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.
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NOTICE OF FILING ON THE PUBLIC RECORD SUPPLEMENTAL SUMMARY JUDGMENT DOCUMENTS PREVIOUSLY FILED UNDER SEAL

Defendant Bank of America N.A. ("BANA") hereby gives notice that it is filing on the public record certain documents, previously filed under seal related to BANA's Motion for Summary Judgment and BANA's Opposition to Plaintiffs' Motion for Partial Summary Judgment in the above-titled case.

On October 4, 2013, this Court issued an Order Upon Mandate [D.E. #368] requiring the parties to specify, by district court docket entry number, which documents previously filed under seal could be unsealed.[1] However, because the parties could not view the sealed entries on the electronic CM/ECF docket in this case—and therefore, could not determine which district court docket entry numbers corresponded to each sealed document—the Court later issued a Sua Sponte Order Regarding Mandate and Documents Filed Under Seal [D.E. #370] requiring the

[1] The parties previously filed with the Eleventh Circuit a letter dated December 14, 2012, identifying documents and testimony that should remain sealed. Since that time, the parties have determined that certain evidence included on that list no longer needs to remain sealed and, upon further review of the record, the parties have identified other evidence that should remain sealed which was inadvertently omitted from the letter.

parties to make a recommendation by November 1, 2013 regarding how they proposed to comply with this Court's October 4, 2013 Order Upon Mandate.

On November 1, 2013, the parties filed a Joint Notice Regarding Proposal for Partially Unsealing Summary Judgment Filings [D.E. #373]. The parties proposed submitting to the Court redacted copies of all memoranda of law and statements of material facts, in addition to one copy of each exhibit and a single compilation of each witness's deposition transcript excerpts cited in all memoranda of law. On November 5, 2013, this Court entered an Order Approving Joint Proposal [D.E. #374], approving the parties' joint proposal and ordering the parties to file via CM/ECF redacted copies of the summary judgment memoranda of law, statements of facts, and exhibits, on or before December 6, 2013.

BANA previously filed under seal the supplemental documents listed below on November 16, 2011. In compliance with this Court's Order Approving Joint Proposal, BANA now files the following documents on the public record:[2]

BANA'S SUPPLEMENTAL SUMMARY JUDGMENT DOCUMENTS			
No.	**Document**	**Date Filed Under Seal**	**Filing Status**
BANA's Response to Plaintiffs' Notice of Submission of Recently Produced Documents			
1	BANA's Response to Plaintiffs' Notice of Submission of Recently Produced Documents in Support of Plaintiffs' Motion for Partial Summary Judgment and in Opposition to BANA's Motion for Summary Judgment	November 16, 2011	Publicly filed with redactions (attached)

[2] Additional documents previously filed under seal related to BANA's Motion for Summary Judgment and Plaintiffs' Motion for Partial Summary Judgment, including exhibits to the Cantor Declarations, deposition exhibits, and other memoranda of law and statements of facts, will be filed under separate cover.

BANA'S SUPPLEMENTAL SUMMARY JUDGMENT DOCUMENTS			
No.	**Document**	**Date Filed Under Seal**	**Filing Status**
BANA's Revised Redlined Statements of Undisputed Material Facts			
2	BANA's Revised Redlined Response to Plaintiffs' Revised Redlined Statement of Undisputed Material Facts and Statement of Additional Undisputed Material Facts in Opposition to Plaintiffs' Motion for Partial Summary Judgment	November 16, 2011	Publicly filed with redactions (attached)
3	BANA's Revised Redlined Reply to Plaintiffs' Revised Redlined Response to Defendant's Statement of Undisputed Material Facts and Statement of Additional Material Facts in Opposition to Defendant's Motion for Summary Judgment	November 16, 2011	Publicly filed with redactions (attached)

Date: Miami, Florida
December 6, 2013

By: /s/ Jamie Zysk Isani
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by transmission of Notice of Electronic Filing generated by CM/ECF on December 6, 2013 on all counsel or parties of record on the Service List below:

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

The five recently-produced e-mails submitted by Plaintiffs are not relevant to the issues raised by the pending motions for summary judgment.[1] They are both factually and legally irrelevant because BANA's Commercial Real Estate Banking group ("CREB") was uninvolved in BANA's decision-making as Disbursement Agent or Bank Agent and there is no evidence that the information in these e-mails was ever communicated to the personnel handling BANA's Disbursement and Bank Agent functions.

[redacted] Despite extensive deposition and

[1] In addition, BANA has filed separate responses addressing the new assertions set forth in: (i) Revised Redlined Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Partial Summary Judgment, and (ii) Term Lender Plaintiffs' Revised Redlined Response to Defendant Bank of America, N.A.'s Statement of Undisputed Material Facts and Statement of Additional Material Facts in Opposition to BofA's Motion for Summary Judgment.

document discovery regarding BANA's process for approving Fontainebleau's Advance Requests, there is no evidence that CREB members participated in BANA's decision-making as Agent. The evidence reflects that BANA's Dallas-based Corporate Debt Products Group ("CDP") was responsible for approving Fontainebleau's Advance Requests, disbursing funds to the Borrowers, and deciding what information was disseminated to the Lenders, and that BANA's Agency Management group and Credit Services and Administration Department reviewed Fontainebleau's monthly draw packages to ensure that all required documentation was included. (*See, e.g.*, BANA's Resp. to Pls.' SOUMF ¶ 9.) [redacted]

The Loan Documents specifically permitted BANA to pursue other banking relationships despite its agent roles, and recognized that BANA (as an entity) might acquire information regarding the Borrowers that would not be shared with the agent. Disbursement Agreement Section 9.2.5 provides that "the Disbursement Agent and its Affiliates may accept deposits from, lend to and generally engage in any kind of banking, trust, financial advisory or other business with the Project Entities or any of their Affiliates as if it were not performing the duties specified herein, and may accept fees and other consideration from the Project Entities or any of their Affiliates for services in connection with this Agreement and otherwise without having to account for the same to the Lenders."[2] Section 9.2.5 further specifies that any knowledge obtained by BANA in a non-agent capacity would not be imputed to BANA as Disbursement

[2] Credit Agreement Section 9.2 likewise specifies that BANA will have the same rights as any other Lender, and that it was free to conduct business with Fontainebleau and its affiliates: "Such Person and its Affiliates may accept deposits from, lend money to, act as the financial advisor or in any other advisory capacity for and the generally engage in any kind of business with any Borrower or any Subsidiary or Affiliate thereof as if such Person were not the Administrative Agent hereunder and without any duty to account therefore to the Lenders."

Agent: "[n]otwithstanding anything to the contrary in this Agreement, the Disbursement Agent shall not be deemed to have knowledge of any fact known to it in any capacity other than the capacity of Disbursement Agent, or by reason of the fact that the Disbursement Agent is also a Funding Agent or Lender." The reasons for these protections are clear. In an organization of BANA's size and complexity, it is unfair and impractical to charge those performing the specific function of Disbursement Agent on the Fontainebleau Las Vegas Project with knowledge obtained (but not shared) by each of BANA's tens of thousands of employees in the course of their many and varied responsibilities. Without this limitation, BANA would arguably be required to canvass repeatedly each of its numerous employees to determine if they had relevant information concerning any transaction on which BANA acted as agent. That onerous duty is inconsistent with the Disbursement Agent's limited ministerial role and the Disbursement Agreement's provisions relieving the agent of any duty to investigate.

Thus, Plaintiffs' relevance assertion fails as to each of the five e-mails attached to their Notice [redacted]:

- Each of the e-mails is [redacted].
- Plaintiffs' Exhibit 1513 is a [redacted]
- Plaintiffs' Exhibit 1514 [redacted]
- Plaintiffs' Exhibit 1515 [redacted]
- Plaintiffs' Exhibit 1516 [redacted]

[redacted]

Dated: November 16, 2011

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2011, 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.

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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 REVISED REDLINED RESPONSE TO PLAINTIFFS' REVISED REDLINED STATEMENT OF UNDISPUTED MATERIAL FACTS AND STATEMENT OF ADDITIONAL UNDISPUTED MATERIAL FACTS IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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CONTAINS INFORMATION THAT IS "CONFIDENTIAL" AND "HIGHLY CONFIDENTIAL" UNDER PROTECTIVE ORDER

FILED UNDER SEAL

BANA'S REVISED REDLINED RESPONSE[1] TO PLAINTIFFS' REVISED REDLINED STATEMENT OF UNDISPUTED MATERIAL FACTS[2]

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

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[1] Defendant submits this Revised Redlined Response to respond to Term Lender Plaintiffs' Revised Redlined Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Partial Summary Judgment filed with this Court under seal on November 14, 2011.

[2] Defined terms are listed in Exhibit A hereto.

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.

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] (*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.[3]

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[3] *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

Response to Paragraph 31: Disputed. "Administrative Agent" is not a defined term 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.[4] 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).)

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asserted in the other litigation, but to establish the fact of such litigation and related filings." (citations omitted)).

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

Response to Paragraph 36: Disputed. [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] 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).) [redacted] (*See* BANA's Resp. to ¶¶ 9–10.)

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]

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[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 Paragraphs 40-42: Undisputed.

Response to Paragraph 43: Disputed. The cited evidence does not support this statement. None of the exhibits cited discuss, or even mention, whether the Project could be built without the Retail Facility financing. Jim Freeman, in his cited testimony, testified that it was a "concern" when asked "if Lehman didn't fund its obligation and no one stepped up to fund it, that could very well shut down all financing for the project?" (Cantor Opp. Decl. Ex. 17 (Freeman Dep. at 56:24-57:3).) [redacted]

Response to Paragraph 44: Undisputed.

Response to Paragraph 45: Disputed. The statement is not supported by the cited evidence. BANA witnesses testified that the funding for the Project would continue if the Retail Lenders continued to advance the Retail Shared Costs. Bret Yunker testified that "I understood there could be complications with funding going forward by virtue of Lehman's bankruptcy. . . . I don't know if it means that the project must be shut down if the retail funding doesn't occur. I think that would mean that the entity couldn't obtain funds out of the resort facility if the retail funding didn't occur." (Cantor Opp. Decl. Ex. 6 (Yunker Dep. at 36:13–37:6).) Jon Varnell testified: "The issue is whether or not [Lehman] would continue to fund or whether that funding

would have to be found somewhere else." (*Id.* Ex. 13 (Varnell Dep. at 162:3–5).) Likewise, Jeff Susman testified that Lehman's bankruptcy "would have an impact if the company was not able to find alternate financing for the retail piece." (*Id.* Ex. 26 (Susman Dep. at 147:23-24).) And the cited David Howard testimony was limited to the implications of the *Retail Lenders* not funding. (*See id.* Ex. 12 (Howard Dep. at 39:13-40:6).) [redacted] (*See* BANA's Resp. to ¶¶ 9–10.)

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

Response to Paragraphs 47-49: Undisputed.

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

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

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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] 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] But the cited evidence establishes only that a 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]

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Response to Paragraph 64: Disputed. [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.* Ex. [redacted]); Ex. 6 (Yunker Dep. at 174:16-175:5).) The exhibit is apparently an internal memorandum prepared by non-party National City and obtained through non-party discovery from PNC Bank. The document's contents are hearsay. Because the document is being offered for the truth of its contents, it is inadmissible under Fed. R. of Evid. 802.[6]

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.

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

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

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).) [redacted]

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[redacted] (*See* BANA's Resp. to ¶¶ 9–10.)

Response to Paragraph 74(a): Disputed. This statement is unsupported by the cited evidence. [redacted] (*See* BANA's Resp. to ¶¶ 9–10.)

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.

Response to Paragraph 80: Disputed. [redacted]

Response to Paragraph 81: Undisputed that the cited document contains the quoted language.

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]

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[redacted]

4. [redacted]

5. [redacted]

II. THE PROJECT

6. The Fontainebleau Las Vegas is a partially completed resort and casino development on an approximately 24.4 acre parcel at the Las Vegas Strip's north end (the "Project"). (*See* Cantor Opp. Decl. Ex. 91 [Dep. Ex. 298].)

7. The Project's developer was the Borrowers' parent, Fontainebleau Resorts, LLC ("Fontainebleau Resorts" or "FBR"). (*Id.* Ex. 41 at 23, 34 [Dep. Ex. 4].)

8. FBR Chairman Jeff Soffer was a developer with years of experience developing major residential and commercial projects across the United States. (*Id.* Ex. 41 at 55-57, 79 [Dep. Ex. 4].)

9. FBR's Chief Executive Officer and President, Glenn Schaeffer, had overseen numerous major Las Vegas development projects. (*Id.* Ex. 41 at 58-59, 79-80 [Dep. Ex. 4].)

10. The Project's general contractor was Turnberry West Construction ("TWC" or "Contractor"), a member of the Turnberry group of companies. (*Id.* Ex. 41 at 57 [Dep. Ex. 4].)

11. The Turnberry group of companies had a 40-year track record building high-end hotels and residential developments across the United States, including several prominent Las Vegas projects. (*Id.* Ex. 41 at 57-58 [Dep. Ex. 4].)

III. THE PROJECT'S FINANCING

12. The largest individual financing component for the Project's resort component was a $1.85 billion senior secured debt facility ("Senior Credit Facility"). (*See* Disbursement Agmt., Recital B.)

13. Fontainebleau Las Vegas, LLC, Fontainebleau Las Vegas II, LLC, BANA, Plaintiffs (or their predecessors-in-interest), and other non-party lenders entered into a June 6, 2007 Credit Agreement creating the Senior Credit Facility which comprised three senior secured loans: (1) a $700 million term loan (the "Initial Term Loan"); (2) a $350 million delay draw term loan (the "Delay Draw Term Loan"); and (3) an $800 million revolving loan (the "Revolver Loan"). (Credit Agmt. §§ 1.1, 2.1.)

14. Additional financing sources included equity contributions by Fontainebleau and its affiliates, $675 million in Second Mortgage Notes, and a $315 million loan earmarked for the Project's retail space ("Retail Facility"). (*Id.*)

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].)

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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).)

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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] (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] (*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]); 64 [Dep. Ex. 285].)

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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]

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

101. [redacted] (*See id.*)

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

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

104. [redacted]

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

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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-on phone call with Freeman and asked him numerous questions about Lehman. (*Id.* Exs. 65 [Dep. Ex. 254]; 66 [Dep. Ex. 465].)

122. [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).)

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

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

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Dated: November 16, 2011

Respectfully submitted,

By: _____

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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

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2011, 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.

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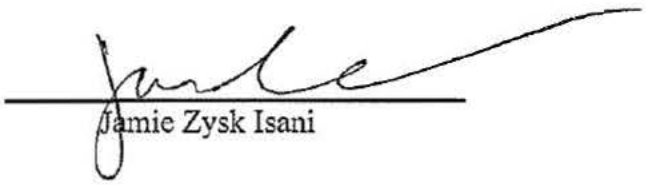

Jamie Zysk Isani

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 REVISED REDLINED REPLY TO PLAINTIFFS' REVISED REDLINED RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS AND STATEMENT OF ADDITIONAL MATERIAL FACTS IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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CONTAINS INFORMATION THAT IS "CONFIDENTIAL" AND "HIGHLY CONFIDENTIAL" UNDER PROTECTIVE ORDER

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I. BANK OF AMERICA, N.A.'S REVISED REDLINED RESPONSE[1] TO PLAINTIFFS' REVISED REDLINED STATEMENT OF ADDITIONAL UNDISPUTED MATERIAL FACTS[2]

Response to Paragraphs 1 through 5: Undisputed.

Response to Paragraph 6: Disputed. The Credit Agreement and Retail Agreement have different definitions of "Defaulting Lender." Undisputed that the quoted language appears only in the Credit Agreement. This quoted language does not appear in the Retail Agreement.

Response to Paragraph 7: Undisputed.

Response to Paragraph 8: Disputed. The cited evidence does not support this statement. Undisputed that Bank of America, N.A. ("BANA") received a copy of the Retail Facility Agreement, but the cited evidence reflects no amendments to that agreement.

Response to Paragraph 9: Undisputed.

Response to Paragraph 10: Disputed. The cited evidence reflects neither that Ms. Brown's and Mr. Naval's positions were "nominal," nor that they described their roles as "ministerial."

Response to Paragraph 11: Disputed. The cited evidence does not support this statement. Although BANA's CDP group decided whether to disburse funds to the Borrowers (*see* Decl. of Daniel L. Cantor in Support of BANA's Reply Mem. of Law in Further Support of its Mot. for Summ. Judg. ("Cantor Reply Decl.") Exs. 11 (Bolio Dep. at 83:3–7); 7 (Brown Dep. at 49:7–50:19); 14 (Susman Dep. at 49:22–50:15; 52:2–7)), BANA's Agency Management and Credit Services and Administration groups 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. 11 (Bolio Dep. at 30:1–32:20); 7 (Brown Dep. at 39:8–12).) Undisputed that Mr. Naval and Ms. Brown reported to the CDP group.

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[1] Defendant submits this Revised Redlined Reply to respond to Term Lender Plaintiffs' Revised Redlined Response to Defendant Bank of America, N.A.'s Statement of Undisputed Material Facts and Statement of Additional Material Facts in Opposition to BofA's Motion for Summary Judgment filed with this Court under seal on November 14, 2011.

[2] Defined terms are listed in Exhibit A hereto.

Response to Paragraph 12: Undisputed that Mr. Susman was a CDP Senior Vice President until mid-February 2009, when he left BANA. (Cantor Reply Decl. Ex. 14 (Susman Dep. at 16:1–4).)

Response to Paragraph 13: Disputed. The cited evidence does not support the statement that Mr. Yunker was an architect of the Disbursement Agreement. The cited evidence reflects only that Mr. Yunker participated in drafting the agreement. (*See* Cantor Reply Decl. Ex. 4 (Yunker Dep. at 84:18–85:8).) Undisputed that Mr. Yunker was Vice President of the Global Gaming Team at BAS.

Response to Paragraph 14: Undisputed that Mr. Howard was a Managing Director of Syndications at BAS until March 31, 2009, when he left BAS. (Cantor Reply Decl. Ex. 5 (Howard Dep. at 10:16–23).)

Response to Paragraph 15: Undisputed.

Response to Paragraph 16: Disputed. This statement is ambiguous and is unsupported by the cited evidence. The Special Assets Group ("SAG") became involved with BANA's Administrative and Disbursement Agent roles in February 2009, but initially only at an advisory level. (Cantor Reply Decl. Ex. 12 (Yu Dep. at 39:11–17).) Mr. Yu was the SAG officer who was assigned to the Project. (*Id.* at 13:6–14:7.)

Response to Paragraph 17: Disputed. This statement is unsupported by the cited evidence. Mr. Susman testified only that if he had evidence that was inconsistent with the borrowers' representations, the decision to disburse "would depend on the degree of inconsistency," and that if he actually knew a representation to be false, he would not disburse. (Cantor Reply Decl. Ex. 14 (Susman Dep. at 181:9–19; 182:22–183:20).)

Response to Paragraph 18: Disputed. This statement is unsupported by the cited evidence. 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. (Cantor Reply Decl. Ex. 11 (Bolio Dep. at 164:20–165:12; 175:6–18).) Nor does the cited testimony establish that Mr. Bolio was Mr. Susman's "right hand man." And Mr. 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. 6 (Varnell Dep. at 211:13–212:5).) The cited evidence also lends no support to the statement that Mr. Varnell was involved in drafting the Disbursement Agreement.

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Response to Paragraph 19: Disputed. This statement is not a "fact"; it is an expert opinion. Moreover, the statement is unsupported by the cited evidence. Mr. Lupiani simply testified that in certain cases it would be commercially reasonable, but not mandatory, for an agent to investigate information indicating that conditions precedent were not satisfied, as long as the information was sufficiently reliable and definitive. (Cantor Reply Decl. Ex. 15 (Lupiani Dep. at 131:10–132:19).)

Response to Paragraph 20: Disputed. This statement is not a "fact"; it is an expert opinion. Mr. Pryor's opinion is inadmissible because it offers legal conclusions under the guise of an expert opinion by purporting to explain BANA's agent duties under the Disbursement Agreement.[3] (*See, e.g.*, Pls. Ex. ¶ 37 (interpreting conditions precedent).) In addition, the cited portions of Pls.' Ex. 1503 do not discuss bank agents' duties. Moreover, Mr. Pryor does not have 35 years of experience acting as an agent. He testified that he has been the agent in connection with fewer than ten credit facilities. (Cantor Reply Decl. Ex. 16 (Pryor Dep. at 12:11–17).) Moreover, Mr. Pryor retired from banking in 1991. (*See id.* Ex. 33 [Dep. Ex. 932 (Pryor Rep. Ex. A)].) Since that time, the syndicated lending industry has evolved significantly, away from small bank-only syndicates and virtually no secondary market to widely held loans that are actively traded in the secondary market by hedge fund investors—such as Plaintiffs here.[4]

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[3] *See, e.g.*, *Montgomery v. Aetna Cas. & Surety Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990) ("A witness … may not testify to the legal implications of conduct"); *In re FedEx Ground Package Sys., Inc. Employment Practices Litig.*, 2010 WL 1838400, at *5 (N.D. Ind. May 4, 2010) ("Whether the contract allows FedEx to control the manner and means of the work is a legal question for the court and isn't the proper subject of expert testimony."); *Smith v. Cont'l Cas. Co.*, 2008 WL 4462120, at *1 (M.D. Pa. Sept, 30, 2008) ("It is well-settled that expert testimony regarding legal conclusions, such as the interpretation of an insurance policy, is impermissible.").

[4] *See* Allison Taylor & Alicia Sansone, THE HANDBOOK OF LOAN SYNDICATIONS AND TRADING, xv (McGraw-Hill 2007) (cited in Pls. Opp. at 4) ("The business of corporate loan syndications, trading, & investing has changed at an astounding rate over the last fifteen years. Back then, banks would lend large amounts of money to their corporate borrowers and hold the loans on their books. Today, these loans are sold to other banks, institutional investors, mutual funds ... and hedge funds. Loans are traded, similar to equity and bonds; indices are made on the performance of loans; loans are put into structured vehicles to attract different types of investors, credit derivatives are made when loans are the underlying instrument; and loans are bought and sold around the globe."); *see also id.* at 39 ("Over the last 20 years, the corporate loan asset class has changed dramatically. It has developed from

Response to Paragraph 21: Disputed. This statement is not a "fact"; it is an expert opinion. Mr. Pryor's opinion is inadmissible because it offers legal conclusions under the guise of an expert opinion by purporting to explain when BANA should reject the Borrowers' Advance Requests under the Disbursement Agreement. (*See* Resp. to ¶ 20.) Moreover, the cited portions of Pls.' Ex. 1503 do not discuss a bank agent's duties. In addition, Mr. Pryor lacks knowledge and experience concerning the role of a bank agent on a large scale syndicated construction loan (*see supra* Resp. to ¶ 20), and is therefore not qualified to opine on the duties of a bank agent.

Response to Paragraph 22: Disputed. This statement is not material or relevant to the resolution of BANA's motion for summary judgment.

Response to Paragraph 23: Undisputed.

Response to Paragraph 24: Disputed. The statement is not supported by the cited evidence. The September 2008 disbursement occurred on September 26, 2008 (Dep. Ex. 625); the November 2008 disbursement occurred on November 26, 2008 (Dep. Exs. 245, 627), and the February 2009 disbursement occurred on February 27, 2009 (Dep. Exs. 251, 622–624). In addition, the cited evidence reflects that $67,178,114.44 of the Delay Draw Term Loan was disbursed on March 10, 2009, rather than $68,000,000. (*See* Dep. Exs. 634–636.) Thus, the total amount of Term Loans disbursed between September 2008 and March 2009 is $787,142,302.06. The cited documents reflect the *total* disbursements of Initial Term Loan and Delay Draw Term Loan proceeds, not all of which were funded by Plaintiffs or their alleged predecessors-in-interest.

Response to Paragraph 25: Undisputed. 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.[5]

Response to Paragraphs 26 and 27: Undisputed.

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a primary-market and bank-oriented asset class into one with well-structured primary and secondary markets and a diversified investor base."); *id* at 3–7, 21–34, 61–65.

[5] *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).

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Response to Paragraph 28: Disputed. The cited evidence does not support this statement. David Howard, Jeff Susman and Bret Yunker testified that credit market conditions created challenges if Lehman needed to be replaced, but offered no opinion regarding the likelihood that a Lehman replacement would need to be found, or the likelihood of finding a replacement lender if one was needed. (Cantor Reply Decl. Exs. 5 (Howard Dep. at 117:17–24); 14 (Susman Dep. at 147:25–148:9); 4 (Yunker Dep. at 37:19–38:8; 39:8–23).) [redacted] (*See* BANA's Resp. to ¶¶ 9, 11.)

Response to Paragraph 29: Disputed. The evidence cited does not establish that "any failure by Lehman to fund the Project" could have caused the Project to "shutdown." The cited evidence shows that "the way the documents were constructed, that if retail funds were not funded, then the [resort] lenders were not required . . . to fund." (Cantor Reply Decl. Exs. 5 (Howard Dep. at 39:23–40:3); 14 (Susman Dep. at 146:10–18).) As explained by Bret Yunker: "That's different from the project shutting down." (*Id.* Ex. 4 (Yunker Dep. at 37:2–11).)

[redacted] (*See* BANA's Resp. to ¶¶ 9, 11.)

Response to Paragraph 30: Disputed. The statement is ambiguous and is not supported by the cited evidence. Dep. Ex. 896 is an e-mail Mr. Susman sent on the day of Lehman's

bankruptcy and Mr. Susman testified that his remark that Lehman was a "big issue" reflected only his immediate reaction to the "potential impact" of that event. (*See* Cantor Reply Decl. Ex. 14 (Susman Dep. at 150:25–151:2).)

Response to Paragraph 31: Disputed. The cited evidence does not support the statement. Dep. Ex. 67 is an e-mail Mr. Yunker sent on the day of Lehman's bankruptcy. Mr. Yunker testified that the e-mail merely reflects his uninformed reaction to that event. (Cantor Reply Decl. Ex. 4 (Yunker Dep. at 40:13–18).) Moreover, the e-mail states, "Lehman *may* be the death nail for FB"—Plaintiffs misleadingly omit the word "may."

Response to Paragraph 32: Disputed. This is a nonsensical statement to which no response is required. Among other things, the statement does not identify the payment the non-Retail Lenders would be making.

Response to Paragraph 33: Disputed. Plaintiffs distort Mr. Yunker's testimony. Mr. Yunker testified to his belief that "*part of the purpose* was to quell concerns not only from BofA but other lenders as to compliance with the condition precedent regarding the retail funding." (*See* Cantor Reply Decl. Ex. 4 (Yunker Dep. at 111:9–13).) He further testified that BANA's September 26, 2008 call was intended to address other Lender concerns raised by the Lehman bankruptcy filing. (*Id.* at 111:13–19.)

Response to Paragraph 34: Disputed. The cited evidence does not support this statement. On September 22, 2008, BANA asked Fontainebleau to schedule a call with the Lenders to address their Lehman-related questions. (Decl. of Daniel L. Cantor in Support of BANA's Mot. for Summ. Judg. ("Cantor Decl.") Ex. 37 [Dep. Ex. 901].) Fontainebleau agreed to participate in the Lender call in October 2008, but later declined to hold the call. (*Id.* Ex. 43 [Dep. Ex. 205].) Fontainebleau later discussed the Lehman bankruptcy's implications with Lenders on numerous occasions, including an October 29, 2008 call, a November 18, 2008 meeting, an early-December 2008 call, and a March 2009 presentation. (*See* Cantor Reply Decl. Exs. 23 [Dep. Ex. 158]; 24 [Dep. Ex. 377]; 26 [Dep. Ex. 379]; 27 [Dep. Ex. 381]; 28 [Dep. Ex. 160].) In addition, numerous Lenders held meetings or calls with Fontainebleau during the fall of 2008, during which the Lehman bankruptcy's implications were discussed. (*Id.* Exs. [redacted]); 17 [Dep. Ex. 382 (Mulé's notes of Caspian's call with Freeman)]; 25 (Brigade e-mail thanking Fontainebleau for arranging call).)

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Response to Paragraph 35: Disputed. Plaintiffs' statement is a fabrication. There is no evidence that Fontainebleau's Jim Freeman told BANA's Jeff Susman or David Howard that he did not want to have a Lender meeting because there were "limitations on what we were and weren't allowed to say, based on our discussions with counsel." 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 Reply Decl. Ex. 8 (Freeman Dep. at 106:11–20).) And Mr. Susman testified that he did not recall ever being told by Mr. Freeman that Fontainebleau was limited in what it could discuss based on advice of counsel. (*Id.* Ex. 14 (Susman Dep. at 156:9–157:22).) The lack of a reasonable basis for Plaintiffs' statement is further reflected by the fact that (i) the cited Howard testimony has nothing to do with Lehman and concerns his employment by BAS, and (ii) the cited Susman and Yunker testimony makes absolutely no reference to Fontainebleau's counsel's alleged advice to Mr. Freeman.

Response to Paragraph 36: Disputed. Plaintiffs' statement is a fabrication. [redacted] And Plaintiffs' characterization of Dep. Ex. 254 is false. This is an e-mail from Mr. Freeman to BANA, but it makes no mention of an inability to discuss the Lehman situation. To the contrary, Mr. Freeman indicates that he spoke with Highland about the Lehman situation.

Response to Paragraph 37: Disputed. The cited evidence lends no support for the statement. The notes are undated and there is no indication that Mr. Bolio was referring to the September 2008 Shared Retail Costs. The dollar amounts—"25 mm" and "2mm Lehman"—do not correspond to the Shared Costs requested by the Borrowers in September 2008. [redacted] (*See* Cantor Reply Decl. Ex. 20 [Dep. Ex. 11].) Finally, Mr. Bolio testified that he could not recall what the notes referred to. (*Id.* Ex. 11 (Bolio Dep. at 59:15–60:25).)

Response to Paragraph 38: Disputed. This statement is unsupported by the cited evidence. None of the cited documents~~deposition exhibits~~ reflects that BANA believed that Lehman's failure to fund was "material and adverse to the Project." Moreover, none of the ~~deposition exhibits~~cited documents reflects BANA's knowledge that Lehman did not fund its portion of the Retail Shared Costs in September 2008. Indeed, contemporaneous internal BANA documents reflect BANA's belief that Lehman had funded the September 2008 Shared Costs.

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(Cantor Decl. Ex. 56 [Dep. Ex. 905].) Further, Plaintiffs misleadingly claim that BANA's employees considered Lehman's failure to fund "material and adverse" while citing only to their immediate reaction in the days following Lehman's bankruptcy filing, and not to ULLICO's later decision to fund for Lehman. [redacted] (*See* BANA's Resp. to ¶¶ 9, 11.)

Response to Paragraph 39: 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 Reply Decl. Ex. 3 (Rafeedie Dep. at 57:5–58:19; 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.* at 58:1–9.) BANA's Jeanne Brown (Mr. Rafeedie's principal BANA contact) testified that she did not remember TriMont telling her that Lehman was not funding in September 2008. (*Id.* Ex. 7 (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 amounts funded by each Retail Co-Lender. (*Id.* Exs. 3 (Rafeedie Dep. at 39:18–41:9); 14 (Susman Dep. at 204:9–10).)

Response to Paragraph 40: 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 Reply Decl. Exs. 8 (Freeman Dep. at 74:12–24, 88:19–91:11); 4 (Yunker Dep. at 96:11–98:14).)

Response to Paragraph 41: Disputed. The cited evidence does not support this statement. BANA disputes that Highland confirmed a "mutual understanding" that Lehman had

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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. (Dep. Ex. 80; Pls.' Ex. 1502.) 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] Thus, Dep. Ex. 80 and Pls.' Ex. 1502 are inadmissible hearsay and double hearsay.[6] Lastly, BANA did not understand that Lehman had made no disbursements while in bankruptcy. For example, internal BANA documents reflect BANA's belief in 2008 that Lehman funded in September 2008. (*See, e.g.*, Cantor Decl. Ex. 56 [Dep. Ex. 905].)

Response to Paragraph 42: Disputed. This statement is not material. The extent to which the Highland e-mail was distributed has no relevance to the resolution of BANA's motion. Moreover, the cited evidence does not support that the Merrill Lynch report was "widely disseminated." The e-mail was sent to a handful of recipients.

Response to Paragraph 43: Disputed. The cited evidence does not support the statement. It reflects that only three Lenders received Mr. Maxwell's reports, and [redacted] Moreover, none of the cited evidence establishes that Fontainebleau communicated to Mr. Maxwell before October 2008. Dep. Exs. 274 and 399 are e-mails from Mr. Maxwell to undisclosed recipients stating that "[w]e spoke with Company management." This is inadmissible hearsay to the extent it is offered to

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[6] *See* Fed. R. Evid. 801–802; *see also Read v. Teton Springs Golf & Casting Club, LLC*, 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 non-deponent witness' alleged statement to another non-deponent witness because the e-mail was inadmissible hearsay within hearsay).

support the statement that Mr. Maxwell was in direct communication with Fontainebleau.[7] Mr. Maxwell was not deposed, and no Fontainebleau deponents testified that they communicated with Mr. Maxwell. Dep. Ex. 275 is an e-mail from Mr. Maxwell to Jim Freeman requesting an update, but Plaintiffs offer no evidence that Fontainebleau responded to Mr. Maxwell's request.

Response to Paragraph 44: Disputed. The cited evidence offers no support to the statement. Dep. Exs. 274, 275 and 399 are self-contained e-mails, and do not attach or even refer to a "more detailed report." Moreover, the alleged separate report is not in evidence. [redacted] (Cantor Reply Decl. Ex. 10 (Rourke Dep. at 104:8–10).)

Response to Paragraph 45: Disputed. BANA's acquisition of Merrill Lynch & Co., Inc. is not material to the resolution of any issue. Moreover, the cited evidence does not support this statement. It does not specify when the transaction closed.

Response to Paragraphs 46, 47 and 48: Undisputed.

Response to Paragraph 49: 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 Decl. Ex. 47 [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." (Cantor Reply Decl. Ex. 11 (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. 4 (Yunker Dep. at 116:6–117:5).)

Response to Paragraph 50: Disputed. This statement is a gross mischaracterization of

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[7] *See id.*

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the cited evidence. Dep. Ex. 903 is a letter from Highland to BANA stating that Fontainebleau's October 7, 2008 memorandum to Lenders "doesn't address our concerns." The e-mail makes no mention of BANA's alleged question regarding Lehman.

Response to Paragraph 51: Disputed to the extent that the word "informed" is intended as an assertion that Highland provided BANA with evidence of an existing fact. As discussed in its response to paragraph 38, BANA was unaware that Fontainebleau paid Lehman's portion of the September 2008 Retail Shared Costs.

Response to Paragraph 52: Disputed. The cited evidence does not support the statement. [redacted] The cited evidence (Dep. Exs. 231, 232) establishes only that a conference call was scheduled for, and occurred in, October 2008, and not what was discussed during the call. In fact, the call's primary purpose was to provide an update on the Project to the Retail Lenders, at the Retail Lenders' request. (*See* Cantor Reply Decl. Ex. 6 (Varnell Dep. at 198:1–7).) And although the Lehman bankruptcy's implications were discussed at the October 2008 meeting, the cited evidence makes clear that the meeting's purpose was for the Retail Lenders to get a report from the Resort Lenders' agent (*i.e.*, BANA) on the Project's overall progress. (Dep. Ex. 18; Cantor Reply Decl. Ex. 8 (Freeman Dep. at 110:23–111:9).)

Response to Paragraph 53: Disputed. Plaintiffs mischaracterize the evidence. [redacted]. (Cantor Reply Decl. Ex. 2 (Kolben Dep. at 69:11–18; 176:16–177:3).) [redacted]

Response to Paragraph 54: Disputed. [redacted]

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[redacted] (*See* Cantor Reply Decl. Ex. 2 (Kolben Dep. at 175:19–176:9).) In addition, Dep. Ex. 19 is inadmissible and should be disregarded. It is a National City Special Assets Committee Report, which was never authenticated. (*See id.* Exs. [redacted]; 4 (Yunker Dep. at 174:16–175:5).) The exhibit is apparently an internal memorandum prepared by an unidentified employee of non-party National City and obtained from non-party PNC Bank, and its contents are hearsay and lack foundation. Because the document is being offered for the truth of its contents, it is inadmissible under Fed. R. of Evid. 802.[8]

Response to Paragraph 55: 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 Reply Decl. Ex. 5 (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* Dep. Ex. 907; [redacted]; Cantor Reply Decl. Exs. 5 (Howard Dep. at 112:9–18; 113:11–114:4); 14 (Susman Dep. at 277:19–278:9).)

Response to Paragraph 56: Disputed. The statement is not a "fact;" rather it is conclusion of law that does not create a disputed issue of material fact. Moreover, it is a gross distortion of the cited evidence. The Intercreditor Agreement provision cited by Plaintiffs grants "to the Bank Agent the right (without any obligation) to purchase, at any time after the occurrence of a Retail Purchase Option Event, all . . . of the principal of and interest on the Retail Secured Obligations," but they offer no evidence that a Retail Purchase Option Event ever occurred. For a "Retail Purchase Option Event" to occur there must be a "failure of the Retail Agent to fund any Advance requested by the Project Credit Parties for Shared Costs, which the Retail Agent is required to fund in accordance with the terms of the Disbursement Agreement." (Dep. Ex. 884 at 4.) There is no evidence that a Retail Purchase Option Event ever occurred. And the cited Howard deposition testimony makes no reference to the Intercreditor Agreement.

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[8] *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").

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Response to Paragraph 57: Disputed. Undisputed that Lehman funded its portion of the Shared Retail Costs in October and November 2008. The cited evidence does not reflect whether Lehman funding was "touch and go." The cited testimony reflects only TriMont's Mac Rafeedie's recollection, and not that of FB, BANA or Lehman.

Response to Paragraph 58: Disputed. [redacted]. Dep. Ex. 804 is a February 2009 e-mail which only states after the fact that Lehman had failed to fund since December 2008. [redacted] (*See* Dep. Exs. 22, 28, 34, 40.) And the cited Freeman testimony reflects only his understanding in December 2008 and January 2009 that Lehman would not be funding those months.

Response to Paragraph 59: Undisputed, but BANA disputes that the cited evidence supports the statement. Dep. Exs. 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 60: Undisputed.

Response to Paragraph 61: Disputed. The cited evidence does not support the statement. There is no evidence that BANA knew that Retail Lenders National City Bank, Sumitomo or ULLICO would not agree to assume Lehman's remaining commitment. [redacted] The cited documents reflect that Fontainebleau informed BANA that discussions with the Retail Lenders regarding the Retail Facility were ongoing. The cited deposition testimony likewise lends no support to Plaintiffs' statement. It is limited to an October 23, 2008 meeting between Fontainebleau, the Retail Lenders and BANA during which ULLICO stated that it was considering funding for Lehman. (Cantor Reply Decl. Ex. 5 (Howard Dep. at 150:22–151:13).) In fact, after the meeting, Fontainebleau consistently reported that the Retail Co-Lenders could

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fund for Lehman after Lehman's bankruptcy. For example, in a February 23, 2009 letter to BANA, Fontainebleau stated 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." (Cantor Decl. Ex. 63 [Dep. Ex. 811].) Moreover, Mr. Susman explained in his testimony that while he understood that ULLICO was a short-term deal "[a]s it was initially presented to [BANA]," he added that "Ullico could decide to fund it on a long-term basis." (Cantor Reply Decl. Ex. 14 (Susman Dep. at 273:23–275:7).) [redacted] (*See* BANA's Resp. to ¶¶ 9, 11.)

Response to Paragraph 62: Undisputed.

Response to Paragraph 63: Disputed. The cited evidence does not support the statement. The cited evidence reflects no "funding gap." In fact, the evidence demonstrates that ULLICO funded Lehman's share of the Retail Shared Costs [redacted], demonstrating that there was no "financing gap." Moreover, as described in BANA's response to paragraph 61, Fontainebleau consistently reported to BANA that the Retail Co-Lenders would fund for Lehman after Lehman's bankruptcy. [redacted] (*See* BANA's Resp. to ¶¶ 9, 11.)

Response to Paragraph 64: Undisputed.

Response to Paragraph 65: Disputed. The cited evidence does not reflect that Fontainebleau failed to provide a meaningful response to the questions raised by BANA's February 20, 2009 letter. In fact, Fontainebleau responded to several of BANA's questions in a February 23, 2009 letter. (*See* Cantor Decl. Ex. 63 [Dep. Ex. 811].)

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Response to Paragraph 66: Undisputed.

Response to Paragraph 67: Disputed. [redacted]

Response to Paragraph 67(a): Disputed. This statement is unsupported by the cited evidence. [redacted] (*See* BANA's Resp. to ¶¶ 9–10.)

Response to Paragraphs 68 and 69: Undisputed.

Response to Paragraph 70: Disputed. Dep. Ex. 868—a June 2008 report prepared by the Construction Consultant—does not support this statement as it does not reflect $201 million in change orders. In addition, Dep. Ex. 216 does not support this statement as it does not identify previously disclosed change orders.

Response to Paragraph 71: Disputed. This statement is not material or relevant to the resolution of BANA's motion for summary judgment. To the extent a response is required, the statement is false. Dep. Exs. 216, 868, and 917 do not indicate whether the costs had been disclosed to IVI and/or BANA before May 2008. Additionally, BANA's Jeff Susman testified that he did not recall whether BANA was informed of these change orders before May or June of 2008. (Cantor Reply Decl. Ex. 14 (Susman Dep. at 93:2–8).)

Response to Paragraph 72: Disputed. This statement is not material or relevant to the resolution of BANA's motion for summary judgment. To the extent a response is required, the statement lacks any support in the evidence. Dep. Exs. 891 and 915 address a single change order. Dep. Ex. 891 is an unauthenticated Owner Change Order ("OCO") signed by non-parties

Fontainebleau Resorts and Turnberry West Construction on May 23, 2008. The OCO is accompanied by numerous letters from TWC to FBR or from WW Steel to TWC. No fact witness has authenticated Dep. Ex. 891 or testified about its contents. The document was introduced as an exhibit during Mr. Susman's deposition but he testified that he had never seen it. Moreover, the document's signers—TWC's Robert Ambridge and Fontainebleau's Deven Kumar—were both deposed but neither witness was asked about this document. Thus, it is inadmissible and may not be considered for the truth of its contents. Moreover, even if it were admissible, Dep. Ex. 891 lends no support to the statement. To the contrary, the change order is accompanied by numerous letters, both from TWC to FBR and the subcontractor to TWC, demonstrating that the proposed change was still being negotiated as late as May 8, 2008. Thus Plaintiffs' assertion that the change order had been known to the Borrowers for a year is false. Dep. Ex. 915—Plaintiffs' expert Donald Boyken's report—should also be disregarded. Plaintiffs cannot circumvent Dep. Ex. 891's hearsay and foundation issues by having their expert put his spin on its contents.[9]

Response to Paragraph 73: Disputed. This statement is not material or relevant to the resolution of BANA's motion for summary judgment. To the extent a response is required, this statement lacks any support in the evidence. Dep. Ex. 891 is inadmissible as explained in BANA's response to paragraph 72, *supra*. In addition, Plaintiffs' expert's testimony sheds no light on when the Borrowers learned about the OCO and should be disregarded as explained in BANA's response to paragraph 72, *supra*.

Response to Paragraph 74: Disputed. This statement is not material or relevant to the resolution of BANA's motion for summary judgment. To the extent a response is required, the cited testimony does not support this statement. Plaintiffs offer no admissible evidence

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[9] *See* Fed. R. Evid. 801(c), 802; *see also Marvel Worldwide, Inc. v. Kirby*, 777 F. Supp. 2d 720, 729 (S.D.N.Y. 2011) (striking expert reports because they were "merely factual narratives based on their review of secondary sources and interviews that attempt to reconstruct events about which neither has first-hand knowledge. Although Rule 703 of the Federal Rules of Evidence permits an expert to rely on hearsay in reaching his own opinion, a party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony.") (quotations omitted); *Estate of Parsons v. Palestinian Auth.*, 715 F. Supp. 2d 27, 32-33 (D.D.C. 2010) (disregarding expert's affidavit and granting summary judgment to the defendant because expert opinions "may be based on hearsay, but they may not be a conduit for the introduction of factual assertions that are not based on personal knowledge").

establishing that BANA was furnished with documentation relating to a structural steel change order in mid-2008. Plaintiffs attempt to cite BANA's expert Peter Badala's testimony in support of their statement, but Mr. Badala's expert opinion cannot be used to establish facts about which he has no personal knowledge any more than Mr. Boyken's expert opinion, as explained in BANA's response to paragraph 72, *supra*.

Response to Paragraph 75: Disputed. This statement is not material or relevant to the resolution of BANA's motion for summary judgment. To the extent a response is required, the cited evidence does not support this statement. Neither the cited document nor testimony supports Plaintiffs' statement that learning about $201 million in additional costs was important to BANA.

Response to Paragraph 76: Disputed. The cited evidence does not support this statement. Dep. Ex. 217—an internal BANA e-mail—states IVI believed there were "additional known cost increases," but it says nothing about BANA's belief, or unreported change orders. Moreover, the record is clear that BANA promptly followed up with IVI on the construction cost increases disclosed by Fontainebleau, and gained closure on the issue. (Cantor Reply Decl. Ex. 18 [Dep. Ex. 892].) And in IVI's next project status report, dated June 25, 2008, IVI further stated that "[a]t this time, the construction costs are anticipated to increase but not exceed the Developer's revised direct cost budget of $1,909,734,213 plus $190,265,021 in equity with the new direct cost budget of $2,099,999,234." (*Id.* Ex. 19 [Dep. Ex. 868].) Thus any concerns that may have existed were limited to early June 2008, and were addressed by Fontainebleau and IVI.

[redacted]

Response to Paragraph 77: Disputed. The cited evidence and testimony do not support this statement. IVI's Robert Barone stated that he raised concerns about the completeness and accuracy of the additional costs in the fourth quarter of 2008, but he did not mention raising concerns about the timeliness of reporting, or to whom the concerns were raised. (Dep. Ex. 851 at ¶ 14.) BANA's Jeff Susman testified that he did not recall whether IVI raised concerns with BANA in Q4 2008. (Cantor Reply Decl. Ex. 14 (Susman Dep. at 134:10–135:14).)

Response to Paragraph 78: Disputed. This is a nonsensical statement to which no response is required. This statement does not indicate or provide any context as to what concerns of BANA and the other Lenders are at issue. To the extent a response is required, the

statement does not support that BANA had concerns about the accuracy and timeliness of the Borrowers' reporting anticipated construction costs. Mr. Newby's testimony does not specify when the concerns arose, and Mr. Susman testified that he did not recall whether IVI raised concerns with BANA in Q4 2008. (Cantor Reply Decl. Ex. 14 (Susman Dep. at 134:10–135:14).) While Messrs. Howard and Bolio testified that Deutsche Bank e-mailed BANA about Project costs, its questions were unsubstantiated. When Deutsche Bank asked BANA in December 2008, about Project costs, BANA responded by asking Deutsche Bank to provide additional information because BANA was unaware of any such issues. (*Id.* Ex. 11 (Bolio Dep. at 171:3–172:7.) There is no evidence that BANA received a response from Deutsche Bank.

[redacted] (*See* BANA's Resp. to ¶¶ 9, 11.)

Response to Paragraph 79: Undisputed.

Response to Paragraph 80: Disputed. IVI's Robert Barone raised concerns about the completeness and accuracy of the additional costs in the fourth quarter of 2008, but did not raise concerns about the timeliness of reporting. Moreover, Plaintiffs have offered no evidence as to whom IVI's concerns were raised. (Dep. Ex. 851 at ¶ 14.) BANA's Jeff Susman testified that he did not recall whether IVI raised concerns with BANA in the fourth quarter of 2008. (Cantor Reply Decl. Ex. 14 (Susman Dep. at 134:10–135:14).)

Response to Paragraph 81: Disputed. The statement mischaracterizes the evidence. IVI's January 30, 2009 Project Status Report No. 21 identified as concerns "that all the subcontractor claims have not been fully incorporated into the [Anticipated Cost Report] and potential acceleration impact to meet the schedule has not been included" and "that the LEED credits are tracking behind projects." (Cantor Decl. Ex. 59 at 7 [Dep. Ex. 809].)

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Response to Paragraph 82: Disputed. The cited testimony does not support this statement. The cited Jeanne Brown testimony makes no reference to concerns raised by IVI. (Cantor Reply Decl. Ex. 7 (Brown Dep. at 96:3–7).)

Response to Paragraph 83: Disputed. The cited evidence does not support this statement. The evidence makes no reference to the accuracy of LEED credit reporting. (*See* Cantor Decl. Ex. 84 at ¶ 20 [Dep. Ex. 808 (Decl. of Henry Yu)]; Dep. Ex. 851 at ¶ 15; Cantor Reply Decl. Ex. 12 (Yu Dep. at 105:12–23).)

Response to Paragraphs 84 and 85: Undisputed.

Response to Paragraph 86: Disputed. The cited evidence and testimony do not support this statement. While IVI continued to be concerned that there were unreported costs, IVI's March and April 2009 Project Status Reports stated that the Anticipated Cost Reports issued by the Developer indicated the project was expected to stay within budget. (Dep. Exs. 600 at 23; 828 at 22.) IVI also reported a potential issue with LEED credits tracking behind projections, but was awaiting an audit by Fontainebleau that would provide additional information. (Dep. Exs. 600 at 23; 828 at 22.) The cited Bolio testimony consists solely of his interpretation of IVI's February 2009 report, and does not address his view of whether BANA received satisfactory information from the Borrowers. (Cantor Reply Decl. Ex. 11 (Bolio Dep. at 204:9–206:19).) The cited Henry Yu testimony recounts Mr. Freeman's initial refusal to meet with BANA around March 2009, but again contains no assessment of whether BANA was receiving satisfactory information at the time. (*Id.* Ex. 12 (Yu Dep. at 49:24–51:5).)

Response to Paragraph 87: Undisputed.

Response to Paragraph 88: Undisputed, but the cited testimony does not support this statement.

Response to Paragraph 89: Disputed. Plaintiffs mischaracterize the cited evidence. The letter is a request for elaboration on issues that were raised in IVI's January 2009 report rather than an indication of concern by JP Morgan Chase. (Cantor Decl. Ex. 61 [Dep. Ex. 810].)

Response to Paragraph 90: Undisputed.

Response to Paragraph 91: Disputed. The cited testimony does not reflect that BANA thought it was a "bad sign" that Fontainebleau refused to meet with Lenders in February 2009. (*See* Cantor Reply Decl. Ex. 12 (Yu Dep. at 128:1–13).) In fact, Mr. Yu testified that he

understood in February 2009 that Fontainebleau was meeting with other Lenders, but refused to meet with him. (*Id.* at 127:4–12; 129:6–15.)

Response to Paragraph 92: Undisputed.

Response to Paragraph 93: Disputed. The cited evidence does not support this statement. The cited evidence concerns Mr. Yu's opinion as of March 4, 2009 concerning Fontainebleau's answer to the questions posed in its February 23, 2009 letter. (Cantor Reply Decl. Ex. 12 (Yu Dep. at 143:17–144:4).)

Response to Paragraph 94: Undisputed.

Response to Paragraph 95: Disputed. Plaintiffs mischaracterize the evidence. According to the letter, IVI's concerns were based on a review of the TWC Requisition for February 2009 and the January 2009 ACR. (Cantor Decl. Ex. 69 [Dep. Ex. 604].)

Response to Paragraph 96: Undisputed that, upon being asked during his deposition whether IVI's concerns about unreported project costs were a "pretty big deal," Brandon Bolio responded, "[i]t is." (*See* Cantor Reply Decl. Ex. 11 (Bolio Dep. at 229:20–230:5).)

Response to Paragraph 97: Disputed. The cited evidence does not support the statement. There was no "refusal" by Fontainebleau to meet. During the weekend of March 7–8, 2009, BANA offered to meet with Fontainebleau, but as of March 10, 2009, Fontainebleau had "still not agreed to meet" with BANA. (*See* Cantor Decl. Ex. 71 [Dep. Ex. 819].)

Response to Paragraphs 98 and 99: Undisputed.

Response to Paragraph 100: Disputed. The cited evidence does not support the statement. There were no discussion between Borrowers and IVI in mid-2009. The cited evidence reflects that in mid-March 2009, following discussions with IVI, the Borrowers acknowledged that there were outstanding costs in addition to the $35 million in costs initially disclosed, and agreed to increase the Project's budget by a further $50 million. (Dep. Ex. 851 at ¶ 26; *see also* BANA SOUF ¶ 153; Cantor Reply Decl. Ex. 9 (Kumar Dep. at 165:22–166:24).)

Response to Paragraph 101: Disputed. The cited evidence does not support this statement. The cited evidence reflects that IVI sent an update to BANA about anticipated costs, and noted that IVI expected to receive a summary of the construction budget exposure based on updated projections from the general contractor. (Cantor Decl. Ex. 72 [Dep. Ex. 608].) IVI's Robert Barone testified that he remained skeptical about whether all subcontractor claims were incorporated into the disclosed costs. (Cantor Reply Decl. Ex. 13 (Barone Dep. at 75:19–24).)

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Response to Paragraph 102: Disputed. The cited evidence does not support this statement. Mr. Yu testified that IVI held this belief in early-March 2009. (*See* Cantor Reply Decl. Ex. 12 (Yu Dep. at 145:6–24).)

Response to Paragraph 103: Disputed. This statement mischaracterizes the evidence. On February 23, 2009, Fontainebleau wrote to BANA and explained that it was engaging auditors with respect to the Project's LEED credits. (*See* Cantor Decl. Ex. 63 [Dep. Ex. 811].) On March 5, 2009, IVI requested that the audit be expedited. (*See* Dep. Ex. 851 at ¶ 25.) On March 20, 2009, the Borrowers informed the Lenders that it had retained KPMG to conduct the LEED audit, and that an internal LEED review was ongoing. (*See* Cantor Reply Decl. Ex. 29 at ING014067 [Dep. Ex. 346].) But before the results of the LEED audit were disclosed, the revolving lenders terminated the Revolver Loan under the Credit Agreement and litigation commenced. (*See* Cantor Decl. Ex. 82 [Dep. Ex. 827].)

Response to Paragraph 104: Disputed. The statement mischaracterizes the cited evidence. Henry Yu testified that he told Mr. Freeman that the LEED audit should be completed as soon as possible, but could not remember whether BANA gave Mr. Freeman a deadline for completion of the LEED audit. (*See* Cantor Reply Decl. Ex. 12 (Yu Dep. at 121:6–15).)

Response to Paragraph 105: Disputed. The statement mischaracterizes the cited evidence. The March 11, 2009 Advance Request did not reflect certain additional costs that Fontainebleau's Deven Kumar disclosed to IVI on March 11, 2009. (*See* Dep. Ex. 851 at ¶ 27.)

Response to Paragraph 106: Disputed. The statement mischaracterizes the stated evidence. IVI refused to approve the Borrowers' March 11, 2009 Advance Request because of material errors in the Request, and did so through a Construction Consultant Advance Certificate that identified those errors. (Bolio Decl. Ex. 36 [Dep. Ex. 860]; Cantor Reply Decl. Ex. 12 (Yu Dep. 193:5–9).) Mr. Barone testified that IVI refused to certify the Advance Request because it "no longer believed it" (*see* Cantor Reply Decl. Ex. 13 (Barone Dep. at 60:24-62:16)), but this was not reflected in the IVI Construction Consultant Advance Certificate provided to BANA. (*See* Bolio Decl. Ex. 36 [Dep. Ex. 860].)

Response to Paragraph 107: Disputed. The cited evidence does not support the statement. The March 11 Advance Request contained errors that were resolved through negotiations between the Borrowers and IVI. (Cantor Reply Decl. Exs. 30 [Dep. Ex. 861]; 13 (Barone Dep. at 65:6–66:2).) These negotiations added costs and shifted the Project's opening

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date. The cited evidence does not establish that the March 11 Advance Request "failed to include all of the cost overruns that had been identified and failed to indicate that the opening date for the Resort would have to be moved back by a month" because it implies that such facts were known to Borrowers as of March 11, 2009, an assertion for which the cited evidence lends no support.

Response to Paragraph 108: Disputed. The statement is not supported by the cited evidence. The cited evidence makes no mention of cost overruns. IVI's concerns were limited to Fontainebleau's representations regarding disclosure of subcontractor claims. (*See* Dep. Ex. 828 at 7, 21–22; Cantor Reply Decl. Ex. 13 (Barone Dep. at 75:19–24).) Moreover, IVI also concluded that "construction costs are anticipated to increase but not exceed the Developer's revised direct cost budget." (Dep. Ex. 828 at 22.)

Response to Paragraph 109: Disputed. Mr. Barone's testimony concerns subcontractor claims in late March 2009. (*See* Cantor Reply Decl. Ex. 13 (Barone Dep. at 75:19–24).)

Response to Paragraph 110: Disputed. The cited evidence does not support this statement. While it is true that IVI expressed concerns about Fontainebleau's cost disclosures in January and February 2009, IVI executed the Construction Consultant Advance Certificates for the January and February 2009 Advance Requests indicating that it had identified no material errors in the Borrowers' Advance Request. (Barone Decl. ¶¶ 15, 20, Exs. 3, 6; Cantor Decl. Exs. 59 at 7 [Dep. Ex. 809]; 66 at 23 [Dep. Ex. 600].) IVI also executed a Construction Consultant Advance Certificate approving the Borrowers' Revised March 2009 Advance Request. (Cantor Reply Decl. Ex. 31 (Dep. Ex. 862).) Moreover, IVI indicated that the Project was expected to remain within budget in both of its Project Status Reports for January 2009 and February 2009. (Cantor Decl. Exs. 59 at 7 [Dep. Ex. 809]; 66 at 23 [Dep. Ex. 600].) Any concerns IVI may have had were based only on its "gut" feelings, and IVI lacked evidence supporting its suspicions. (Barone Decl. ¶ 17.) Moreover, IVI pressed the Borrowers for additional information and received responses the Borrowers represented were accurate and that IVI believed to be "credible." (Barone Decl. ¶ 28; Cantor Reply Decl. Ex. 30 [Dep. Ex. 861].)

Response to Paragraph 111: Disputed. The cited evidence does not support the statement. Henry Yu testified that the Borrower did not answer some of IVI's questions that had been pending since January 2009. (Cantor Reply Decl. Ex. 12 (Yu Dep. at 195:2–10).)

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Response to Paragraph 112: Disputed. Plaintiffs mischaracterize the evidence. IVI never raised the possibility of an audit of the Borrower's construction costs. Rather, IVI acknowledged that it had not "conducted an audit of the information presented," but it nonetheless believed that "the information presented appears reasonable at this stage in the project." (Dep. Ex. 861.) Undisputed that BANA never conducted an audit of information presented by the Borrowers.

Response to Paragraph 113: Disputed. BANA's acquisition of Merrill Lynch & Co., Inc. is not material to the resolution of any issue. In addition, the cited evidence does not support this statement. [redacted] While BANA was aware of Merrill Lynch's involvement in fundraising efforts by Turnberry (not Fontainebleau), it did not know for what purpose. (Dep. Ex. 222; Cantor Reply Decl. Ex. 4 (Yunker Dep. at 58:2–19).) The cited evidence does not reflect that Borrowers were trying to raise hundreds of millions of dollars in added capital for the Project. [redacted] (*See* BANA's Resp. to ¶¶ 9, 11.)

Response to Paragraph 114: Disputed. The Notice of Borrowing was originally submitted on March 2, 2009, and a corrected version was submitted on March 3, 2009. (*See* Pls.' Ex. 1507 at BANA_FB00215940.) The Notice of Borrowing submitted on March 3, 2009 requested an aggregate amount of $1,006,522,698.00, composed of $350,000,000.00 under the Delay Draw Loan, and $656,522,698.00 under the Revolver. (*See id.* at BANA_FB00215942.)

Response to Paragraph 115: Disputed. The statement mischaracterizes the cited evidence. Mr. Yu did not testify that the Borrowers' proposal to enter into a pre-negotiation agreement "increased BofA's concern that the Borrowers were not providing accurate or complete information about the Project." Mr. Yu testified that he found the standstill provision

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of the proposed pre-negotiation agreement to be "objectionable" and that he viewed it as a "continuation of [the Borrowers'] behavior of not providing information." (Cantor Reply Decl. Ex. 12 (Yu Dep. at 179:7–22).)

Response to Paragraph 116: Disputed. The cited evidence does not support the statement. Plaintiffs cite to IVI's May 15, 2009 Cost-to-Complete Report and an April 13, 2009 e-mail from Henry Yu to Robert Barone and others. Neither document references anticipated change orders totaling over $350 million, nearly $190 million of which were admitted to be for previously committed construction costs.

Response to Paragraph 117: Disputed. Mr. Barone testified that he was "stunned" to learn of the additional unreported costs revealed by the Borrowers in mid-April 2009. (*See* Cantor Reply Decl. Exs. 13 (Barone Dep. at 81:3–82:7; 85:10–86:8); 32 at ¶ 33 [Dep. Ex. 851] ("I was stunned to see such an enormous increase in anticipated costs, which had not been previously reported to us, despite our repeated requests that all such information be disclosed.").)

Response to Paragraph 118: Disputed. Plaintiffs mischaracterize the cited evidence. BANA does not dispute that the evidence cited is an e-mail from Mr. Bonvicino stating, "Pretty close to my 150 mil." But when Mr. Barone was asked if he recalled "Mr. Bonvicino predict[ing] or . . . know[ing] that there were 150 million dollars in cost overruns," he stated only that he remembered Mr. Bonvicino "speculating" about cost overruns. (Cantor Reply Decl. Ex. 13 (Barone Dep. at 85:1–5).)

Response to Paragraph 119: Disputed. The statement is not a "fact;" rather it is a conclusion of law.

Response to Paragraphs 120 and 121: Undisputed.

Response to Paragraph 122: Disputed. This statement is a legal conclusion, not a factual statement. Moreover, the cited evidence offers no support for this statement. Plaintiffs' Exhibit 1503 is a report by Plaintiffs' expert Shepherd Pryor IV. Paragraph 35 deals with borrower representations and makes no reference to lender defaults. And even if it did, Mr. Pryor (who retired from banking in 1991) is not qualified to testify about current practices concerning widely held and actively traded syndicated loans. (*See* Cantor Reply Decl. Exs. 16 (Pryor Dep. at 75:24–76:3 (testifying that he did not rely on anything "other than [his] experience and the . . . materials that appear in [Pryor Report] Ex. B."); *id.* at 11:25–12:10 (testifying that he did not recall working as an agent on any construction loans); *id.* at 12:7–9;

19:19–24 (testifying typically served as agent on credits with "15 or 20 participating lenders" and at most, 30 banks)); 33 [Dep. Ex. 932 (Pryor Rep. Ex. B)]; *supra* Resp. to Para. 20.) Peter Badala's deposition testimony likewise makes no reference to lender defaults. Nor could it, as Mr. Badala is BANA's expert on construction-related issues.

Response to Paragraph 123: Undisputed.

Response to Paragraph 124: Disputed. The cited evidence does not support the statement. Dep. Ex. 291-B is a March 30, 2009 e-mail from Whitney Thier to Albert Kotite, Sony Ben-Moshe, Jed Bergman, Michael Krietzer, Jim Freeman, Augusto Sasso and Todd Kaplan attaching letters from Fontainebleau Las Vegas, LLC—signed by Ms. Thier—to Z Capital Partners, L.L.C. and the Guggenheim lenders. Neither the e-mail, nor the attached letters use the phrase "defaulting lender" or reference Mr. Howard. And to the extent Plaintiffs imply that Mr. Howard testified that a lender's failure to fund constituted a "default" under any of the loan agreements, that would be inaccurate. Mr. Howard testified: "we had lots of cases where Lehman was involved, other transactions where it didn't constitute a default under the agreement, it just created a shortfall . . . It didn't necessarily create a default under the document." (Cantor Reply Decl. Ex. 5 (Howard Dep. at 193:3–15).)

Response to Paragraph 125: Disputed. None of the cited evidence refers to "defaulted DDTL Loans." Dep. Ex. 104 is a March 23, 2009 letter from BANA to Lenders stating: "Several Lenders … have not funded the $350MM Delay Draw Term Loan requested by the Borrower. . . . Bank of America's position is that it is willing to include the $21,666,667 for the March 25 Advance, pending further information about whether these lenders will fund. Absent any other changes, note that the exclusion of the $21,666,667 amount from Available Funds would result in a failure to satisfy the In-Balance Test. . . . We request that any Lender which does not support these interpretations immediately inform us in writing of their specific position." (Cantor Decl. Ex. 76 [Dep. Ex. 104].)

Response to Paragraph 126: Disputed. The statement is not supported by the cited evidence. Ms. Brown's testimony was limited to receipt of the retail funds. She testified that BANA "wouldn't go forward [and disburse the funds] unless [it] had [the retail] part. That was part of the protocol. Each step had to come in order." (Cantor Reply Decl. Ex. 7 (Brown Dep. at 72:16–73:1).) And as for the Term Lenders' funds, Ms. Brown testified "I don't even remember anything about the term lenders." (*Id.* at 109:22–110:3.)

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Response to Paragraph 127: Disputed. "Defaulting DDTL Lenders" is not a defined term in any of the loan agreements. Moreover, Mr. Yu did not testify that he was "never sure" that certain DDTL lenders would make payments. He testified only that he did not want to represent to the other Lenders in writing "don't worry, the Guggenheim money is coming in, so that's going to be okay" because, in general, "[u]ntil the money comes in, you're never sure" and "until something happen[s], there's always a chance that it's not going to happen." (Cantor Reply Decl. Ex. 12 (Yu Dep. at 232:3–23; 233:8–23).)

Response to Paragraph 128: Disputed. "Defaulting DDTL Lenders" is not a defined term under any of the loan agreements. Undisputed that in early April 2009, the Guggenheim lenders funded $10,000,000 in Delay Draw Term Loan funds. (Dep. Ex. 643.)

Response to Paragraph 129: Disputed. "Defaulting Delay Draw Lenders" is not a defined term under any of the loan agreements. The cited evidence does not support this statement. Mr. Yu's testimony concerned a Lender disagreement over whether the Borrowers would be permitted to borrow under the Revolver in April 2009—not whether the unfunded Delay Draw funds should be included in the Available Sources for purposes of the In Balance Test as suggested by Plaintiffs. Mr. Yu was testifying about the March 23, 2009 letter from BANA to the Lenders stating that there was "a divergence of opinions as to the reading of 2.1(c)(iii) of the Credit Agreement." (Cantor Decl. Ex. 76 [Dep. Ex. 104].) Section 2.1(c)(iii) concerns borrowings under the Revolver, *not* the In Balance Test's computation.

Response to Paragraphs 130, 131 and 132: Undisputed.

Response to Paragraph 133: Disputed. The statement is unsupported by the cited evidence. None of the cited testimony supports an assertion that "[e]arly 2009 was a time of stress in . . . the Las Vegas market in particular." Undisputed that early-2009 was a time of economic stress in the financial markets in general.

Response to Paragraph 134: Disputed. This statement is overly broad and ambiguous, and not material or relevant to the resolution of BANA's motion for summary judgment. The cited evidence reflects only that BANA internally monitored the Project as a Lender in 2008 and 2009, a role that was distinct from its agent roles. [redacted]

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[redacted] (*See* BANA's Resp. to ¶¶ 9, 11.)

Response to Paragraph 135: Disputed. This statement is not material nor relevant to the resolution of BANA's motion for summary judgment because BANA's internal analysis of its future post-construction credit risk exposure as a lender is irrelevant in determining its good faith as agent. (*See* Cantor Reply Decl. Ex. 11 (Bolio Dep. at 11:22–16:25).)

Response to Paragraphs 136 and 137: Disputed. (*See* Resp. to ¶ 135.)

Response to Paragraph 138: Disputed. This statement is not material nor relevant to the resolution of BANA's motion for summary judgment because BANA's internal analysis of its future post-construction credit risk exposure as a lender is irrelevant in determining its good faith as agent. (*See* Resp. to ¶ 135.)This statement is also unsupported by the cited evidence. Dep. Ex. 831 is a Scheduled Exposure Report ("SER") dated April 6, 2009 and does not reflect any "continuing concern" by BANA regarding condo sales. Moreover, while Dep. Ex. 831 states that "it is unlikely that the Company will sell the 933 condo units," it notes that "the Company has the ability to convert the unsold condos into hotel rooms." (Dep. Ex. 831 at 4.)

Response to Paragraph 139: Disputed. This statement is not material nor relevant to the resolution of BANA's motion for summary judgment because BANA's internal analysis of its future post-construction credit risk exposure as a lender is irrelevant in determining its good faith as agent. (*See* Resp. to ¶ 135.) To the extent a response is required, the cited evidence does not support Plaintiffs' statement. Credit Agreement § 2.11(a)(ii) refers to "mandatory prepayments," not *repayments*. While some of the cited documents indicate that condo sales would be a source of debt repayment, they do not indicate that that condo sales would "substantially repay outstanding debt." Similarly, Messrs. Varnell and Yunker testified that both condo sales and operating cash flows from the casino and hotel would service the debt, but he did not testify that they would substantially repay outstanding debt after the Project's opening. (Cantor Reply Decl. Exs. 4 (Yunker Dep. at 43:16–44:17); 6 (Varnell Dep. at 67:6–11).)

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Response to Paragraph 140: Disputed. This statement is not material nor relevant to the resolution of BANA's motion for summary judgment because BANA's internal analysis of its future post-construction credit risk exposure as a lender is irrelevant in determining its good faith as agent. (*See* Resp. to ¶ 135.) To the extent a further response is required, it is unsupported by the cited evidence. Mr. Bolio did not testify that the Project could be "in default" upon opening. Mr. Bolio testified that while Fontainebleau Las Vegas "[c]ould have a difficulty meeting its covenants when it opened," that "[w]as not the expectation. It was something that could happen, and it was [CDP's] job to factor that in." (Cantor Reply Decl. Ex. 11 (Bolio Dep. at 35:14–36:2).)

Response to Paragraph 141: Disputed. This statement is not material nor relevant to the resolution of BANA's motion for summary judgment because BANA's internal analysis of its future post-construction credit risk exposure as a lender is irrelevant in determining its good faith as agent. (*See* Resp. to ¶ 135.) To the extent a response is required, the statement is not supported by the cited evidence. Moreover, the cited evidence is inadmissible because it was never authenticated and contains hearsay. Pls.' Ex. 1508 is an October 18, 2007 e-mail from Jon Varnell to BAS' Michael Malone and others at BAS, stating that Mr. Varnell had heard that Fontainebleau's Jeff Soffer told Mr. Malone that the Borrowers had decided not to sell condos. The e-mail also states that Jim Freeman told Mr. Varnell that although Mr. Soffer had raised the idea of not selling condos "internally," his idea had "no support from any other FB or Turnberry executive, particularly Glenn." Neither the sender, nor any of the recipients that were deposed were questioned about the e-mail during their depositions. Messrs. Freeman and Varnell did not testify about the purported conversations and Messrs. Soffer and Malone have not been deposed in this case. Because no witnesses with personal knowledge of the e-mail or conversations have testified about them, the speculative statements contained in Pls.' Ex. 1508 purporting to describe those conversations are inadmissible hearsay.[10]

Response to Paragraph 142: Disputed. This statement is not material nor relevant to the resolution of BANA's motion for summary judgment because BANA's internal analysis of its future post-construction credit risk exposure as a lender is irrelevant in determining its good

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[10] *See* Fed. R. Evid. 801–802; *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).

faith as agent (*see* Resp. to ¶ 135), and is not supported by the cited evidence. Plaintiffs offer no evidence of a condo sale schedule or projections. Moreover, Pls.' Ex. 1509 is inadmissible because it contains hearsay statements. It is a March 27, 2008 e-mail from Kyle Bender to Jon Varnell and Bret Yunker forwarding a Barclays Capital analyst report that purports to summarize conversations that Barclays had with Fontainebleau "management." The report's contents lack foundation and constitute inadmissible hearsay because the analyst was never deposed and Plaintiffs cite the report for the truth of its contents.[11] Because no witnesses with personal knowledge of the analyst report or purported conversations testified about them, the speculative statements contained in Pls.' Ex. 1509 are inadmissible hearsay.

Response to Paragraph 143: Disputed. This statement is not material nor relevant to the resolution of BANA's motion for summary judgment because BANA's internal analysis of its future post-construction credit risk exposure as a lender is irrelevant in determining its good faith as agent (*see* Resp. to ¶ 135), and is not supported by the cited evidence. Dep. Ex. 831, an internal BANA report dated April 6, 2009, states "it is *unlikely* that the Company will sell the 933 condo units." (Dep. Ex. 831 at p. 4 (emphasis added).)

Response to Paragraph 144: Disputed. [redacted]

Response to Paragraph 145: Undisputed that the cited document contains the quoted language.

II. DEFENDANT'S REVISED REDLINED REPLY TO PLAINTIFF'S REVISED REDLINED RESPONSE TO BANA'S STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Fed. R. Civ. P. 56 and S.D. Fla. L.R. 7.5(c) and (d), BANA submits this reply to Plaintiffs' Response to Defendants' Statement of Undisputed Material Facts. BANA's initial statement establishes that the facts are undisputed and are supported by the cited evidence. Constrained by page limitations, BANA writes to address certain issues raised by Plaintiffs' Response. BANA does not concede that any statement to which Plaintiffs have objected is either disputed or not material and relevant.

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

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In a transparent attempt to manufacture the appearance of disputed issues of material fact where none exists, Plaintiffs' response mischaracterizes the evidence on several key points:

- **Pls.' Resp. to BANA SOUF Paras. 72, 75, 118.** Plaintiffs do nothing more than repeat their baseless claim that BANA knew that Fontainebleau Resorts funded Lehman's share of the Retail Shared Costs in September 2008. Plaintiffs fail to offer any evidence supporting their assertions. As explained in BANA's Response to Plaintiffs' Statement of Undisputed Material Facts, the factual record shows Plaintiffs' assertions to be false.
- **Pls.' Resp. to BANA SOUF Para. 79.** There are ***no*** documents supporting Plaintiffs' conclusory assertion that BANA was aware that Lehman did not fund its share of Shared Costs in September 2008. Dep. Ex. 204 is an e-mail sent a week before the Shared Costs were received by BANA from TriMont. And Dep. Ex. 475—Bolio's undated handwritten notes—are clearly irrelevant as the noted dollar amounts—"25 mm" and "2mm Lehman"—do not correspond to the September 2008 Shared Costs. [redacted] (*See* Cantor Reply Decl. Ex. 20 [Dep. Ex. 11].)
- **Pls.' Resp. to BANA SOUF Para. 73.** Plaintiffs' claim that BANA received more than one wire from TriMont, the Retail Servicer, is contradicted by the evidence they cite. Bolio Decl. Ex. 29 is a December 30, 2008 Jeanne Brown e-mail clearly reflecting that a single wire was received that day by BANA from TriMont for the Retail Costs requested by Fontainebleau in the December 2008 Advance Request. Ms. Brown writes "The wire in the amount of $4,969,135.00 has been received." The accompanying Advance Request states that the "Amounts to be Advanced From the Retail Facility for Shared Costs" are $4,969,135.00. The cited Brown testimony is likewise off point—it refers only to when she learned there were multiple Retail Lenders, and not about whether multiple wires were sent by TriMont to BANA.
- **Pls.' Resp. to BANA SOUF Para. 83.** Jeanne Brown's testimony is unambiguous that she did not recall discussing with TriMont's Mac Rafeedie whether Lehman funded in September 2008: "Q. And in September 2008, which as I stated was the month Lehman filed bankruptcy, so the month Lehman filed bankruptcy, did Mr. Rafeedie tell you that Lehman was not funding? Would that have been one of your sources of information? A.

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I don't remember him telling me that." (Cantor Reply Decl. Ex. 7 (Brown Dep. at 57:1–8) (emphasis added).) Plaintiffs nonetheless attempt to manufacture a factual dispute.

- **Pls.' Resp. to BANA SOUF Paras. 100 and 103.** [redacted] (*See* BANA's Resp. to ¶¶ 9, 11.)
- **Pls.' Resp. to BANA SOUF Para. 115.** Plaintiffs dispute that BANA concluded that Highland's September 30, 2008 claims were incorrect. While they cite an evidentiary kitchen sink, almost none of the cited evidence has anything to do with Highland's e-mail, [redacted]. Indeed, most of it consists of documents and testimony concerning events that occurred long after September 30, 2008. Incredibly, Plaintiffs even cite a September 2009 filing in the Lehman bankruptcy by Fontainebleau Las Vegas Retail, LLC (Pls.' Ex. 1504), a document created more than a year after the events at issue. Plaintiffs clearly lack any good faith basis for their response to Paragraph 115.
- **Pls.' Resp. to BANA SOUF Paras. 121 and 123.** Plaintiffs' assertion that BANA "did not evaluate Highland's claims but turned a blind eye to them" or that it "dismissed Highland's claims out of hand" is shown to be false by the evidence that Plaintiffs themselves have submitted. Plaintiffs introduced numerous e-mails between BANA and Highland reflecting BANA's attempts to address Highland's Lehman-related concerns. (*See* Cantor Reply Decl. Exs. 21 [Dep. Ex. 81]; 22 [Dep. Ex. 80]; Cantor Decl. Ex. 49

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[Dep. Ex. 904]; *see also* Susman Decl. Ex. 5; *id.* ¶¶ 14–16, 22–24; Cantor Reply Decl. Exs. [redacted] 5 (Howard Dep. at 52:19–53:19).)

- **Pls.' Resp. to BANA SOUF Paras. 137 and 146.** There is no material dispute that concerns raised by IVI in Project Status Report 21 were only "gut" feelings, and IVI had no evidence supporting its suspicions. In fact, the documents Plaintiffs rely upon make clear that IVI's concerns were only a "gut" feeling and there was nothing concrete that IVI could point to as evidence of problems.
- **Pls.' Resp. to BANA SOUF Para. 193.** Plaintiffs ignore the unambiguous deposition testimony cited by BANA where Henry Yu explained that Guggenheim informed him that it was "rounding up all the parties" and intended to fund its $10 million Delay Draw commitment in March 2009: "I believe I had a conversation with Guggenheim, with Guggenheim saying, "Yes, we're rounding up all the parties, all our investors, and we intend to send those funds, and as they come in, we have been sending them, that's why you already got some and the rest are coming." (Cantor Reply Decl. Ex. 12 (Yu Dep. at 228:15–229:4).)

In addition, while claiming to dispute certain statements, Plaintiffs concede certain key facts:

- **Pls.' Resp. to BANA SOUF Para. 57.** Plaintiffs do not dispute that BANA received all required certifications from Fontainebleau, TWC, and BWA for September 2008 through March 2009 or from IVI for September 2008 through February 2009. Plaintiffs admit in response to Paragraph 162 that IVI provided BANA with a certificate for March 2009 before BANA approved funding of the March 2009 Advance Request.
- **Pls.' Resp. to BANA SOUF Para. 74.** Plaintiffs do not dispute that 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 conditions precedent to funding were satisfied.
- **Pls.' Resp. to BANA SOUF Para. 76.** Plaintiffs do not dispute that BANA understood in September 2008 and thereafter that Lehman was continuing to honor some loan commitments. The Susman testimony cited by Plaintiffs is entirely consistent with this statement.

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- **Pls.' Resp. to BANA SOUF Para. 120.** [redacted]
- **Pls.' Resp. to BANA SOUF Para. 154.** Plaintiffs admit that the March 19, 2009 Construction Consultant Certificate was the first time that IVI declared it had discovered material errors in the Advance Request and supporting documentation.
- **Pls.' Resp. to BANA SOUF Para. 196.** Plaintiffs' assertion that two Lenders, Highland and Deutsche Bank, "replied" to BANA's letter misses the point: there is no evidence that those Lenders ***disagreed*** with BANA's position. As Plaintiffs point out, Highland refused to "state a position" and reserved its right to sue BANA regardless of whether it funded the March Advance. (*See* Dep. Ex. 471.) And the Deutsche Bank e-mail simply asked BANA to schedule a call to discuss certain Advance-related issues. (Dep. Ex. 832.) Contrary to Plaintiffs' claim, BANA did hold that that call, which addressed Deutsche Bank's concerns. (*See* Pls.' Ex. 1505.)

Dated: November 16, 2011

Respectfully submitted,

By: _____

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EXHIBIT A – DEFINED TERMS

ACR – Anticipated Cost Report

BANA – Bank of America, N.A, Defendant

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

BAS – Banc of America Securities, LLC

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.

IVI or Construction Consultant – Inspection and Valuation International, Inc.

LEED – Leadership in Energy and Environmental Design.

Lehman – Lehman Brothers Holdings, Inc.

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

MAE – Material Adverse Effect

National City – National City Bank

OCO – Owner Change Order

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

Sumitomo – Sumitomo Mitsui Banking Corp.

TriMont – TriMont Real Estate Advisors, Inc.

TRLP – Turnberry Residential Limited Partners

TWC or Contractor – Turnberry West Construction

ULLICO – Union Labor Life Insurance Company

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2011, 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.

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