Retail Advance for September 2008 and not his understanding in September 2008. (*See id.* Ex. 26 (Susman Dep. at 264:24-265:3).)

Response to Paragraph 36: Disputed. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]. (*See* Cantor Opp. Decl. Exs. 73, 78, 83, 87 [Dep. Exs. 22, 28, 35, 41].) Some of the cited evidence does not support this statement [REDACTED]

³ *See United States v. Baker*, 432 F.3d 1189, 1211 (11th Cir. 2005) (news report inadmissible as hearsay).

[REDACTED]
[REDACTED] And the cited Susman testimony does not support Plaintiffs' statement because he was no longer employed by BANA at the time of the February 2009 Retail Advance. (*Id.* Ex. 26 (Susman Dep. at 15:22-16:22).)

Response to Paragraph 37: Disputed. Plaintiffs' mischaracterize the evidence by misidentifying the parties to the Guaranty Agreement and amendments thereto. In December 2008, FBR, Turnberry Residential Limited Partner, L.P. ("TRLP"), and Jeffrey Soffer entered into the Guaranty Agreement in favor of ULLICO. (Cantor Opp. Decl. Ex. 75 [Dep. Ex. 24].)

[REDACTED]
(*See id.* Exs. 79 [Dep. Ex. 30]; 80 [Dep. Ex. 36]; 86 [Dep. Ex. 42].)

Response to Paragraph 38: Disputed. The cited evidence does not support this statement. The cited evidence reflects that, under the Guaranty Agreement, ULLICO would pay Lehman's \$3,391,631.83 portion of the December 2008 Retail Advance portion, and Jeffrey Soffer, FBR, and TRLP (together, the "Guarantors") guaranteed repayment within ninety days subject to certain conditions. (*See* Cantor Opp. Decl. Ex. 75 [Dep. Ex. 24].)

[REDACTED] (*Id.* Ex. 79 [Dep. Ex. 30].)

[REDACTED] (*Id.* Ex. 80 [Dep. Ex. 36].)

And under the Third Amendment, ULLICO received a \$1 million payment from Soffer—less than Lehman's \$3,313,170.49 March 2009 Retail Advance portion). (*See id.* Ex. 86 [Dep. Ex. 42].)

[REDACTED] (*Id.* Exs. 69 [Dep. Ex. 46]; 4 (Kolben Dep. at 133:18-134:10).)

Response to Paragraph 39: Undisputed, but BANA disputes that the cited evidence supports the statement. Deposition Exhibits 206, 609, 814, 831, 906 and 907 do not support the statement because they do not reflect that ULLICO did not agree to permanently pay or to assume Lehman's obligations under the Retail Facility.

Response 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).)

Response to Paragraph 51: Disputed. On September 22, 2008, BANA asked Fontainebleau to schedule a call with the Lenders to address their Lehman-related questions. (Cantor Opp. Decl. Ex. 47 [Dep. Ex. 901].) Fontainebleau agreed to participate in the Lender call in October 2008, but later declined to hold the call. (*Id.* Ex. 55 [Dep. Ex. 205].) Fontainebleau later discussed the implications of the Lehman bankruptcy with Lenders on numerous occasions, including during an October 29, 2008 call, a November 18, 2008 meeting, an early-December 2008 call, and a March 2009 presentation. (*See id.* Exs. 68 [Dep. Ex. 158 (Fu's notes of October 29, 2008 Fontainebleau call with Lenders)]; 98 [Dep. Ex. 377 (Mulé's summary of October 29, 2008 call)]; 99 [Dep. Ex. 379 (e-mail confirming Caspian's attendance at Fontainebleau meeting)]; 70 [Dep. Ex. 381 (Mulé's notes of November 2008 meeting with Fontainebleau)]; 71 [Dep. Ex. 160 (Churchill e-mail summarizing December 2008 Fontainebleau call)].) In addition, numerous Lenders held meetings or calls with Fontainebleau during the fall of 2008, during which the implications of Lehman's bankruptcy for the Project were discussed. (*Id.* Exs. [REDACTED]; 40 [Dep. Ex. 382 (Mulé's notes of Caspian's call with Freeman)]; 100 (Brigade e-mail thanking Fontainebleau for arranging call).)

Response 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].)

Response to Paragraph 53: Undisputed that on September 30, 2008, BANA sent Mr. Freeman a letter requesting a call to discuss issues related to Lehman's bankruptcy and that the quoted statement is an excerpt from that letter. (Cantor Opp. Decl. Ex. 54 [Dep. Ex. 76].)

Response to Paragraph 54: Undisputed.

Response 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.

Response to Paragraph 56: Undisputed.

Response 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).)

Response 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.

Response to Paragraph 59: Disputed. BANA disputes that Highland provided notice to BANA that no disbursements may be made under the Loan Facility. BANA does not dispute that on September 26, 2008 Highland sent BANA an e-mail expressing concerns regarding the implications of Lehman's bankruptcy and its opinion that "[n]o disbursements may be made" and sent additional e-mails expressing concerns about the Lehman bankruptcy's implications in October 2008. (Cantor Opp. Decl. Ex. 53 [Dep. Ex. 455].)

Response to Paragraph 60: Disputed. The cited evidence does not support this statement. On October 6, 2008, Highland sent BANA an e-mail claiming that there were unidentified "public reports" that "equity sponsors" had funded Lehman's September 2008 Retail Advance portion. (Cantor Opp. Decl. Ex. 58 [Dep. Ex. 81].) Then, on October 13, Highland sent BANA a Merrill Lynch research analyst's e-mail that stated: "We understand that FBLEAU equity sponsors have funded the amount required from Lehman on the retail credit facility due this month (\$4 million)." (*Id.* Ex. 62 [Dep. Ex. 80].) The Merrill Lynch report did not identify a source or basis for the statement, and overstated Lehman's Shared Costs portion. (*Id.*) [REDACTED]

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

[REDACTED] Because no witnesses with personal knowledge of the conversation have testified about it, the statements

contained in Deposition Exhibit 80 purporting to describe the conversation are inadmissible hearsay.⁴ 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].)

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

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

Response to Paragraph 62: Disputed. The cited evidence does not support the statement. Although the impact of Lehman's bankruptcy on the Project was discussed at the meeting in October 2008, the meeting's purpose was for the Retail Lenders to get a report from BANA (the Resort Lenders' agent) on the Project's overall progress. (Cantor Opp. Decl. Exs. 67 [Dep. Ex. 18 (meeting agenda)]; 17 (Freeman Dep. at 110:23-111:9).) [REDACTED]

[REDACTED]

[REDACTED] But the cited evidence establishes only that a

⁴ *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).

conference call was scheduled for, and occurred in, October 2008, and not what was discussed during the call. The call's primary purpose was to provide an update on the Project to the Retail Lenders, at the Retail Lenders' request. (*See id.* Ex. 13 (Varnell Dep. at 198:1-7).)

Response to Paragraph 63: Disputed. Plaintiffs mischaracterize the evidence.

[REDACTED]

Response to Paragraph 64: Disputed. [REDACTED]

[REDACTED]

[REDACTED] (*See* Cantor Opp. Decl. Ex. 4 (Kolben Dep. at 175:19-176:9).) In addition, Plaintiffs' Exhibit 19 is inadmissible and should be disregarded. The exhibit, a National City Special Assets Committee Report, was never authenticated. (*See id.* [REDACTED]; Ex. 6 (Yunker Dep. at 174:16-175:5).) The exhibit is apparently an internal memorandum prepared by non-party National City and obtained through non-party discovery from PNC Bank. The document's contents are hearsay. Because the document is being offered for the truth of its contents, it is inadmissible under Fed. R. of Evid. 802.⁵

Response to Paragraph 65: Disputed. The cited evidence does not support the statement. The Retail Lenders asked BANA to take over Lehman's remaining commitment under the Retail Facility, (Cantor Opp. Decl. Ex. 12 (Howard Dep. at 112:19-113:10, 146:1-13)), but there is no evidence that Fontainebleau made the request at the October Retail meeting. Furthermore, much of the cited evidence has nothing to do with the October 2008 meeting. (*See id.* Exs. 77 [Dep. Ex. 907]; 12 (Howard Dep. at 112:9-18, 113:11-114:4); 26 (Susman Dep. at 277:19-278:9).)

Response to Paragraphs 66 through 69: Undisputed.

⁵ *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").

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

Response to Paragraph 71: Undisputed.

Response 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].)

Response to Paragraph 73: Undisputed.

Response 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).)

Response to Paragraph 75: Undisputed.

Response 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).)

Response to Paragraph 77: Disputed. This statement mischaracterizes the cited evidence because BANA did not terminate the Revolver Loan. The April 20, 2009 letter that BANA, as Administrative Agent, sent to Jim Freeman informed Fontainebleau that “the Required Facility Lenders under the Revolving Credit Facility have determined that one or more Events of Default have occurred and are continuing and that they have requested that the Administrative Agent notify [Fontainebleau] that the Total Revolving Commitments have been terminated.” (Cantor Opp. Decl. Ex. 90 [Dep. Ex. 664].)

Response to Paragraph 78: Disputed. The statement is not supported by the cited evidence. Plaintiffs define “Term Lenders” to mean the plaintiffs in this action “and/or their predecessors in interest.” (Pls.’ SOUMF, Def. 7.) The cited documents reflect the *total*

disbursements of Initial Term Loan and Delay Draw Term Loan proceeds, not all of which was funded by Plaintiffs or their alleged predecessors-in-interest.

Response to Paragraph 79: Undisputed.

**BANA'S STATEMENT OF ADDITIONAL UNDISPUTED
MATERIAL FACTS IN OPPOSITION TO PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT**

I. THE PARTIES

1. BANA is a nationally chartered bank with its main office in Charlotte, North Carolina. (*See* Cantor Opp. Decl. Ex. 30 at ¶ 102.)

2. BANA was a Revolver Loan lender to Fontainebleau Las Vegas, LLC and Fontainebleau Las Vegas II, LLC (collectively, the "Borrowers" or "Fontainebleau") under the Credit Agreement. (*See id.* Ex. 30 at ¶ 102.)

3. Plaintiffs are a group of sophisticated financial institutions who were lenders—or in most cases, successors-in-interest to lenders—to Fontainebleau under the Credit Agreement. (*See id.* Ex. 29 at ¶¶ 113, 117). [REDACTED]

[REDACTED]

4. [REDACTED]

5. [REDACTED]

15. Plaintiffs own only Initial Term Loan and Delay Draw Term Loan notes. (*See* Cantor Opp. Decl. Ex. 29 (Second Am. Term Lender Compl. [D.E. 15], at ¶ 117).)

16. The Project's retail space was to be developed by Fontainebleau Las Vegas Retail, LLC (the "Retail Affiliate"), an FBR subsidiary distinct from the Borrowers. (*See id.* Ex. 41 at 28 [Dep. Ex. 4].)

17. The Project's resort and retail components each had their own separate credit facilities and construction budgets. (*See id.* Ex. 26 (Susman Dep. at 173:18-174:3); *see also* Disbursement Agmt., Recital C.)

18. FBR specifically designed the retail space's financing to be separate and distinct from the Senior Credit Facility. (*See* Cantor Opp. Decl. Ex. 26 (Susman Dep. at 173:18-174:3).)

19. The \$315 million Retail Facility was subject to a separate June 6, 2007 agreement between the Retail Affiliate and Lehman Brothers Holdings, Inc. ("Lehman") (the "Retail Facility Agreement"). (*See id.* Ex. 43 (Retail Agmt.) [Dep. Ex. 8].)

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. at ¶ 9).)

21. The resort budget included \$83 million in costs that were to be funded through the Retail Facility ("Shared Costs"). (*See* Disbursement Agmt., Recital C.)

22. The Shared Costs were used to fund construction of portions of the Project's retail space that were structurally inseparable from the resort. (Cantor Opp. Decl. Ex. 97 (Susman Decl. ¶ 12).)

23. Lehman signed the Retail Facility Agreement as a lender and as agent for one or more co-lenders (each a "Retail Co-Lender"). (*See* Retail Agmt. at 1.)

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).)

25. The Retail Facility was syndicated under a separate confidential agreement among the Retail Co-Lenders (the "Retail Co-Lending Agreement"). (*See* Cantor Opp. Decl. Ex. 49

[Dep Ex. 9].) The terms under which the Retail Facility was syndicated to the Retail Co-Lenders were not disclosed to BANA. (*See id.* Ex. 97 (Susman Decl. at ¶¶ 8, 9).)

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).)

27. The Retail Facility Agreement permitted Lehman to “delegate all or any portion of its responsibilities under [the Retail Facility Agreement] and the other Loan Documents to the Servicer.” (Retail Agmt. § 9.3.)

28. Lehman designated TriMont Real Estate Advisors, Inc. (“TriMont”) as the Servicer for the Retail Facility. (Cantor Opp. Decl. Ex. [REDACTED].)

29. Lehman delegated to TriMont the responsibility for collecting the Retail Co-Lenders’ respective Shared Costs obligations in response to an Advance Request and transferring those funds to BANA, as Disbursement Agent. (*See id.* Ex. 5 (Rafeedie Dep. at 18:22-19:8).)

30. The Borrower’s access to the construction financing was governed by a June 6, 2007 Master Disbursement Agreement (“Disbursement Agreement”). (*See generally id.* Ex. 6 (Yunker Dep. at 20:3-21:5).)

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).)

32. After Fontainebleau submitted an Advance Request, BANA was required to “review the Advance Request and attachments thereto to determine whether all required documentation has been provided.” (Disbursement Agmt., § 2.4.4(a).)

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.)

34. Section 3.3 had twenty-four separate multi-part conditions precedent, including:

- “Representations and Warranties. Each representation and warranty of ... [e]ach Project Entity set forth in Article 4 ... shall be true and correct in all material respects as if made on such date.” (Disbursement Agmt. § 3.3.2.)
- “Default. No Default or Event of Default shall have occurred and be continuing.” (*Id.* § 3.3.3.)
- “Material Adverse Effect. Since the Closing Date, there shall not have occurred any change in the economics or feasibility of constructing and/or operating the Project, or in the financial condition, business or property of the Project Entities, any of which could reasonably be expected to have a Material Adverse Effect.” (*Id.* § 3.3.11.)

- “Retail Advances. 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.” (*Id.* § 3.3.23.)

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)).)

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.)

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).)

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.)

39. If an Advance Request’s conditions precedent were satisfied, BANA (as Disbursement Agent) and Fontainebleau were required to execute an Advance Confirmation Notice. (*See* Disbursement Agmt. § 2.4.6.)

40. In the Advance Confirmation Notice, Fontainebleau expressly confirmed “that each of the representations, warranties and certifications made in the Advance Request ... (including the various Appendices attached thereto), ... are true and correct as of the Requested Advance Date and Disbursement Agent is entitled to rely on the foregoing in authorizing and making the Advances herein requested” and “that the [Advance Request] representations, warranties and certifications are correct as of the Requested Advance Date.” (Cantor Opp. Decl. Ex. 96 (Bolio Decl. at ¶ 14, Ex. 20 (Disbursement Agmt. Ex. E)).)

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.)

42. If the conditions precedent were not satisfied, the Disbursement Agent was required to issue a Stop Funding Notice. (*See* Disbursement Agmt. § 2.5.1.)

43. A Stop Funding Notice would be issued if “the [Funding Agent] notifies the Disbursement Agent that a Default or an Event of Default has occurred and is continuing.” (Disbursement Agmt. § 2.5.1.)

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

IV. CONTRACTUAL PROTECTIONS FOR DISBURSEMENT AGENT AND ADMINISTRATIVE AGENT

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.)

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.)

47. Disbursement Agreement Section 9.10 limits BANA’s duties as Disbursement Agent, providing, among other things, that:

- “... [BANA] shall have no duties or obligations [under the Disbursement Agreement] except as expressly set forth herein, shall be responsible only for the performance of such duties and obligations and shall not be required to take any action otherwise than in accordance with the terms hereof”;

- "...nothing in this Agreement, expressed or implied, is intended to or shall be so construed as to impose upon [BANA] any obligations in respect of this Agreement except as expressly set forth herein or therein"; and
- "... [BANA] shall have no duty to inquire of any Person whether a Default or an Event of Default has occurred and is continuing."

48. Disbursement Agreement Section 9.10 limits BANA's potential liability to bad faith, fraud, gross negligence or willful misconduct:

Neither the Disbursement Agent nor any of its officers, directors, employees or agents shall be in any manner liable or responsible for any loss or damage arising by reason of any act or omission to act by it or them hereunder or in connection with any of the transactions contemplated hereby, including, but not limited to, any loss that may occur by reason of forgery, false representations, the exercise of its discretion, or any other reason, except as a result of their bad faith, fraud, gross negligence or willful misconduct as finally judicially determined by a court of competent jurisdiction.

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.)

50. Section 9.3 of the Credit Agreement states that "[t]he Administrative Agent shall not be liable for any action taken or not taken by it (i) with the consent or at the request of the Required Lenders ... or (ii) in the absence of its own gross negligence or willful misconduct."

51. Section 9.3(b) of the Credit Agreement provides that "[T]he Administrative Agent: ... shall not have any duty to take any discretionary action or exercise any discretionary powers, except discretionary rights and powers expressly contemplated hereby or by the other Loan Documents that the Administrative Agent is required to exercise as directed in writing by the Required Lenders (or such other number or percentage of the Lenders as shall be expressly provided for herein or in the other Loan Documents), provided that the Administrative Agent shall not be required to take any action that ... may expose the Administrative Agent to liability or that is contrary to any Loan Document or applicable law."

52. Section 9.4 of the Credit Agreement provides that "[t]he Administrative Agent shall be entitled to rely upon, and shall not incur any liability for relying upon, any notice, request, certificate, consent, statement, instrument, document or other writing ... believed by it to be genuine and to have been signed, sent or otherwise authenticated by the proper Person. The

Administrative Agent also may rely upon any statement made to it orally or by telephone ... and shall not incur any liability for relying thereon.”

V. LEHMAN’S BANKRUPTCY FILING AND ITS AFTERMATH

53. Fontainebleau requested nearly \$3.8 million in Retail Facility funds as part of its \$103.7 million September 2008 Advance Request. (*See* Cantor Opp. Decl. Ex. 96 (Bolio Decl. ¶ 13, Ex. 7).)

A. BANA Determines That the September 2008 Advance Request’s Conditions Precedent Are Satisfied.

54. If the Retail Facility did not fund its entire portion of the Advance Request, no funds would be disbursed to Fontainebleau from the Bank Proceeds Account, which could cause Fontainebleau to be unable to pay that month’s Project construction costs. (Disbursement Agmt. § 3.3.23.)

55. It was understood that Fontainebleau’s failure to remain timely in paying subcontractors could adversely impact the Project. (*See* Cantor Opp. Decl. Ex. 97 (Susman Decl. at ¶ 21).)

56. In the days after Lehman’s bankruptcy filing, BANA held a series of calls with Fontainebleau to obtain additional information regarding the Lehman bankruptcy’s implications for the September 2008 Advance Request. (*See id.* Ex. 6 (Yunker Dep. at 24:19-25:6).)

57. The calls that BANA held with Fontainebleau after Lehman’s bankruptcy filing focused on whether Lehman would fund its portion of the Advance Request and on potential alternative financing arrangements if Lehman did not fund, including funding by the other Retail Facility Lenders or Fontainebleau. (*Id.* Ex. 6 (Yunker Dep. at 81:13-83:14).)

58. During 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. (*Id.* Ex. 6 (Yunker Dep. at 25:8-12).)

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).)

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).)

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).)

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).)

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).)

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).)

B. Fontainebleau Conceals that FBR Had Funded Lehman's Portion of the September 2008 Advance Request.

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].)

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].)

67. Jim Freeman was instructed by Fontainebleau's counsel not to reveal that FBR had funded for Lehman. (*Id.* Ex. 17 (Freeman Dep. at 227:8-20; 237:5-11).)

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).)

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).)

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).)

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).)

72. Ms. Brown communicated all information she obtained as Disbursement Agent regarding Lehman to BANA’s Corporate Debt Products group. (*Id.* Ex. 16 (Brown Dep. at 39:17-40:2; 57:1-12; 58:10-13).)

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.

74. On October 6, 2008, Jim Freeman told Moody’s that “Retail funded its small portion last month.” (*Id.* Ex. 56 [Dep. Ex. 283].)

75. Jim Freeman did not tell Moody’s that FBR had funded for Lehman in September 2008 because “[b]ased on the discussion that I had, the advice of counsel, I was -- I was not talking to people about the source of funding.” (*Id.* Ex. 17 (Freeman Dep. at 250:10-12).)

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).)

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).)

C. Fontainebleau Provides Repeated Assurances that the Advance Request Conditions Precedent Were Satisfied Despite Lehman’s Bankruptcy.

78. On September 22, 2008, BANA asked Fontainebleau to schedule a call with Lenders to address their Lehman-related questions. (Cantor Opp. Decl. Ex. 47 [Dep. Ex. 901].)

79. In anticipation of the Lender call, BANA sent Fontainebleau a list of potential Lender questions, including whether Lehman funded its September 2008 Shared Costs portion,

the identity of any entity that funded on Lehman's behalf, and the Lehman bankruptcy's effect on Fontainebleau's ability to complete the Project. (*Id.* Ex. 54 [Dep. Ex. 76].)

80. Fontainebleau agreed to participate in the Lender call that BANA requested but later backed out. (*See id.* Ex. 55 [Dep. Ex. 205].)

81. On October 7, 2008, Fontainebleau sent BANA and the Lenders a memo addressing the Retail Facility's status. (*Id.* Ex. 59 [Dep. Ex. 77].)

82. The October 7, 2008 memorandum assured the Lenders that the August and September Shared Costs had been funded in full. (*Id.*)

83. The October 7, 2008 memo 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.*)

84. The October 7, 2008 memo stated that Fontainebleau did not "believe there will be any interruption in the retail funding of the project." (*Id.*)

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 Dep. at 116:6-117:5).)

86. On October 22, 2008, Fontainebleau provided the Lenders with another memo, stating that Lehman's "commitment to the Retail Facility had not been rejected in bankruptcy court and remained in full force and effect." (*Id.* Ex. 64 [Dep. Ex. 285].)

87. Fontainebleau's October 22, 2008 update stated that "Lehman Brothers has indicated to us that it has sought the necessary approvals to fund its commitment this month," and that Fontainebleau had been assured by the "co-lenders to the retail facility" that "[i]f Lehman Brothers is not in a position to perform ... that they would fund Lehman's portion of the draw." (*Id.*)

88. [REDACTED]

[REDACTED] (Cantor Opp. Decl. Ex. 4 (Kolben Dep. at 62:12-64:2).)

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).)

90. [REDACTED]

[REDACTED] (*Id.* Ex. 4 (Kolben Dep. 176:22-177:3).)

91. On December 5, 2008, FBR issued financial statements for the period ended September 30, 2008 that included disclosures regarding the Retail Facility's status. (*Id.* Ex. 72 [Dep. Ex. 286].)

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.*)

93. The FBR financial statements' "Equity Contributions" disclosure made no mention of its September 2008 equity contribution on Lehman's behalf. (*Id.* at FBR01281007.)

94. Lehman funded its Shared Costs portion for the October and November Advances. (*See* Cantor Opp. Decl. Exs. 5 (Rafeedie Dep. at 63:13-21, 66:3-23); [REDACTED]; [REDACTED]; 64 [Dep. Ex. 285].)

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].)

96. ULLICO was a Retail Co-Lender under the Retail Co-Lending Agreement. (*Id.* Ex. [REDACTED]; *see also id.* Ex. 49 [Dep. Ex. 9].)

97. Each month from October 2008 through March 2009, TriMont wired BANA the full requested Shared Costs, and BANA waited until after it received the wire from Trimont to make any disbursements to Fontainebleau. (*See id.* Exs. 96 (Bolio Decl. at ¶ 16, Ex. 29-34); 16 (Brown Dep. at 72:16-73:1).)

D. [REDACTED]

98. [REDACTED]
[REDACTED]
[REDACTED]

99. In December 2008, ULLICO entered an agreement with the Guarantors under which ULLICO would pay Lehman's December 2008 Retail Advance portion, and the Guarantors would guaranty repayment within 90 days. (*See id.* Ex. 75 [Dep. Ex. 24].)

100. [REDACTED]
[REDACTED] (*See id.* Exs. 79 [Dep. Ex. 30]; 80 [Dep. Ex. 36]; 86 [Dep. Ex. 42].)

101. [REDACTED]

[REDACTED]

[REDACTED] (See *id.*)

102. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.* Exs. 69 [Dep. Ex. 46]; 4 (Kolben Dep. at 133:18-134:10).)

103. [REDACTED]

[REDACTED]

[REDACTED] (*Id.* Ex. 4 (Kolben Dep. at 95:16-96:18).)

104. [REDACTED]

[REDACTED]

E. BANA Evaluates Highland’s Claim that Lehman’s Bankruptcy was a Default Under the Loan Documents.

105. Funds managed by Highland Capital Management (“Highland”) were Initial Term Loan and Delay Draw Term Loan Lenders. (*See* Cantor Opp. Decl. Ex. 29 (Second Amended Compl. (Jan. 15, 2010) at ¶¶ 38-40, 117).)

106. On September 26, 2008, Highland sent BANA an e-mail claiming that: “As a result of [Lehman]’s bankruptcy filing earlier this month, the financing agreements are no longer in full force and effect, triggering a number of breaches under the Loan Facility - resulting in the following consequences: (i) No disbursements may be made under the Loan Facility; and (ii) The Borrower should be sent a notice of breach immediately to protect the Lenders’ rights and ensure that any cure period commence as soon as possible.” (*Id.* Ex. 53 [Dep. Ex. 455].)

107. Through its counsel Sheppard Mullin Richter & Hampton LLP (“SMRH”), BANA told Highland that the Bankruptcy Code specifically provides that “no executory contract may be terminated or modified solely based on the commencement of a Chapter 11 case,” and asked Highland to identify any “authority or documents supporting a contrary conclusion.” (*Id.* Ex. 60 [Dep. Ex. 904].)

108. Following communications with Highland and further internal analysis, BANA concluded that Lehman’s bankruptcy filing did not provide a basis for rejecting Fontainebleau’s September 2008 Advance Request. (*Id.* Ex. 97 (Susman Decl. at ¶ 16).)

109. BANA provided additional information to Highland in a September 29, 2008 Sheppard Mullin e-mail, explaining that it had been “monitoring all [Lehman] court orders” and was “unaware of a restriction on performance of this agreement.” (*Id.* at ¶ 22, Ex. 5.) The e-mail also rejected Highland’s suggestion that Lehman’s bankruptcy filing was an “anticipatory repudiation of the contract.” (*Id.*)

110. On September 30, 2008, Highland sent BANA another e-mail, this time claiming that Lehman’s bankruptcy filing constituted a Material Adverse Effect. (*Id.* at ¶ 23, Ex. 5.)

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.)

112. [REDACTED]

[REDACTED] (Cantor Opp. Decl. Ex. 57 [Dep. Ex. 458].) [REDACTED]

[REDACTED] (*Id.*)

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.*)

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.*)

115. In its October 13, 2008 e-mail, Highland also requested that because of these concerns, BANA “confirm” certain matters concerning the Retail Facility, including: (i) “wiring confirmations from the Retail Lenders or funding certificates from the Retail Lenders to confirm that funding is made by the Retail lenders (rather than other sources)” and (ii) a legal opinion from the “borrower’s legal counsel . . . that the Lehman funding agreement is in full force and effect.” (*Id.*) Highland cited no provision of any agreement requiring such information be provided to the agent or the lenders. (*Id.*)

116. [REDACTED]

[REDACTED] (Cantor Opp. Decl. Ex. 20 (Rourke Dep. at 103:6-16).)

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).)

118. In September 2008, numerous credible publications reported that certain Highland funds had suffered losses and faced a liquidity crunch. (*Id.* Ex. 28 (P. Paulden, Highland Shuts Funds Amid 'Unprecedented' Disruption, BLOOMBERG (Oct. 16, 2008).)

119. [REDACTED]

[REDACTED] (*Id.* Ex. 20 (Rourke Dep. at 70:24-72:2).)

120. In September and October 2008, BANA facilitated calls between Fontainebleau and numerous Lenders (including Highland, Brigade and Halcyon) to discuss the Lehman bankruptcy. (*Id.* Exs. 20 (Rourke Dep. at 92:12-93:16); 95 [Dep. Ex. 279]; 12 (Howard Dep. at 52:19-53:19).)

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

122. [REDACTED]

[REDACTED] (*Id.* Ex. 20 (Rourke Dep. at 126:2-127:2; 136:21-137:12).)

123. On October 23, 2008, Highland sent an e-mail to Freeman asking whether FBR funded Lehman's September 2008 Advance Request share [REDACTED]. (*Id.* Exs. [REDACTED]; 66 [Dep. Ex. 465].)

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.

125. Highland [REDACTED], and is no longer a Plaintiff. (*See id.* Ex. [REDACTED]; *see also* Order Dismissing Parties Without Prejudice (May 3, 2010) [D.E. 68].)

126. On February 20, 2009, BANA sent a letter to Fontainebleau seeking information regarding, among other things, the Retail Facility. (*Id.* Ex. 81 [Dep. Ex. 498].)

127. On February 23, 2009, Fontainebleau sent BANA a letter stating that it was “continuing active discussions with Lehman Brothers and the co-lenders to ensure that funding for the Project will continue on a timely basis,” and that the “Retail Facility is in full force and effect, [and] there has not been an interruption in the retail funding of the Project to date.” (*Id.* Ex. 82 [Dep. Ex. 811].)

128. On February 23, 2009, in response to Lender requests, BANA asked Fontainebleau to schedule a Lender call. (*See id.* Exs. 96 (Bolio Decl. at ¶ 17), 35.)

129. On March 4, 2009, BANA sent Fontainebleau a letter requesting a Lender meeting because it was “critical that the Company meet and interact with its Lenders.” BANA’s letter attached a list of Lender information requests concerning Project costs, which mirrored BANA’s prior information requests. (*Id.* Ex. 84 [Dep. Ex. 814].)

130. [REDACTED]. (*Id.* Ex. 20 (Rourke Dep. at 160:19-162:2).)

131. On March 20, 2009, Fontainebleau held a Lender meeting in Las Vegas where it delivered a presentation on the Project’s construction budget and other issues relating to the Project’s financial condition. (*See id.* Ex. 85 [Dep. Ex. 97].)

132. During the March 20, 2009 Lender meeting, Fontainebleau presented a slideshow to the attendees. (*Id.*)

133. The Credit Agreement provides that “Each Lender ... acknowledges that it will, independently and without reliance upon the Administrative Agent or any other Lender ... continue to make its own decisions in taking or not taking action under or based upon this Agreement, any other Loan Document or any related agreement or any document furnished hereunder or thereunder.” (Credit Agmt. § 9.7.)

VI. THE TERM LENDERS AND THE LEHMAN BANKRUPTCY

134. Plaintiffs who were lenders in September 2008 testified that they “believe[d]” that “at least one [of Lehman’s Retail] advance[s] had been made by another retail lender.” (Cantor Opp. Decl. Exs. 7 (Pardon Dep. at 83:10-20); *see also id.* Exs. 23 (Mulé Dep. at 161:19-22); 93 [Dep. Ex. 91]; 92 [Dep. Ex. 154]; 94 [Dep. Ex. 182 at 3]; [REDACTED].)

135. Because they were concerned with potential liability, the Lenders did not direct BANA to deny the Advance Requests. (*Id.* Ex. 23 (Mulé Dep. at 253:2-20).)

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

137. Plaintiffs increased their exposure to Fontainebleau Term Loans following the Lehman bankruptcy filing. (*Id.* Ex. 23 (Mulé Dep. at 172:10-174:25).)

138. [REDACTED]

[REDACTED] (*See id.* Ex. 15 (Sheffield Dep. at 188:5-13).)

139. [REDACTED]

[REDACTED] (*See id.* Ex. 15 (Sheffield Dep. at 199:13-18).)

Dated: September 9, 2011

Respectfully submitted,

By: 

O'MELVENY & MYERS LLP
Bradley J. Butwin (*pro hac vice*)
Jonathan Rosenberg (*pro hac vice*)
Daniel L. Cantor (*pro hac vice*)
William J. Sushon (*pro hac vice*)
7 Times Square
New York, New York 10036
Telephone: (212) 326-2000
Facsimile: (212) 326-2061
E-mails: bbutwin@omm.com;
jrosenberg@omm.com; dcantor@omm.com;
wsushon@omm.com

- and -

HUNTON & WILLIAMS LLP
Jamie Zysk Isani (Fla. Bar No. 728861)
Matthew Mannering (Fla. Bar No. 39300)
1111 Brickell Avenue, Suite 2500
Miami, Florida 33131
Telephone: (305) 810-2500
Facsimile: (305) 810-1675
E-mail: jisani@hunton.com;
mmannering@hunton.com

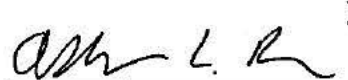
Attorneys for Bank of America, N.A.

CERTIFICATE OF SERVICE

I, Asher L. Rivner, hereby certify that on September 9, 2011, I served by electronic means pursuant to an agreement between the parties a true and correct copy of the foregoing Defendant Bank of America, N.A.'s Response to Plaintiffs' Statement of Undisputed Material Facts and Statement of Additional Undisputed Material Facts in Opposition to Plaintiffs' Motion for Partial Summary Judgment upon the below-listed counsel of record and that the original and a paper copy of these documents will be filed with the Clerk of Court under seal.

Kirk Dillman, Esq.
Robert Mockler, Esq.
HENNIGAN DORMAN LLP
865 South Figueroa Street, Suite 2900
Los Angeles, California 90017
Telephone: (213) 694-1200
Facsimile: (213) 694-1234
E-mail: dillmank@hdlitigation.com
mocklerr@hdlitigation.com

Attorneys for Plaintiffs Avenue CLO Fund, Ltd. et al.



Asher L. Rivner

EXHIBIT A – DEFINED TERMS

BANA -- Bank of America, N.A, Defendant

Bank Proceeds Account -- The designated bank account into which Lenders transferred Project funds

CDP -- BANA's Corporate Debt Products Group

Credit Agreement or Credit Agmt. -- Credit Agreement dated as of June 6, 2007 attached as Exhibit 2 to the Declaration of Daniel L. Cantor in Support of BANA's Opposition to Plaintiffs' Motion for Partial Summary Judgment.

Delay Draw Term Loan -- The \$350 million delay draw term loan under the Credit Agreement

Disbursement Agreement or Disbursement Agmt. -- Master Disbursement Agreement dated as of June 6, 2007 attached as Exhibit 1 to the Declaration of Daniel L. Cantor in Support of BANA's Opposition to Plaintiffs' Motion for Partial Summary Judgment

FBR or Fontainebleau Resorts -- Fontainebleau Resorts, LLC

Fontainebleau or Borrowers -- Fontainebleau Las Vegas, LLC and Fontainebleau Las Vegas II, LLC

Guarantors -- Jeffrey Soffer, Fontainebleau Resorts, LLC, and Turnberry Residential Limited Partner, L.P., together.

Highland -- Highland Capital Management

Initial Term Loan -- The \$700 million initial term loan under the Credit Agreement.

Lehman -- Lehman Brothers Holdings, Inc.

Lenders -- Lenders under the Credit Agreement for the Senior Credit Facility.

MAE -- Material Adverse Effect

Project -- The Fontainebleau Las Vegas, a partially completed resort and casino development on an approximately 24.4 acre parcel at the Las Vegas Strip's north end.

Retail Affiliate -- Fontainebleau Las Vegas Retail, LLC

Retail Co-Lending Agreement -- The confidential Retail Co-Lending Agreement dated as of September 24, 2007 attached as Exhibit 49 to the Declaration of Daniel L. Cantor in Support of BANA's Opposition to Plaintiffs' Motion for Partial Summary Judgment.

Retail Facility Agreement or Retail Agmt. -- Retail Facility Agreement dated as of June 6, 2007 attached as Exhibit 43 to the Declaration of Daniel L. Cantor in Support of BANA's Opposition to Plaintiffs' Motion for Partial Summary Judgment

Retail Facility -- The \$315 million in loans earmarked for the Project's retail space

Retail Lenders -- Lenders among whom the Retail Facility was syndicated under the Retail Co-Lending Agreement

Revolver Loan -- The \$800 million revolving loan under the Credit Agreement.

Senior Credit Facility -- The \$1.85 billion senior secured facilities under the Credit Agreement.

Shared Costs -- The \$83 million in resort costs to be funded through the Retail Facility.

SMRH -- Sheppard Mullin Richter & Hampton LLP

TriMont -- TriMont Real Estate Advisors, Inc.

TRLP -- Turnberry Residential Limited Partners

TWC or Contractor -- Turnberry West Construction

ULLICO -- Union Labor Life Insurance Company

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division
CASE NO.: 09-2106-MD-GOLD/GOODMAN**

IN RE:

**FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION**

MDL NO. 2106

This document relates to all actions.

**DECLARATION OF DANIEL L. CANTOR IN SUPPORT OF
BANK OF AMERICA, N.A.'S OPPOSITION TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY
JUDGMENT AND REQUEST FOR JUDICIAL NOTICE**

I, Daniel L. Cantor, hereby declare as follows:

1. I am a member of the law firm of O'Melveny & Myers LLP, counsel for defendant Bank of America, N.A. ("BANA"), and I am familiar with the facts and circumstances in this action.
2. I make this declaration in opposition to Plaintiffs' Motion for Partial Summary Judgment.
3. Attached as Exhibit 1 is a true and correct copy of Deposition Exhibit 72, the Master Disbursement Agreement dated June 6, 2007, produced in this lawsuit by BANA as BANA_FB00204948-5092.
4. Attached as Exhibit 2 is a true and correct copy of Deposition Exhibit 658, the Credit Agreement dated June 6, 2007, produced in this lawsuit by BANA as BANA_FB00342012-385.
5. Attached as Exhibit 3 is a true and correct copy of excerpts from the transcript of the February 17, 2011 William S. Newby deposition.
6. Attached as Exhibit 4 is a true and correct copy of excerpts from the transcript of the February 22, 2011 Herbert Kolben deposition.

**CONTAINS "CONFIDENTIAL" AND "HIGHLY CONFIDENTIAL"
INFORMATION AND DOCUMENTS UNDER PROTECTIVE ORDER**

FILED UNDER SEAL

7. Attached as Exhibit 5 is a true and correct copy of excerpts from the transcript of the February 24, 2011 McLendon P. Rafeedie deposition.
8. Attached as Exhibit 6 is a true and correct copy of excerpts from the transcript of the March 1, 2011 Bret Yunker deposition.
9. Attached as Exhibit 7 is a true and correct copy of excerpts from the transcript of the March 3, 2011 Douglas Pardon deposition.
10. Attached as Exhibit 8 is a true and correct copy of excerpts from the transcript of the March 8, 2011 Scott Macklin deposition.
11. Attached as Exhibit 9 is a true and correct copy of excerpts from the transcript of the March 9, 2011 Hans Christensen deposition.
12. Attached as Exhibit 10 is a true and correct copy of excerpts from the transcript of the March 10, 2011 Mitchell Sussman deposition.
13. Attached as Exhibit 11 is a true and correct copy of excerpts from the transcript of the March 11, 2011 Roger Schmitz deposition.
14. Attached as Exhibit 12 is a true and correct copy of excerpts from the transcript of the March 11, 2011 David Howard deposition.
15. Attached as Exhibit 13 is a true and correct copy of excerpts from the transcript of the March 17, 2011 Jon Varnell deposition.
16. Attached as Exhibit 14 is a true and correct copy of excerpts from the transcript of the March 17, 2011 Vincent Fu deposition.
17. Attached as Exhibit 15 is a true and correct copy of excerpts from the transcript of the March 18, 2011 Chaney Sheffield deposition.
18. Attached as Exhibit 16 is a true and correct copy of excerpts from the transcript of the March 20, 2011 Jeanne Brown deposition.
19. Attached as Exhibit 17 is a true and correct copy of excerpts from the transcript of the March 23, 2011 Jim Freeman deposition.
20. Attached as Exhibit 18 is a true and correct copy of excerpts from the transcript of the March 23, 2011 Stephen Blauner deposition.
21. Attached as Exhibit 19 is a true and correct copy of excerpts from the transcript of the March 25, 2011 Michael Scott deposition.

22. Attached as Exhibit 20 is a true and correct copy of excerpts from the transcript of the March 29, 2011 Kevin Rourke deposition.

23. Attached as Exhibit 21 is a true and correct copy of excerpts from the transcript of the March 30, 2011 Brandon Bolio deposition.

24. Attached as Exhibit 22 is a true and correct copy of excerpts from the transcript of the March 31, 2011 Jason Esplin deposition.

25. Attached as Exhibit 23 is a true and correct copy of excerpts from the transcript of the April 5, 2011 Philip Mulé deposition.

26. Attached as Exhibit 24 is a true and correct copy of excerpts from the transcript of the April 7, 2011 Todd Miranowski deposition.

27. Attached as Exhibit 25 is a true and correct copy of excerpts from the transcript of the April 8, 2011 David Corleto deposition.

28. Attached as Exhibit 26 is a true and correct copy of excerpts from the transcript of the April 28, 2011 Jeff Susman deposition.

29. Attached as Exhibit 27 is a true and correct copy of excerpts from the transcript of the July 21, 2011 Daniel Lupiani deposition.

30. Attached as Exhibit 28 is a true and correct copy of Pierre Paulden, *Highland Shuts Funds Amid 'Unprecedented' Disruption*, Bloomberg (Oct. 16, 2008), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=agiw6VSt2goI> (last visited Aug. 4, 2011). BANA requests that the Court take judicial request of this article under Fed. R. Evid. 201 not for the truth of the matters set forth therein, but for the fact of its publication. *See United States v. Baker*, 432 F.3d 1189, 1211 (11th Cir. 2005).

31. Attached as Exhibit 29 is a true and correct copy of the Second Amended Complaint for Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, and Declaratory Relief, dated January 15, 2010 [DE 15], filed in the matter of *In re: Fontainebleau Las Vegas Contract Litigation*, Case No. 09-MD-02106-CIV-GOLD/BANDSTRA (S.D. Fla.).

32. Attached as Exhibit 30 is a true and correct copy of the Answer of Defendant Bank of America, N.A., dated June 18, 2010 [DE 88], filed in the matter of *In re: Fontainebleau Las Vegas Contract Litigation*, Case No. 09-MD-02106-CIV-GOLD/ BANDSTRA (S.D. Fla.).

33. Attached as Exhibit 31 is a true and correct copy of the Expert Report of Saul Solomon, dated May 23, 2011.

34. Attached as Exhibit 32 is a true and correct copy of [REDACTED]
[REDACTED]
[REDACTED] produced in this lawsuit by plaintiff Venor Capital Master Fund Ltd. as VEN 000803-06.

35. Attached as Exhibit 33 is a true and correct copy of an LSTA Distressed Trade Confirmation for the purchase by SPCP Group, LLC from Morgan Stanley Senior Funding, Inc., produced in this lawsuit by plaintiff SPCP Group, LLC as SPT 000179-81.

36. Attached as Exhibit 34 is a true and correct copy of an LSTA Distressed Trade Confirmation for the purchase by Brigade Capital Fund, LTD from Morgan Stanley Senior Funding, Inc., produced in this lawsuit by plaintiffs Brigade Leveraged Capital Structures Fund, Ltd. and Battalion CLO 2007-I Ltd. as BGD 004016-18.

37. Attached as Exhibit 35 is a true and correct copy of Deposition Exhibit 137, [REDACTED]
[REDACTED]
[REDACTED] produced in this lawsuit by plaintiff Monarch Master Funding, Ltd. as MON 000044-45.

38. Attached as Exhibit 36 is a true and correct copy of Deposition Exhibit 126, [REDACTED]
[REDACTED]
[REDACTED] produced in this lawsuit by plaintiff Stone Lion Portfolio, L.P. as SLN 000318-20.

39. Attached as Exhibit 37 is a true and correct copy of Deposition Exhibit 127, [REDACTED]
[REDACTED]
[REDACTED] produced in this lawsuit by plaintiff Stone Lion Portfolio, L.P. as SLN 000315-17.

40. Attached as Exhibit 38 is a true and correct copy of Deposition Exhibit 128, [REDACTED]
[REDACTED]
[REDACTED] produced in this lawsuit by plaintiff Stone Lion Portfolio, L.P. as SLN 000312-14.

41. Attached as Exhibit 39 is a true and correct copy of Deposition Exhibit 129, [REDACTED]
[REDACTED]

[REDACTED], produced in this lawsuit by plaintiff Stone Lion Portfolio, L.P. as SLN 000323-25.

42. Attached as Exhibit 40 is a true and correct copy of Deposition Exhibit 382, undated handwritten meeting notes, produced in this lawsuit by Caspian Capital Partners, L.P. and Caspian Select Credit Master Fund, Ltd. as CASP 061714.

43. Attached as Exhibit 41 is a true and correct copy of Deposition Exhibit 4, the March 2007 Public Offering Memorandum, produced in this lawsuit by BANA as BANA_FB00291925-2018.

44. Attached as Exhibit 42 is a true and correct copy of Deposition Exhibit 5, the March 2007 Private Offering Memorandum.

45. Attached as Exhibit 43 is a true and correct copy of Deposition Exhibit 8, the Retail Facility Agreement dated June 6, 2007, produced in this lawsuit by Union Labor Life Insurance Company as ULL-FLVR0002046-207.

46. Attached as Exhibit 44 is a true and correct copy of Deposition Exhibit 67, a September 15, 2008 e-mail from Bret Yunker to Jon Varnell, produced in this lawsuit by BANA as BANA_FB00358828.

47. Attached as Exhibit 45 is a true and correct copy of Deposition Exhibit 237, a September 17, 2008 e-mail from Jeanne Brown to McLendon Rafeedie, Josh Freedman and Amit Rustgi, copied to Ronaldo Naval, Jesse Phalen, Diane Dycus and Brandon Bolio, forwarding an Advance Confirmation Notice and IVI Certification, produced in this lawsuit by BANA as BANA_FB00180358-67.

48. Attached as Exhibit 46 is a true and correct copy of Deposition Exhibit 278, a September 18, 2008 e-mail from Albert Kotite to Glenn Schaeffer and Jim Freeman, copied to Carole Parker, produced in this lawsuit by FBR as FBR00151117-18.

49. Attached as Exhibit 47 is a true and correct copy of Deposition Exhibit 901, a September 22, 2008 e-mail from Ronaldo Naval to Jim Freeman and Whitney Thier, copied to David Howard, Bill Scott and Jeff Susman, produced in this lawsuit by BANA as BANA_FB00401793-95.

50. Attached as Exhibit 48 is a true and correct copy of Deposition Exhibit 92, a September 23, 2008 e-mail from Douglas Pardon to Douglas Pardon, produced in this lawsuit by

Brigade Leveraged Capital Structures Fund, Ltd. and Battalion CLO 2007-I Ltd. as BGD 001616.

51. Attached as Exhibit 49 is a true and correct copy of Deposition Exhibit 9, a copy of the Co-Lending Agreement, dated September 24, 2007, produced in this lawsuit by Union Labor Life Insurance Company as ULL-FLVR0002674-738.

52. Attached as Exhibit 50 is a true and correct copy of Deposition Exhibit 241, a September 26, 2008 e-mail from Jeff Susman to Jon Varnell, Bret Yunker, Kyle Bender, David Howard and Peter Fuad, produced in this lawsuit by BANA as BANA_FB00462092.

53. Attached as Exhibit 51 is a true and correct copy of Deposition Exhibit 75, a September 26, 2008 e-mail from Jim Freeman to Jeff Susman, copied to Whitney Thier and Bill Scott, produced in this lawsuit by BANA as BANA_FB00884060.

54. Attached as Exhibit 52 is a true and correct copy of Deposition Exhibit 14, a September 26, 2008 e-mail from Albert Kotite to McLendon Rafeedie, forwarding FBR's letter to "Retail Co-Lenders" Union Labor Life Insurance Company, National City Bank and Sumitomo Mitsui Trust Company, produced in this lawsuit by TriMont Real Estate Advisors as TRIM 028440-41.

55. Attached as Exhibit 53 is a true and correct copy of Deposition Exhibit 455, a September 26, 2008 e-mail from Andrei Dorenbaum to Jeff Susman and copied to Andrei Dorenbaum, Brad Means, Carl Moore and Kevin Rourke, produced in this lawsuit by BANA as BANA_FB00422664-65.

56. Attached as Exhibit 54 is a true and correct copy of Deposition Exhibit 76, a September 30, 2008 letter from Ronaldo Naval to Jim Freeman, produced in this lawsuit by BANA as BANA_FB00402019-20.

57. Attached as Exhibit 55 is a true and correct copy of Deposition Exhibit 205, an October 3, 2008 e-mail from David Howard to Charles Blanton and Robyn Roof, copied to Jeff Susman, produced in this lawsuit by BANA as BANA_FB00735299-301.

58. Attached as Exhibit 56 is a true and correct copy of Deposition Exhibit 283, an October 6, 2008 e-mail from Jim Freeman to Margaret Holloway, produced in this lawsuit by Fontainebleau as FBR01287548.

59. Attached as Exhibit 57 is a true and correct copy of Deposition Exhibit 458, [REDACTED], produced in this lawsuit by plaintiff Highland Capital Management, L.P. as Highland010419-20.

60. Attached as Exhibit 58 is a true and correct copy of Deposition Exhibit 81, an October 6, 2008 e-mail from Kevin Rourke to David Howard, copied to Andrei Dorenbaum, produced in this lawsuit by BANA as BANA_FB00735454-55.

61. Attached as Exhibit 59 is a true and correct copy of Deposition Exhibit 77, an October 7, 2008 memorandum from Jim Freeman to the "Las Vegas Bank Group," produced in this lawsuit by BANA as BANA_FB00358870.

62. Attached as Exhibit 60 is a true and correct copy of Deposition Exhibit 904, an October 10, 2008 e-mail from David Howard to Jeff Susman, produced in this lawsuit by BANA as BANA_FB00869927-30.

63. Attached as Exhibit 61 is a true and correct copy of Deposition Exhibit 459, an October 13, 2008 e-mail from Andrei Dorenbaum to Bill Scott and copied to Brad Means and Kevin Rourke, produced in this lawsuit by Sheppard Mullin Richter & Hampton LLP as SMRH00016771-73.

64. Attached as Exhibit 62 is a true and correct copy of Deposition Exhibit 80, an October 13, 2008 e-mail from Bill Scott to Jeff Susman, Bret Yunker, Jon Varnell, David Howard and Peter Fuad, copied to Richard Brunette and Fred Puglisi, produced in this lawsuit by BANA as BANA_FB00884074-76.

65. Attached as Exhibit 63 is a true and correct copy of Deposition Exhibit 890, an October 17, 2008 e-mail from Brandon Bolio to Bill Scott, copied to Jeff Susman and Ronaldo Naval, forwarding two letters from Wells Fargo dated October 6, 2008, produced by BANA in this lawsuit as BANA_FB00884038-42.

66. Attached as Exhibit 64 is a true and correct copy of Deposition Exhibit 285, an October 22, 2008 e-mail from Jim Freeman to Jeff Susman, copied to Bill Scott, Jon Varnell and David Howard, forwarding an October 22, 2008 memorandum to the "Las Vegas Bank Group," produced in this lawsuit by BANA as BANA_FB00400510-11.

67. Attached as Exhibit 65 is a true and correct copy of Deposition Exhibit 254, an October 22, 2008 e-mail from Jim Freeman to David Howard and Jeff Susman, copied to Bill Scott and Jon Varnell, produced in this lawsuit by BANA as BANA_FB00402511-13.

68. Attached as Exhibit 66 is a true and correct copy of Deposition Exhibit 465, an October 23, 2008 e-mail from Jim Freeman to Whitney Thier, produced in this lawsuit by Fontainebleau as FBR01266769.

69. Attached as Exhibit 67 is a true and correct copy of Deposition Exhibit 18, an October 23, 2008 meeting agenda.

70. Attached as Exhibit 68 is a true and correct copy of Deposition Exhibit 158, an October 29, 2008 e-mail from Vincent Fu to John Casparian, Steve Ahearn and Kevin Hickam, produced in this lawsuit by plaintiff Churchill Pacific Asset Management LLC as CRCH 000866.

71. Attached as Exhibit 69 is a true and correct copy of Deposition Exhibit 46, [REDACTED], produced in this lawsuit by Union Labor Life Insurance Company as ULL-FLVR0007582.000816.

72. Attached as Exhibit 70 is a true and correct copy of Deposition Exhibit 381, handwritten meeting notes dated November 18, 2008, produced in this lawsuit by Caspian Capital Partners, L.P. and Caspian Select Credit Master Fund, Ltd. as CASP 061712.

73. Attached as Exhibit 71 is a true and correct copy of Deposition Exhibit 160, a December 4, 2008 e-mail from Martin Kim to John Casparian, Kevin Hickam and Steve Ahearn, copied to Vincent Fu, produced in this lawsuit by Churchill Pacific Asset Management LLC as CRCH 001013.

74. Attached as Exhibit 72 is a true and correct copy of Deposition Exhibit 286, a December 5, 2008 e-mail from Jim Freeman to Cory Davis forwarding financial statements, produced in this lawsuit by Fontainebleau as FBR01280952-1008.

75. Attached as Exhibit 73 is a true and correct copy of Deposition Exhibit 22, a December 24, 2008 letter from Daniel Cunningham to Elissa Hricik, produced in this lawsuit by Union Labor Life Insurance Company as ULL-FLVR0004429-30.

76. Attached as Exhibit 74 is a true and correct copy of Deposition Exhibit 23, [REDACTED], produced in this lawsuit by Union Labor Life Insurance Company as ULL-FLVR0004221-23.

77. Attached as Exhibit 75 is a true and correct copy of Deposition Exhibit 24, the Guaranty Agreement between Fontainebleau and ULLICO, dated December 29, 2008, produced in this lawsuit by Union Labor Life Insurance Company as ULL-FLVR0004483-88.

78. Attached as Exhibit 76 is a true and correct copy of Deposition Exhibit 905, a December 30, 2008 e-mail from Jeff Susman to Phillip Lynch and Douglas Keyston, produced in this lawsuit by BANA as BANA_FB00798940-41.

79. Attached as Exhibit 77 is a true and correct copy of Deposition Exhibit 907, a January 14, 2009 e-mail from Jeff Susman to David Howard, produced in this lawsuit by BANA as BANA_FB00403515-16.

80. Attached as Exhibit 78 is a true and correct copy of Deposition Exhibit 28, [REDACTED], produced in this lawsuit by Union Labor Life Insurance Company as ULL-FLVR0007582.006807-08.

81. Attached as Exhibit 79 is a true and correct copy of Deposition Exhibit 30, [REDACTED], produced in this lawsuit by Union Labor Life Insurance Company as ULL-FLVR0004249-53.

82. Attached as Exhibit 80 is a true and correct copy of Deposition Exhibit 36, [REDACTED], produced in this lawsuit by Union Labor Life Insurance Company as ULL-FLVR0007582.002960-63.

83. Attached as Exhibit 81 is a true and correct copy of Deposition Exhibit 498, a February 20, 2009 letter from Maurice Washington to Jim Freeman, produced in this lawsuit by BANA as BANA_FB00376889-91.

84. Attached as Exhibit 82 is a true and correct copy of Deposition Exhibit 811, a February 23, 2009 letter from Jim Freeman to Maurice Washington.

85. Attached as Exhibit 83 is a true and correct copy of Deposition Exhibit 35, [REDACTED], produced in this lawsuit by Union Labor Life Insurance Company as ULL-FLVR0007582.004314-16.

86. Attached as Exhibit 84 is a true and correct copy of Deposition Exhibit 814, a March 4, 2009 letter from Henry Yu to Jim Freeman, produced in this lawsuit by BANA as BANA_FB00810803-05.

87. Attached as Exhibit 85 is a true and correct copy of Deposition Exhibit 97, a March 20, 2009 Fontainebleau Lender Update, produced in this lawsuit by plaintiffs Brigade Leveraged Capital Structures Fund, Ltd. and Battalion CLO 2007-I Ltd. as BGD 000331-57.

88. Attached as Exhibit 86 is a true and correct copy of Deposition Exhibit 42, the Third Amendment to Guaranty Agreement, dated March 25, 2009, produced in this lawsuit by Union Labor Life Insurance Company as ULL-FLVR0004468-73.

89. Attached as Exhibit 87 is a true and correct copy of Deposition Exhibit 41, [REDACTED], produced in this lawsuit by Union Labor Life Insurance Company as ULL-FLVR0007582.006934-36.

90. Attached as Exhibit 88 is a true and correct copy of Deposition Exhibit 831, a Scheduled Exposure Report (GCIB), dated April 6, 2009, produced by BANA in this lawsuit as BANA_FB00181092-98.

91. Attached as Exhibit 89 is a true and correct copy of Deposition Exhibit 19, a National City Special Assets Committee (SAC) Report, dated April 20, 2009, produced in this lawsuit by PNC Bank as PNC 000369-77.

92. Attached as Exhibit 90 is a true and correct copy of Deposition Exhibit 664, an April 20, 2009 e-mail from Bill Scott to Whitney Thier, copied to Mario Romine, Ronaldo Naval, Brandon Bolio, Brian Corum, Jon Varnell, Charbel Lahoud and Alan Martin, forwarding a notice to Fontainebleau Las Vegas LLC terminating the Revolving Commitments, produced in this lawsuit by BANA as BANA_FB00340734-36.

93. Attached as Exhibit 91 is a true and correct copy of Deposition Exhibit 298, a Cost-to-Complete Review dated May 15, 2009, produced in this lawsuit by BANA as BANA_FB00808826-955.

94. Attached as Exhibit 92 is a true and correct copy of Deposition Exhibit 154, an October 23, 2008 e-mail from Vincent Fu to Steve Ahearn, John Casparian and Kevin Hickam, copied to Zachary Corboni and James Eustice, produced in this lawsuit by plaintiff Churchill Pacific Asset Management LLC as CRCH 001032.

95. Attached as Exhibit 93 is a true and correct copy of Deposition Exhibit 91, an October 24, 2008 e-mail from Doug Pardon to Don Morgan, produced in this lawsuit by plaintiffs Brigade Leveraged Capital Structures Fund, Ltd. and Battalion CLO 2007-I Ltd. as BGD 000502-58.

96. Attached as Exhibit 94 is a true and correct copy of Deposition Exhibit 182, a March 2, 2009 e-mail from Mitch Julius to Chaney Sheffield, Josh Friedman, Bobby Turner and Patrick Dooley, copied to Richard Bosworth, produced in this lawsuit by plaintiffs CanPartners

Investments IV, LLC, Canyon Special Opportunities Master Fund (Cayman), Ltd., Canyon Capital CLO 2004 1 Ltd., Canyon Capital CLO 2006 1 Ltd., and Canyon Capital CLO 2007 1 Ltd. as CNY 004937-40.

97. Attached as Exhibit 95 is a true and correct copy of Deposition Exhibit 279, a September 22, 2008 e-mail from Jim Freeman to David Howard, copied to Bret Yunker, produced in this lawsuit by FBR as FBR01278532-33.

98. Attached as Exhibit 96 is a true and correct copy of the Declaration of Brandon Bolio, dated August 4, 2011, including all exhibits referenced therein.

99. Attached as Exhibit 97 is a true and correct copy of the Declaration of Jeff Susman dated August 5, 2011, including all exhibits referenced therein.

100. Attached as Exhibit 98 is a true and correct copy of Deposition Exhibit 377, an October 29, 2008 e-mail from Philip Mule to David Corleto, produced in this litigation by Caspian Capital Partners, L.P. and Caspian Select Credit Master Fund, Ltd. as CASP053298-99.

101. Attached as Exhibit 99 is a true and correct copy of Deposition Exhibit 379, a November 12, 2008 e-mail from Philip Mule to John Maxwell, produced in this litigation by Caspian Capital Partners, L.P. and Caspian Select Credit Master Fund, Ltd. as CASP053803-04.

102. Attached as Exhibit 100 is a true and correct copy of a November 5, 2008 e-mail from Fontainebleau Resorts LLC's Albert Kotite to Douglas Pardon, copied to Glenn Schaeffer and Jim Freeman, produced in this lawsuit by Brigade Leveraged Capital Structures Fund, Ltd. and Battalion CLO 2007-I Ltd. as BGD 000845-49.

103. Attached as Exhibit 101 is a true and correct copy of the Complaint and Jury Demand for Fraud, Breach of Fiduciary Duty, Negligence and Conspiracy filed in the District Court of Clark County, Nevada on or about March 25, 2011 in *Brigade Leveraged Capital Structures Fund, Ltd., et al v. Fontainebleau Resorts, LLC, et al*, No. A-11-637835-B. BANA requests that the Court take judicial request of the *Brigade* complaint under Fed. R. Evid. 201, as it is appropriate to take judicial notice of documents filed in other courts. *See U.S. v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994). In addition, the *Brigade* complaint was filed by Plaintiffs, and is therefore admissible as a party admission.

104. I declare under penalty of perjury and 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge, information, and belief.

Date: September 9, 2011
New York, New York



DANIEL L. CANTOR

CERTIFICATE OF SERVICE

I, Asher L. Rivner, hereby certify that on September 9, 2011, I served by electronic means pursuant to an agreement between the parties a true and correct copy of the foregoing Declaration of Daniel L. Cantor in Support of Bank of America, N.A.'s Opposition to Plaintiffs' Motion for Partial Summary Judgment and Request for Judicial Notice, and the exhibits attached thereto, upon the below-listed counsel of record and that the original and a paper copy of these documents will be filed with the Clerk of Court under seal.

Kirk Dillman, Esq.
Robert Mockler, Esq.
HENNIGAN DORMAN LLP
865 South Figueroa Street, Suite 2900
Los Angeles, California 90017
Telephone: (213) 694-1200
Fascimile: (213) 694-1234
E-mail: dillmank@hdlitigation.com
mocklerr@hdlitigation.com

Attorneys for Plaintiffs Avenue CLO Fund, Ltd. et al.



Asher L. Rivner

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division
CASE NO.: 09-2106-MD-GOLD/GOODMAN**

IN RE:

**FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION**

MDL NO. 2106

This document relates to all actions.

**DEFENDANT BANK OF AMERICA, N.A.'S OPPOSITION
TO PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE**

Defendant Bank of America, N.A. ("BANA") respectfully submits this opposition to Plaintiffs' Request for Judicial Notice in Support of Term Lender Plaintiffs' Motion for Partial Summary Judgment. As demonstrated below, the document designated by Plaintiffs as Exhibit 1504 to the Declaration of Robert W. Mockler is not a proper subject of judicial notice. At most, the Court should take judicial notice solely of the document's existence, but not its truthfulness or Plaintiffs' interpretation of it.

ARGUMENT

To be judicially noticed, a fact must be "one not subject to reasonable dispute." Fed. R. Evid. 201(b). Exhibit 1504 does not meet this requirement because it is not "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id.* Exhibit 1504 is a filing by Fontainebleau Las Vegas Retail, LLC ("FBLV Retail") in the Lehman Brothers Holdings Inc. bankruptcy. The filing's contents are nothing more than FBLV Retail's allegations in a court filing. No FBLV Retail witness or attorney has been deposed to corroborate the basis for the averments set forth in the court filing. Courts "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." *Autonation, Inc. v. O'Brien*, 347 F. Supp. 2d 1299, 1310 (S.D. Fla. 2004) (citations omitted). To the extent

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Plaintiffs seek to introduce a proof of claim filed in a bankruptcy court as evidence of the disputed facts contained therein—and not merely to establish the fact that such a document was filed—judicial notice of Ex. 1504 should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' request for judicial notice of Exhibit 1504 or, in the alternative, take judicial notice solely of the document's existence. A proposed Order is attached hereto as Exhibit A.

Dated: September 9, 2011

Respectfully submitted,

By: 

O'MELVENY & MYERS LLP
Bradley J. Butwin (*pro hac vice*)
Jonathan Rosenberg (*pro hac vice*)
Daniel L. Cantor (*pro hac vice*)
William J. Sushon (*pro hac vice*)
7 Times Square
New York, New York 10036
Telephone: (212) 326-2000
Facsimile: (212) 326-2061
E-mails: bbutwin@omm.com;
jrosenberg@omm.com; dcantor@omm.com;
wsushon@omm.com

- and -

HUNTON & WILLIAMS LLP
Jamie Zysk Isani (Fla. Bar No. 728861)
Matthew Mannering (Fla. Bar No. 39300)
1111 Brickell Avenue, Suite 2500
Miami, Florida 33131
Telephone: (305) 810-2500
Facsimile: (305) 810-1675
E-mails: jisani@hunton.com;
mmannering@hunton.com

Attorneys for Bank of America, N.A.

CERTIFICATE OF SERVICE

I, Asher L. Rivner, hereby certify that on September 9, 2011, I served by electronic means pursuant to an agreement between the parties a true and correct copy of the foregoing Defendant Bank of America, N.A.'s Opposition to Plaintiffs' Request for Judicial Notice upon the below-listed counsel of record and that the original and a paper copy of these documents will be filed with the Clerk of Court under seal.

Kirk Dillman, Esq.
Robert Mockler, Esq.
HENNIGAN DORMAN LLP
865 South Figueroa Street, Suite 2900
Los Angeles, California 90017
Telephone: (213) 694-1200
Facsimile: (213) 694-1234
E-mail: dillmank@hdlitigation.com
mocklerr@hdlitigation.com

Attorneys for Plaintiffs Avenue CLO Fund, Ltd. et al.



Asher L. Rivner

EXHIBIT A

Case No. 09-2106-MD-GOLD/GOODMAN

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division
CASE NO.: 09-2106-MD-GOLD/GOODMAN**

IN RE:

**FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION**

MDL NO. 2106

This document relates to all actions.

**ORDER DENYING PLAINTIFFS'
REQUEST FOR JUDICIAL NOTICE**

THIS CAUSE is before the Court on Defendant Bank of America, N.A.'s ("BANA") Opposition to Plaintiffs' Request for Judicial Notice dated September 9, 2011. Having reviewed Plaintiffs' Request for Judicial Notice, BANA's Opposition to Plaintiffs' Request for Judicial Notice, the record and otherwise being duly advised, it is hereby

ORDERED AND ADJUDGED that:

1. Plaintiffs' Request for Judicial Notice of the document designated by Plaintiffs as Exhibit 1504 is DENIED.
2. The document designated by Plaintiffs as Exhibit 1504 is STRICKEN.

DONE and ORDERED in Chambers in Miami, Florida this ___ day of _____,
2011.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc:
Counsel of Record
Magistrate Judge Goodman

FILED UNDER SEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division
CASE NO.: 09-2106-MD-GOLD/GOODMAN

IN RE:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to all actions.

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

Defendant Bank of America, N.A. ("BANA") respectfully submits this Reply to Term Lender Plaintiffs' Response to BANA's Evidentiary Objections ("Pls. Resp."). As an initial matter, the Court should disregard Plaintiffs' Response, as it is not provided for under the Federal Rules of Civil Procedure or the Southern District of Florida's Local Rules. Plaintiffs should have included their response to the evidentiary objections BANA raised in its Response to Plaintiffs' Statement of Undisputed Material Facts ("BANA's Opp. SOUMF") in their Reply to BANA's Response to Plaintiffs' Statement of Undisputed Material Facts ("Pls. SOUMF Reply"). Because Plaintiffs' "Response" is an improper and a transparent attempt to evade their SOUMF Reply page limit, the Court should not consider it. Moreover, Plaintiffs' Response is unavailing because it fails to establish that Deposition Exhibits 19, 78, and 80, Plaintiffs' Exhibits 1502 and 1504, or the Herbert Kolben deposition excerpt are admissible evidence that can be considered on Plaintiffs' motion for partial summary judgment.

ARGUMENT

I. FBLV RETAIL'S SEPTEMBER 2009 FILING IN THE LEHMAN BANKRUPTCY (PLAINTIFFS' EXHIBIT 1504) IS INADMISSIBLE HEARSAY.

Plaintiffs ask the Court to take judicial notice of Plaintiffs' Exhibit 1504—non-party Fontainebleau Las Vegas Retail, LLC's September 2009 filing in the Lehman bankruptcy. (*See*

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Decl. of Robert W. Mockler & Request for Judicial Notice in Support of Term Lender Pls.’ Mot. for Partial Summ. J. at ¶ 7.) Plaintiffs concede (as they must) that this document is not in evidence and cannot be introduced to prove the truth of any matter asserted in the filing. (Pls. Resp. at 1.) Nonetheless, Plaintiffs are indisputably relying on the filing to establish the truth of facts set forth therein regarding Lehman’s role as a Retail Lender. (Pls.’ Statement of Undisputed Material Facts ¶ 30.) Indeed, the document would be irrelevant if offered for any other purpose because it was filed in September 2009—more than six months after the last alleged BANA contract breach. But the document is hearsay and even if the Court takes judicial notice of the filing, it is inadmissible to prove the truth of the matters set forth therein. *See Autonation, Inc. v. O’Brien*, 347 F. Supp. 2d 1299, 1310 (S.D. Fla. 2004) (Courts “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.”) (citations omitted).

II. THE SEPTEMBER 2008 HIGHLAND CAPITAL E-MAILS (DEPOSITION EXHIBITS 78 AND 80 AND PLAINTIFFS’ EXHIBIT 1502) ARE INADMISSIBLE HEARSAY.

Plaintiffs’ claim that Deposition Exhibits 78 and 80 and Plaintiffs’ Exhibit 1502 are admissible for the truth of their contents should be rejected because Plaintiffs fail to lay the required evidentiary foundation. Plaintiffs’ Exhibit 1502 is an October 13, 2008 e-mail from BANA’s outside counsel Bill Scott to BANA recipients, forwarding an e-mail from non-party Highland Capital Management L.P.’s (“Highland”) Andrei Dorenbaum. Mr. Dorenbaum’s e-mail purports to “confirm” a conversation with Mr. Scott that took place “last week” regarding the Lehman bankruptcy’s implications for the Fontainebleau Project. Mr. Dorenbaum’s e-mail attaches an e-mail to Mr. Dorenbaum and Highland’s Brad Means from Highland’s Kevin Rourke, which, in turn, forwards an e-mail from a Merrill Lynch analyst that, among several other topics, speculates that a Fontainebleau affiliate funded Lehman’s September Shared Costs portion. Deposition Exhibit 78 is another copy of the same e-mail from Mr. Rourke to Messrs. Dorenbaum and Means, and Deposition Exhibit 80 is a copy of the Bill Scott e-mail without the attached Highland e-mail. Plaintiffs’ assertion that the contents of (i) Mr. Dorenbaum’s e-mail to Mr. Scott, and (ii) the Merrill Lynch report are admissible as adoptive admissions because

BANA “fail[ed] to respond or contradict Highland’s assertions” fails for several reasons. (*See* Pls. Response at 2.)

First, Plaintiffs offer no evidence that BANA acquiesced in Highland’s assertions or the Merrill Lynch Report’s contents, or that BANA did not respond to Highland. As the party seeking to admit the documents into evidence, Plaintiffs bear the burden of demonstrating that BANA acquiesced to the statements in the e-mail—*i.e.*, that it did not respond to Mr. Dorenbaum’s e-mail. *See White Indus., Inc. v. Cessna Aircraft Co.*, 611 F. Supp. 1049, 1063 (W.D. Mo. 1985) (“First, and quite obviously, the fact of silence or non-response must itself be shown as a part of the proponent’s proof. It is not sufficient merely to establish that a communication was received by a party-opponent, or to suggest that the party-opponent should prove the fact of a response if it claims there was one.”). But Plaintiffs cannot point to any evidence that BANA agreed with Highland’s assertions or the Merrill Lynch Report. Indeed, as demonstrated in BANA’s Statement of Additional Undisputed Material Facts set forth in its Opposition SOUMF (“BANA Opp. SOUMF, Add. Facts”), BANA understood that Lehman funded its share of the Shared Retail Costs in September 2008 (*see* BANA Opp. SOUMF, Add. Facts at ¶ 66; *see also* Susman Decl. at ¶ 20) and did not acquiesce in or adopt Highland’s assertions (*see* BANA Opp. SOUMF, Add. Facts at ¶ 117; *see also* Susman Decl. at ¶ 24). Moreover, Plaintiffs point to no evidence to support their naked claim that BANA “fail[ed] to respond or contradict Highland’s statements.” (Pls. Resp. at 2.) Nor are there any documents or testimony supporting Plaintiffs’ claim. Indeed, Plaintiffs made no effort during discovery to establish this fact—failing to ask any deponent (including BANA’s Brandon Bolio, David Howard, Jeff Susman, Jon Varnell and Bret Yunker) whether BANA responded to Mr. Dorenbaum’s e-mail, and choosing not to depose Bill Scott or Highland’s Andrei Dorenbaum.

[REDACTED]

[REDACTED]

[REDACTED] (Rourke Dep. at 217:23–218:4.) It is too late for Plaintiffs to attempt to fill in their evidentiary vacuum with unfounded speculation.

Moreover, Plaintiffs simply ignore documents produced by BANA in this litigation reflecting that, in fact BANA *did respond* to Mr. Dorenbaum's e-mail. (*See* Exs. A and B.)¹

Second, even if Plaintiffs' groundless assertion that BANA did not respond were credited, the e-mails would still be inadmissible because Plaintiffs do not explain why BANA's silence would have been unreasonable. *See Tober v. Graco Children's Prods., Inc.*, 431 F.3d 572, 576 (7th Cir. 2005) ("With respect to statements contained in a letter, the failure to reply to a letter may be introduced as an admission of the statements contained in the letter when the receiver of the letter remains silent in a situation where a response would seem natural or expected. The burden is on the party seeking to introduce the letter to establish that under the circumstances the failure to respond is so unnatural that it supports the inference that the party acquiesced to the statements contained in the letter.") (citations omitted); *S. Stone Co. v. Singer*, 665 F.2d 698, 703 (5th Cir. 1982) ("[T]he mere failure to respond to a letter does not indicate an adoption unless it was reasonable under the circumstances for the sender to expect the recipient to respond and to correct erroneous assertions."). As demonstrated in BANA's Statement of Additional Undisputed Material Facts in opposition to Plaintiffs' motion for partial summary judgment, [REDACTED]

[REDACTED]. (*See* BANA Opp. SOUMF, Add. Facts at ¶¶ 120–122.)

Thus, it would have been completely reasonable for BANA to assume that Highland would resolve its concerns directly with Fontainebleau. Accordingly, Plaintiffs' claim that Deposition Exhibits 78 and 80, and Plaintiffs' Exhibit 1502 are adoptive admissions should be rejected. *See S. Stone*, 665 F.2d at 703 (rejecting claim that defendant's failure to respond to letter was an admission where plaintiff "fail[ed] to lay a foundation for the introduction of the letter more solid than [defendant's] mere failure to respond").

¹ Plaintiffs' authorities are inapposite. *United States v. Central Gulf Lines*, 974 F.2d 621, 628 (5th Cir. 1992) is off-point because the adoptive admissions concerned survey reports prepared with the extensive involvement of the party against whom the survey reports were introduced at trial, and there was no evidence that the party objected to the survey reports. *Hellenic Lines Ltd. v. Gulf Oil Corp.*, 340 F.2d 398 (2d Cir. 1965) lends no support to Plaintiffs' assertion because the court did not find that the letter there constituted an adoptive admission.

III. MR. KOLBEN'S TESTIMONY [REDACTED] IS INADMISSIBLE HEARSAY.

Plaintiffs cite an excerpt from the deposition transcript of non-party Union Labor Life Insurance Company's Herbert Kolben [REDACTED] [REDACTED]. (Kolben Dep. at 76:14-77:5.) [REDACTED] [REDACTED] [REDACTED] (Pls. Resp. at 3-4.) But this argument does not adequately address BANA's objection because it fails to explain why the statement is not hearsay. *See Macuba v. DeBoer*, 193 F.3d 1316, 1322, 1325 (11th Cir. 1999) (excluding as inadmissible hearsay deposition testimony and a subsequent affidavit by a witness who "testified that he had spoken with a number of county employees who told him that [the defendant] was heavily involved" in a plan to fire the plaintiff). [REDACTED] [REDACTED] Accordingly, the Court should not consider Mr. Kolben's statement [REDACTED] [REDACTED].

IV. THE NATIONAL CITY SPECIAL ASSETS COMMITTEE REPORT (DEPOSITION EXHIBIT 19) IS INADMISSIBLE HEARSAY.

Deposition Exhibit 19 appears to be an internal memorandum prepared by non-party National City and obtained through non-party discovery from PNC Bank. This document was never authenticated during depositions and, in any event, its contents are hearsay. *See, e.g., TLT-Babcock, Inc. v. Emerson Elec. Co.*, 33 F.3d 397, 401 (4th Cir. 1994) (excluding as hearsay memorandum purporting to summarize meeting); *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."). [REDACTED] [REDACTED] [REDACTED] (Pls. Resp. at 5.) But neither Mr. Kolben nor Mr. Yunker was competent to

authenticate the document. [REDACTED]
[REDACTED]

(Kolben Dep. at 72:14-16), and Mr. Yunker's statement was vague (Yunker Dep. at 174:16-175:9). Moreover, Plaintiffs could have deposed a National City or PNC Bank witness but elected not to do so. Thus, the document is hearsay and should be disregarded.

CONCLUSION

For the foregoing reasons, the Court should not consider as evidence Deposition Exhibits 19, 78, and 80, Plaintiffs' Exhibits 1502 and 1504, or the excerpt from Herbert Kolben's deposition transcript.

Dated: October 7, 2011

Respectfully submitted,

By: 

O'MELVENY & MYERS LLP
Bradley J. Butwin (*pro hac vice*)
Jonathan Rosenberg (*pro hac vice*)
Daniel L. Cantor (*pro hac vice*)
William J. Sushon (*pro hac vice*)
7 Times Square
New York, New York 10036
Telephone: (212) 326-2000
Facsimile: (212) 326-2061
E-mails: bbutwin@omm.com;
jrosenberg@omm.com; dcantor@omm.com;
wsushon@omm.com

- and -

HUNTON & WILLIAMS LLP
Jamie Zysk Isani (Fla. Bar No. 728861)
Matthew Mannering (Fla. Bar No. 39300)
1111 Brickell Avenue, Suite 2500
Miami, Florida 33131
Telephone: (305) 810-2500
Facsimile: (305) 810-1675
E-mails: jisani@hunton.com;
mmannering@hunton.com

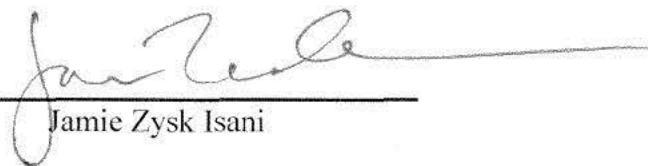
Attorneys for Bank of America, N.A.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic means pursuant to an agreement between the parties on all counsel or parties of record listed below.

Kirk Dillman, Esq.
Robert Mockler, Esq.
MCKOOL SMITH HENNIGAN
865 South Figueroa Street, Suite 2900
Los Angeles, California 90017
Telephone: (213) 694-1200
Facsimile: (213) 694-1234
E-mail: kdillman@mckoolsmithhennigan.com
rmockler@mckoolsmithhennigan.com

Attorneys for Plaintiffs Avenue CLO Fund, Ltd. et al.



Jamie Zysk Isani

EXHIBIT A

From: Susman, Jeff. Sent: 10/16/2008 9:57 AM.
To: Bill Scott; Varnell, Jon M; Bill Scott; Varnell, Jon M.
Cc: .
Bcc: .
Subject: RE: Fontainebleau Resorts.

Bill, I am fine with your reply.

From: Bill Scott [mailto:bscott@sheppardmullin.com]
Sent: Monday, October 13, 2008 10:17 PM
To: Varnell, Jon M; Susman, Jeff
Subject: FW: Fontainebleau Resorts

Redacted--Privileged

Sheppard Mullin 333 South Hope Street
48th Floor
Los Angeles, CA 90071-1448
213.620.1780 office
fax
www.sheppardmullin.com
William M. Scott IV

213.617.4276 direct | 213.443.2717 direct fax
818.515.3679 cell
bscott@sheppardmullin.com | Bio

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Attention: This message is sent by a law firm and may contain information that is privileged or confidential. If you received this transmission in error, please notify the sender by reply e-mail and delete the message and any attachments.

From: Andrei Dorenbaum [mailto:ADorenbaum@hcmlp.com]
Sent: Monday, October 13, 2008 9:37 AM
To: Bill Scott
Cc: Brad Means; Kevin Rourke
Subject: RE: Fontainebleau Resorts

Bill,

This e-mail follows-up our conversation from last week. We would like to confirm the following matters:

1. Under section 3.3.23 of the Master Disbursement Agreement, the borrower cannot request disbursements without demonstrating that the Retail Lenders made required advances under the relevant financing agreements.
2. We are unaware and understand 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.
3. It does not appear that Retail Lenders made the Sept. payment, but rather equity investors. Please see attached report from Merrill Lynch. This would indicate that the reps the company made for that funding request were false.
4. Given the above, we believe that the agent should request the borrower to provide wiring confirmations from the Retail Lenders or funding certificates from the Retail Lenders to confirm that funding is made by the Retail Lenders (rather than other sources). This includes confirmation for the Sept. payment as this issues raises a breach concern under the Disbursement Agreement.

5. The borrower's legal counsel should provide an opinion that the Lehman funding agreement is in full force and effect. This issue is a legal question and should be certified by qualified bankruptcy counsel, rather than the borrower's CFO. Our position is that Lehman is in breach of the agreement because it failed to fund and thus the agreement is not in full force.

Please let me know if you have any additional questions.

Best regards,

Andrei Dorenbaum

Assistant General Counsel

Highland Capital Management, L.P.

13455 Noel Road, Suite 800

Dallas, Texas 75240

office: 972-419-2573

fax: 972-628-4147

adorenbaum@hcmlp.com

Highland Capital Management is growing. Check out Careers at www.hcmlp.com.

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EXHIBIT B

From: Howard, David. Sent: 10/17/2008 5:24 PM.
To: KRourke@hcmlp.com; KRourke@hcmlp.com.
Cc: Susman, Jeff; Susman, Jeff.
Bcc: .
Subject: Re: Fontainebleau - follow up.

I had called Jim after we spoke and he was planning to call you. I just called him and he said he definitely would call you today or Monday. You might shoot him an email with some good times.

I'll check Bill Scott's status and get back.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----

From: Kevin Rourke <KRourke@hcmlp.com>
To: Howard, David
Cc: Andrei Dorenbaum <ADorenbaum@hcmlp.com>
Sent: Fri Oct 17 16:03:09 2008
Subject: Fontainebleau - follow up

David –

To follow up on our conversation yesterday, we are still awaiting a response from Bill Scott regarding Bank of America's position on the contractual points we raised previously. In addition, please advise status of either i) and all lender call or ii) a call with Highland.

The continued silence of both Fontainebleau Management and Agent's counsel on these matters as we approach another draw funding date is a source of growing concern for Highland. I appreciate your assistance in resolving these matters.

Regards,

Kevin Rourke
Highland Capital Management, LP
13455 Noel Road, Suite 800
(972) 628-4100
krourke@hcmlp.com

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