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 PLAINTIFFS' BRIEFS AND RELATED FILINGS PREVIOUSLY FILED UNDER SEAL OPPOSING BANK OF AMERICA, N.A.'S MOTION FOR SUMMARY JUDGMENT

Avenue CLO Fund, et al. ("Plaintiffs") hereby give notice that they are filing on the public record certain briefs and related filings, previously filed under seal, related to Bank of America, N.A.'s Motion for 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 parties to make a recommendation by November 1, 2013 regarding how they proposed to comply

[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.

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.

Plaintiffs previously filed under seal the briefs and related filings listed below in connection with Bank of America, N.A.'s Motion For Summary Judgment on September 9, 2011, September 12, October 7, 2011 and November 14, 2013. In compliance with this Court's Order Approving Joint Proposal, Plaintiffs now file the following briefs and related filings on the public record with the exception of portions of the documents that remain under seal and are therefore redacted (as indicated below):[2]

PLAINTIFFS' OPPOSITION TO BANK OF AMERICA'S MOTION FOR SUMMARY JUDGMENT		
Tab	**Document**	**Filing Status**
1	Term Lender Plaintiffs' Opposition To Bank Of America, N.A.'s Motion For Summary Judgment (originally filed under seal on September 9, 2011)	Publicly filed with redactions (attached)

[2] Additional documents previously filed under seal by Plaintiffs relating to Bank of America, N.A.'s Motion for Partial Summary Judgment, including the evidence submitted in opposition to the motion that was attached to various appendices of exhibits and testimony, have been filed under separate cover.

PLAINTIFFS' OPPOSITION TO BANK OF AMERICA'S MOTION FOR SUMMARY JUDGMENT		
Tab	**Document**	**Filing Status**
2	Term Lender Plaintiffs' 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 (originally filed under seal on September 9, 2011)	Publicly filed with redactions (attached)
3	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 (originally filed under seal on November 14, 2011)	Publicly filed with redactions (attached)
4	Declaration Of Robert W. Mockler And Request For Judicial Notice In Support Of Term Lender Plaintiffs' Opposition To Bank Of America, N.A.'s Motion For Summary Judgment (originally filed under seal on September 9, 2011)	Publicly filed (attached)
5	Appendix Of Exhibits In Support Of Term Lender Plaintiffs' Opposition To Defendant Bank Of America, N.A.'s Motion For Summary Judgment excluding attachments (originally filed under seal on September 12, 2011)	Publicly filed with redactions (attached)
6	Appendix Of Testimony In Support Of Plaintiffs' Opposition To Defendant Bank Of America, N.A.'s Motion For Summary Judgment excluding attachments (originally filed under seal on September 12, 2011)	Publicly filed (attached)
7	Term Lender Plaintiffs' Response To Bank Of America, N.A.'s Evidentiary Objections Included In Its Response To Plaintiffs' Statement Of Additional Undisputed Material Facts (originally filed under seal on October 7, 2011)	Publicly filed with redactions (attached)
8	Declaration of Robert W. Mockler In Support Of Term Lender Plaintiffs' Response To Bank Of America, N.A.'s Evidentiary Objections Included In Its Response To Plaintiffs' Statement Of Additional Undisputed Material Facts (originally filed under seal on October 7, 2011)	Publicly filed (attached)

Date: Miami, Florida
December 6, 2013

.

By: /s/ Lorenz Michel Prüss
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **NOTICE OF FILING ON THE PUBLIC RECORD PLAINTIFFS' BRIEFS AND RELATED FILINGS PREVIOUSLY FILED UNDER SEAL OPPOSING BANK OF AMERICA, N.A.'S MOTION FOR SUMMARY JUDGMENT** was filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically the Notice of Electronic Filing.

Dated: December 6, 2013.

/s/ Lorenz Michel Prüss
Lorenz Michel Prüss

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

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

Sealed

This document relates to all actions.

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TERM LENDER PLAINTIFFS' OPPOSITION TO BANK OF AMERICA, N.A.'S MOTION FOR SUMMARY JUDGMENT

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I. PRELIMINARY STATEMENT

Beginning in April 2008, BofA began receiving information that convinced it that Fontainebleau had been concealing costs and under-reporting funds that would be required to complete the project. BofA was on notice from that moment forward that material conditions to disbursement of Lender funds had not been satisfied.

The In Balance Test was a primary requirement for disbursement. That test could only be satisfied if "Available Funds" from the financing sources were equal to or exceeded the "Remaining Costs" necessary to complete the project, which were set forth in an accompanying Remaining Cost Report. The Borrowers were required to represent and warrant in each Advance Request that the Remaining Cost Report "reflects all reasonably anticipated Project Costs required to achieve Final Completion." Concealing costs caused that condition to fail.

In September 2008, Lehman Brothers, the primary retail lender, filed for bankruptcy. The odds of replacing Lehman's commitment were small. In a descriptive mixed metaphor, one BofA official described the event as the "death nail" of the Project. It turned out to be one of many. At the very least it had a Material Adverse Effect on the Project under the terms of the contract, which caused the failure of another required condition of disbursement. BofA disbursed anyway.

From September 2008 through March 2009, as repeated breaches caused multiple condition failures, BofA wrongfully disbursed more than $787 million of Term Lender funds. BofA was not so cavalier with its own money. Within just a few weeks after completing its disbursement of nearly the last of the Term Lender Loans, BofA pulled the plug on Fontainebleau and terminated its own pending loan commitments under the Revolving Loans.

BofA asserts that it was permitted, indeed required, to disburse the Term Lender funds because it received each month all of the necessary paperwork in the necessary form from the Borrowers, including boilerplate certificates representing that all conditions precedent had been satisfied. BofA could not disburse without such paperwork. But, it just as clearly could not disburse in blind "reliance" on misrepresentations of the (interested) Borrowers when it knew the truth.

The Term Lenders entrusted BofA with the responsibility of disbursing Loan proceeds to the Borrowers. The Disbursement Agreement articulated the conditions under which BofA was

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authorized to do so. By disbursing hundreds of millions of dollars to the Borrowers under circumstances where it knew that conditions precedent to disbursement had not been satisfied, BofA not only breached its obligations under the Disbursement Agreement, it breached the trust the Term Lenders had placed in its hands. This conduct was, at a minimum, recklessly indifferent to the rights of those Term Lenders and thus grossly negligent.

II. LEGAL STANDARD

Summary judgment is appropriate only when "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law."[1] The "burden of establishing the absence of a genuine issue of material fact lies with the moving party" and is a "stringent" one.[2] In determining whether the record presents a genuine issue as to a material fact, "the Court must draw all reasonable inferences in favor of the nonmoving party, and may not make credibility determinations or weigh the evidence."[3] "If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial."[4] To the extent that there are undisputed facts that may lead "reasonable minds [to] differ on the inferences arising from" them, "the court should deny summary judgment."[5] A moving party must assert all arguments upon which it relies in its moving papers and "cannot assert new allegations or arguments raised for the first time on Reply."[6]

III. BOFA'S DISBURSEMENT OBLIGATIONS

BofA served as Disbursement Agent under a Master Disbursement Agreement that controlled the disbursement of funds supplied under three separate but interlocking credit

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[1] FED. R. CIV. P. 56(a).

[2] *SEC v. Keith Group of Cos.*, 95-6702-CIV-Gonzalez, 1998 U.S. Dist. LEXIS 13011 *2 (S.D. Fla. July 7, 1998).

[3] *Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133, 150 (2000).

[4] *Clemons v. Dougherty County*, 684 F.2d 1365, 1369 (11th Cir. 1982).

[5] Id.

[6] *Bumpers v. Austal, U.S.A.*, No. 08-00155-KD-N, 2011 U.S. Dist. LEXIS 57488, at *6 (S.D. Ala. May 26, 2011) (citation omitted). *See also Waddell v. Holiday Isle, LLC,* 2009 U.S. Dist. LEXIS 67669, *11-12 & n.5 (S.D. Ala. Aug. 4, 2009) (citing cases from almost two dozen federal districts following rule).

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facilities for the construction of the Fontainebleau Resort and Casino project.[7] BofA also served as Administrative Agent (aka, "Bank Agent")[8] under the Credit Agreement. In these capacities, BofA provided the full agency role for participating Lenders, including the Term Lenders. It served as the last line of defense for each of the Lenders to ensure that funds were not improperly transferred to the control of the Borrowers. In performing this essential function, BofA was required to strictly adhere to the terms of the Disbursement Agreement. (D.A. § 9.2.2.)

All of BofA's agency activities for the Project were managed by the same group within its Corporate Debt Products Group.[9] Jeff Susman, a Senior Vice President of Corporate Debt Products,[10] had primary management responsibility for BofA's agency activities relating to the Project until his departure in February 2009.[11] After Mr. Susman's departure, the Project was transferred to BofA's workout group, known as the "Special Assets Group," under the charge of Henry Yu.[12]

In undertaking its responsibilities under the Disbursement Agreement, BofA agreed "to exercise commercially reasonable efforts and utilize commercially prudent practices in the performance of its duties consistent with those of similar institutions holding collateral, administering construction loans and disbursing disbursement control funds." (D.A. § 9.1.)

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[7] BofA's Separate Statement of Undisputed Material Facts ("BofA SOUF") ¶ 3. The Master Disbursement Agreement ("D.A.") is attached as Exhibits 1-5 to the Declaration of Brandon Bolio submitted in support of BofA's Motion. The facilities were the Credit Facility, the Retail Facility and the Second Mortgage Facility.

[8] BofA SOUF ¶ 2. The Credit Agreement ("C.A.") is attached as Exhibit 1 to the Declaration of Daniel L. Cantor submitted in support of BofA's Motion ("Cantor Decl."). The Disbursement Agreement uses the term "Bank Agent" to mean BofA in its capacity as Administrative Agent under the Credit Agreement. D.A., Ex. A at p. 3.

[9] Plaintiffs' Statement of Additional Material Facts in Opposition to BofA's Motion for Summary Judgment ("Plts. Add'l SS") ¶ 9. Plts. Add'l SS follows Plaintiffs' Response to BofA's Statement of Undisputed Material Facts ("Plts. Opp. SS") in a single document submitted herewith.

[10] Plts. Add'l SS ¶ 12.

[11] Plts. Add'l SS ¶ 15. The nominal Bank/Administrative Agent, Mr. Naval, and Disbursement Agent, Ms. Brown, described their roles as ministerial. Plts. Add'l SS ¶ 10. They both reported to and took direction from the Corporate Debt Products Group, who made all decisions relating to the disbursement of the loans. Plts. Add'l SS ¶ 11.

[12] Plts. Add'l SS ¶ 16.

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Upon notice of an Event of Default or a Default, BofA agreed to "exercise such of the rights and powers vested in it by this [Disbursement] Agreement . . . and use the same degree of care and skill in their exercise, as a prudent person would exercise or use under the circumstances in the reasonable administration of its own affairs." (D.A. § 9.2.3.)

A. BofA Could Not Disburse Unless All Conditions Precedent Were Satisfied.

The Disbursement Agreement authorized BofA to disburse Loans only "upon the prior satisfaction of each of the conditions precedent set forth in this Section 3.3." Two of those conditioned disbursement upon BofA's receipt of an Advance Request and associated certificates. (D.A. §§ 3.3.4(a), 3.3.5.) The parties could have agreed that BofA was authorized to disburse once it received those documents. If they had, Section 3.3 would have been considerably shorter, and BofA would have been the simple paper-pusher, the institutional rubber stamp that it now claims to have been.[13]

But that is not what the parties agreed. Consistent with industry practice,[14] Section 3.3 established 24 separately-enumerated factual predicates (not including subparts), each of which had to be satisfied before BofA could disburse. Under New York law, conditions precedent are strictly construed and must be fully complied with to be considered satisfied.[15] Those at issue here include:[16]

§ 3.3.2(a). Representations and Warranties. "Each representation and warranty of each Project Entity in Article 4 was true and correct as if made on such date . . . ." These include

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[13] Motion at pp. 6, 24-25. Notably, as BofA points out, its annual agency fees were $165,000. Motion at p. 9. This was multiples of the typical $25,000 fee. RICHARD NIGHT, WARREN COOKE AND RICHARD GRAY, THE LSTA'S COMPLETE CREDIT AGREEMENT GUIDE 465 (McGraw Hill 2009); Lupiani Depo., 150:1-8.

[14] "Credit agreements do not normally allow the mere delivery of a certificate to satisfy the condition itself; rather, the condition will go to the underlying facts . . . ." NIGHT, ET AL., *supra* note 13, at 274.

[15] *Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 690-92 (1995).

[16] BofA's Motion fails to address many of the failed conditions precedent that Plaintiffs previously identified as integral to the issues at hand, specifically, 3.3.3, 3.3.4(a), 3.3.11, 3.3.21, and 3.3.24. *See* Cantor Decl. Ex. 29 at pp. 5-22 (Term Lender Plaintiffs' Amended Responses to Second Set of Interrogatories from Defendant Bank of America, N.A.); Ex. 1503 (Pryor Report) at pp. 8-9, 16-17, 24-30, 38-42, 44-48. The Motion should be denied on this ground alone.

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Section 4.9.1 ("[t]here is no default or event of default under any of the Financing Agreements," including the Retail Facility Agreement and the Credit Agreement) and Section 4.9.2 ("[t]here is no Default or Event of Default hereunder.") It is an Event of Default under the Disbursement Agreement if "[a]ny representation, warranty or certification confirmed or made by any of the Project Entities . . . shall be found to have been incorrect when made or deemed to be made in any material respect." (D.A. § 7.1.3(c).)[17]

§ 3.3.3. Default. "No Default or Event of Default shall have occurred and be continuing."

§ 3.3.4(a). Advance Request and Advance Confirmation Notice. Borrowers were required to provide an Advance Request for an amount "sufficient to pay all amounts due and payable for work performed on the Project through the last day of the period covered by such Advance Request . . . ."

§ 3.3.8. In Balance Requirement. The Project Entities were required to submit "an In Balance Report demonstrating that the In Balance Test was satisfied."

§ 3.3.11. Material Adverse Effect. There had been no "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 [have] be[en] expected to have a Material Adverse Effect" ("MAE").[18]

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[17] Defaults under the Disbursement Agreement included defined Defaults under the Facility Agreements, including the Credit Agreement. D.A., Ex. A at p. 10. Under Section 8(j) of the Credit Agreement, it is a Default if any person "shall breach or default under any term, condition, provision, covenant, representation or warranty contained in any Material Agreement . . . ." The Material Agreements include the Credit and Retail Facility Agreements. C.A. Schedule 4.24; D.A. at Ex. A, pp. 12, 14. Accordingly, any breach or default under any of these Agreements, including a lender failing to fund, was a Default under both the Credit Agreement and, as a result, the Disbursement Agreement.

[18] A MAE includes events or circumstances which "(a) ha[d] a material adverse effect on the business, assets, properties (actual or contingent), operations, conditions (financial or otherwise) or prospects of . . . the Companies and the Subsidiaries, taken as a whole . . . ; (b) materially and adversely affect[ed] the ability of the . . . Project Entities to construct the Project; . . . or (d) materially and adversely affect[ed] the ability of the Project Entities to achieve the Opening Date by the Outside Date."

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§ 3.3.21. Adverse Information. BofA was required to be unaware "of any information or other matter affecting . . . the Project or the transactions contemplated . . . that taken as a whole [wa]s inconsistent in a material and adverse manner with the information or other matter disclosed to them concerning . . . the Project, taken as a whole."

§ 3.3.23. Retail Advances. Each of "the Retail Agent and Retail Lenders" were required to "make any Advances required of them . . . ."

§ 3.3.24. Other Documents. BofA as Bank Agent was required to have "received such other documents and evidence as are customary for transactions of this type" as it "reasonably request[ed] in order to evidence the satisfaction of the other conditions . . . ."

If any condition precedent were not satisfied, BofA had no authority to disburse funds to the Borrowers unless it obtained Required Lender consent, which it never did.[19] (C.A. § 9.3(b).) Accordingly, unless BofA determined that all conditions precedent had been satisfied, it was required to issue a Stop Funding Notice: "In the event that . . . the conditions precedent to an Advance have not been satisfied . . . then the Disbursement Agent *shall*" issue a Stop Funding Notice. (D.A. § 2.5.1 (emphasis added).) Upon the issuance of a Stop Funding Notice, (a) BofA could not "withdraw, transfer or release any funds on deposit in the Accounts," including the Bank Proceeds Account (D.A. § 2.5.2(a)(ii)), and (b) the Lenders were relieved of any obligation under the Credit Agreement to make additional Loans. (C.A. § 2.4(e).) Until the circumstances giving rise to the Stop Funding Notice were resolved, all loan funds were required to remain in the Bank Proceeds Account, beyond the reach of the Borrowers.[20]

B. BofA Could Not Rely on Certificates that It Had Reason to Believe Were Incorrect.

Even if the Disbursement Agreement had conditioned BofA's authority to disburse solely upon its receipt of certificates from the Project Entities, BofA still could not rely upon such certificates if it had reason to believe that they were false. BofA places unsustainable weight on Section 9.3.2, which provides that the Disbursement Agent "shall be entitled to rely" upon

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[19] While BofA had the power to unilaterally waive some conditions, it never waived any of the conditions at issue here and was contractually barred from doing so. Plts. Add'l SS ¶ 23; C.A. § 10.1.

[20] *See* BofA SOUF ¶ 36.

certificates provided by the Project Entities and "shall not be required to conduct any independent investigation as to the accuracy, veracity or completeness" of any such certificate. Section 9.3.2 certainly did not relieve BofA of its obligation to determine the satisfaction of conditions precedent that were not covered by certificates. Nor did it authorize BofA to disburse loan proceeds where it has information inconsistent with certificates. The Disbursement Agreement, governing case law, BofA's own understanding of its obligations and common sense all agree: BofA was under no duty to investigate, but it could not disburse funds to the Borrowers unless and until it resolved known inconsistencies.

1. BofA's Position Is Contrary to the Express Terms of the Disbursement Agreement.

As a definitional matter, a party may not "rely" upon certificates that it has reason to believe may not be trustworthy.[21] The parties reinforced this plain meaning by limiting BofA's ability to rely upon certificates to those "believed by it on reasonable grounds to be genuine *and* to have been signed or presented by the property party or parties." (D.A. § 9.3.2 (emphasis added).) Whether certificates were properly signed was only part of the inquiry. BofA also had to determine that the certificates were "genuine." A document containing a misrepresentation is not genuine by any reasonable definition.[22]

The parties agreed upon specific mechanisms to ensure that BofA did not disburse loan proceeds if it was aware of facts inconsistent with representations made in certificates submitted by the Project Entities.[23] The clearest is Section 7.1.3(c). It was an Event of Default under the

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[21] "Rely" means "to have confidence; have a feeling of security; place faith without reservation; trust." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 1919 (1993).

[22] *See Stanford Seed Co. v. Balfour, Guthrie & Co.*, 27 Misc. 2d 147, 150 (N.Y. Sup. Ct. 1960) ("We conclude that in this context 'genuine' means more than an authentic document. It means a truthful statement of the commercial transaction which it purports to represent, namely, that Western 'received for storage from Balfour' the seed in question.").

[23] When interpreting a contract "the entire contract must be considered, and all parts of it reconciled, if possible, in order to avoid an inconsistency." *Terwilliger v. Terwilliger*, 206 F.3d 240, 245 (2d Cir. 2000). Where there is an inconsistency, specific provisions govern over more general or boilerplate provisions. *Rocon Mfg., Inc. v. Ferraro*, 605 N.Y.S.2d 591, 593 (N.Y. App. Div. 1993) (citation omitted); *see also County of Suffolk v. Long Island Lighting Co.*, 266 F.3d 131,139 (2d Cir. 2001) (specific provisions will limit the meaning of general provisions whether or not there is a true conflict between the two provisions).

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Disbursement Agreement if any representation, warranty or certification by any of the Project Entities (including any Advance Request or other certificate submitted with respect to this Agreement) was "found to have been incorrect." Section 7.1.3(c) establishes that BofA cannot simply ignore known, material inaccuracies in the Project Entities' certificates. To the contrary, if it "found" material inaccuracies in any Borrower certificate, it was placed on notice of an Event of Default, which, as noted above, required it to issue a Stop Funding Notice. (D.A. §§ 2.5.1, 2.5.2(a)(ii), 3.3.3, 9.2.3.)[24]

Section 3.3.21 prohibited disbursements if BofA became "aware" of "any information" concerning the Project or any of the Loan Parties (including the Project Entities) that "taken as a whole" was "inconsistent in a material adverse manner" with other information it had been provided, including any information in any certificates. And if BofA had any question regarding the satisfaction of any other condition precedent, Section 3.3.24 conditioned disbursement on BofA having "received such other documents and evidence" as it "may reasonably request *in order to evidence the satisfaction of the other conditions set forth above*." (D.A. § 3.3.24 (emphasis added).) What BofA was aware of (§ 3.3.21) and what it had received (§ 3.3.24) were facts known to BofA, not the Project Entities; and the Project Entities therefore could not meaningfully certify to the satisfaction of these conditions. This is fundamentally inconsistent with BofA's contention that it was entitled to "rely" upon the broad representation by the Project Entities that "all conditions precedent have been satisfied."[25]

BofA further agreed in Section 9.1 to "exercise commercially reasonable efforts and utilize commercially prudent practices . . . consistent with those of similar institutions holding collateral, administering construction loans and disbursing disbursement control funds." BofA's apparent contention that it is a "commercially prudent practice[]" to rely on certificates notwithstanding actual knowledge to the contrary – if not absurd on its face – is contradicted by the undisputed testimony of its own witnesses and all experts.[26] Even if the testimony were not

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[24] Similarly, in issuing a Stop Funding Notice, BofA was required to "specify, in reasonable detail, the conditions precedent which the Disbursement Agent *has determined* have not been satisfied." D.A. § 2.5.1 (emphasis added).

[25] Motion at pp. 24-25.

[26] Plts. Add'l SS ¶¶ 17-19. BofA also misconstrues Plaintiffs' position. Plaintiffs do not assert that BofA was required to investigate the accuracy of the Borrowers' representations, Motion at

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so aligned, commercial reasonableness is a fact issue that is not appropriate for determination at this time.[27]

Finally, Section 9.10 provides that BofA is liable for damages arising out of "any loss that may occur by reason of . . . false representations" where BofA acts with gross negligence. The fact that BofA could be liable for "false representations" establishes that it could not blindly rely on false certificates, as it now contends.

2. BofA's Position Is Contrary to Settled New York Law.

New York cases uniformly reject a party's claim of reliance upon purported misrepresentations that it knew (or should have known) to be false.[28] Courts have applied this general rule in the specific context of multi-party loan agreements. In *Bank Brussels Lambert v. Chase Manhattan Bank, N.A.*,[29] the borrower under a revolving credit facility filed for bankruptcy, and the lenders brought an action against Chase, the agent bank, alleging that Chase breached the credit agreement by performing its duties with negligence, gross negligence, willful misconduct and fraud.[30] Specifically, the lenders alleged that Chase violated an express condition to funding when it issued a letter of credit in purported reliance on documents from the borrower, including financial statements and a certificate representing that no material adverse

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pp. 27-29, but rather that BofA was prohibited from disbursing unless and until it resolved known inconsistencies.

[27] "The issues of whether [the bank's] actions were prudent or whether they met customary standards present questions of fact separate from the legal question of whether the actions were permissible under" the agreement. *LaSalle Bank N.A. v. Citicorp Real Estate*, Inc., No. 01 Civ. 4389 (AGS), 2002 U.S. Dist. LEXIS 23323, at *12 (S.D.N.Y. Dec. 4, 2002). *See also JP Morgan Chase Bank v. Winnick*, 350 F. Supp. 2d 393, 413 (S.D.N.Y. 2004) ("The issue of whether the Bank's reliance [and failure to inquire] was reasonable or justified is a factual question inappropriate for summary judgment."); *BNP Paribas Mortgage Corp. v. Bank of America*, 2011 U.S. Dist. LEXIS 31362 at *45-46 (S.D.N.Y. Mar. 23, 2011) (whether BofA's failure to act under indenture in the face of known defaults constituted gross negligence or willful misconduct was question of fact requiring denial of motion to dismiss).

[28] *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 500 F.3d 171, 182 (2d Cir. 2007) (a party "cannot demonstrate justifiable reliance on representations it knew were false" or to which it was "knowingly blind") (quoting *Banque Franco-Hellinque de Commerce International et Maritime, S.A. v. Christopides*, 106 F.3d 22 (2d Cir. 1997) (guarantor could not have justifiably relied on false statements he had reason to know were false)).

[29] No. 93 Civ. 5298 (LMM), 1996 U.S. Dist. LEXIS 15631 (S.D.N.Y. Oct. 17, 1996).

[30] *Id.* at *4.

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change had occurred.[31] The lenders claimed that Chase knew (or had reason to know) that the documents were materially inaccurate. Chase did not dispute that the documents were inaccurate but argued, as BofA does here, that the credit agreement relieved it of responsibility for the accuracy of the information the borrower supplied. The Court rejected that argument. "[I]f Chase knew, or was grossly negligent in not knowing, that the materials . . . were materially inaccurate, it cannot argue that those materials were satisfactory in 'substance.'"[32]

Chase Manhattan Bank v. Motorola, Inc. reached a similar result.[33] Motorola had guaranteed a loan by Chase and others to Iridium, a spin-off from Motorola. Iridium issued a certificate in apparent compliance with the loan agreements, which according to the terms of the Guarantee extinguished the Guarantee. Chase, the agent bank, questioned the certificate and demanded that the guarantee be reinstated. The court found that the certificate was materially false and rejected Motorola's claim that it could rely on the false certificate to terminate its obligation because Iridium's issuance of a false certificate was itself an Event of Default under the loan agreement that triggered the guarantee and Motorola "knew, or was on notice of, the false and misleading nature of Iridium's Certificate."[34]

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[31] *Id.* at *17-18.

[32] *Id.* at *19-21. The cases BofA previously relied upon in its unsuccessful Motion to Dismiss do not address whether an agent bank can fulfill its obligations by purporting to rely on statements it has reason to know are inaccurate. Instead, they concern whether or not an agent had a duty to disclose information or a duty to investigate. *See Stanfield Offshore Leveraged Assets, Ltd v. Metro Life Ins. Co.*, 883 N.Y.S.2d 486, 489-90 (N.Y. App. Div. 2009); *UniCredito Italiano SpA v. JPMorgan Chase Bank*, 288 F. Supp. 2d 485, 497-99, 502-03 (S.D.N.Y. 2003); *Cont'l Cas. Co. v. State of N.Y. Mortgage Agency*, No. 94 Civ. 8408 (KMW), 1998 WL 513054 (S.D.N.Y. Aug. 18, 1998).

[33] 184 F. Supp. 2d 384 (S.D.N.Y. 2002).

[34] *Id.* at 395. In connection with a different issue, the court noted that the Credit Agreement at issue expressly provided that Chase could rely on Iridium's certificates "regardless of any investigation made by [it] or on its behalf and *notwithstanding that [Chase] or any Lender may have had notice or knowledge of any [. . .] incorrect representation or warranty*." *Id.* (emphasis added). That demonstrates that the banking industry understands how to write language insulating a bank agent from responsibility for known inaccuracies and misrepresentations in certificates submitted by borrowers. Notably, the parties to the Disbursement Agreement provided no such language, and BofA's attempt to read such language into the agreement is impermissible. *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475-476 (2004) ("courts may not by construction add or excise terms" of a contract).

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3. BofA's Position Is Contrary to Industry Standards and Its Own Understanding.

BofA's own witnesses understood that BofA was not authorized to disburse Loan proceeds to the Borrowers if it knew facts inconsistent with the certificates. Mr. Susman, who oversaw BofA's agency responsibilities, testified that it would not be reasonable for BofA to disregard information that was inconsistent with representations of the Borrowers and that he would expect BofA to inquire further to determine the truth before disbursing.[35] Mr. Bolio (Mr. Susman's right hand man) and Mr. Varnell (who was involved in the drafting of the Disbursement Agreement) concurred.[36]

BofA's own expert, Daniel Lupiani, testified that if an agent had reliable information that was inconsistent with representations and warranties in certificates provided by the borrower, it would be commercially reasonable for the agent to verify the information rather than disbursing in blind reliance on the certificates.[37] Plaintiffs' expert agrees. Shepherd Pryor, a commercial banker with over 35 years of experience, testified that it would not be commercially reasonable for a bank agent to disburse funds when it knew facts that contradicted or were materially inconsistent with certifications provided by a borrower.[38] Rather, the agent should refuse to disburse until all of the inconsistencies are addressed.[39]

IV. BOFA IMPROPERLY DISBURSED TERM LENDER LOAN PROCEEDS DESPITE KNOWN FAILURES OF CONDITIONS PRECEDENT

A. BofA Improperly Disbursed Loan Proceeds Knowing that Lehman Had Defaulted on Its Obligations Under the Retail Facility.

On September 15, 2008, Lehman filed for bankruptcy.[40] This alone had a Material Adverse Effect on the Project and should have resulted in a Stop Funding Notice. Lehman was the Retail Agent and the largest Retail Lender, responsible for $215 million, or $68.25% of the

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[35] Plts. Add'l SS ¶ 17.

[36] Plts. Add'l SS ¶ 18.

[37] Plts. Add'l SS ¶ 19.

[38] Plts. Add'l SS ¶ 20.

[39] Plts. Add'l SS ¶ 21.

[40] BofA SOUF ¶ 64.

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Retail Facility.[41] The Retail portion was critical to the completion of the Project,[42] and Lehman's bankruptcy rendered uncertain the availability of its committed funds.[43] Poor conditions in the credit markets also made it unlikely that a replacement lender could be found.[44] As BofA recognized, any failure by Lehman to fund created a financing gap that could have caused the Project to be shutdown.[45] Mr. Susman understood that Lehman's bankruptcy presented a "big issue" for Fontainebleau,[46] a problem that another BofA executive characterized as the "death nail" for the Project.[47]

Lehman failed to fund its portion of the Retail Advances for September 2008 and at all times from and after December 2008.[48] These failures constituted "Lender Defaults" under the Retail Facility and caused numerous conditions to disbursement to fail. BofA acknowledged that it was not authorized to disburse if the Retail Lenders failed to fund.[49] But that's just what it did, disbursing more than $787 million of Term Lender funds to the Borrowers between September 2008 and March 2009.[50]

1. BofA Knew that Lehman Failed to Make Its Required Retail Advance in September 2008.

Fontainebleau funded Lehman's share of the September 2008 Retail Advance.[51] BofA asserts that it did not know this at the time.[52] The evidence establishes otherwise. Shortly after

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[41] Plts. Add'l SS ¶ 25.

[42] BofA SOUF ¶ 67; Plts. Add'l SS ¶ 26.

[43] Plts. Add'l SS ¶ 27; *see also* Motion at p. 11 ("Lehman's bankruptcy created financial problems for the Project.").

[44] Plts. Add'l SS ¶ 28.

[45] Plts. Add'l SS ¶ 29; BofA SOUF ¶ 67.

[46] Plts. Add'l SS ¶ 30.

[47] Plts. Add'l SS ¶ 31.

[48] BofA SOUF ¶ 78; Plts. Add'l SS ¶¶ 58, 60. Although Lehman ultimately funded in October and November 2008, whether it would fund was "touch and go." Plts. Add'l SS ¶ 57.

[49] BofA SOUF ¶ 66; Plts. Add'l SS ¶ 32.

[50] Plts. Add'l SS ¶ 24.

[51] BofA SOUF ¶ 78.

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Lehman filed for bankruptcy, BofA learned that Fontainebleau was considering funding Lehman's share of the September Retail Advance.[53] BofA "concluded that Fontainebleau funding Lehman's share would not satisfy the Advance Request's conditions precedent."[54] BofA contends that, prior to disbursing funds in September, it never discussed its conclusion with Fontainebleau and never asked directly whether Fontainebleau had funded for Lehman.[55] Instead, it asked the Borrowers to reaffirm all prior representations and warranties.[56] This was a meaningless request because the certifications were self-reaffirming on the date of each scheduled Advance. (D.A. § 4, Ex. C-1.) According to Mr. Yunker, the primary purpose of this request was "to quell concerns not only from BofA but other lenders as to compliance with the condition precedent regarding the retail funding."[57] If so, BofA hardly could have fashioned a more cryptic and less specific request.

BofA continued to close its eyes. Fontainebleau refused BofA's request to have a call with the Lenders "to discuss the implications of the recent bankruptcy filing by Lehman" on the Project.[58] Mr. Freeman, Fontainebleau's CFO, testified that he told Mr. Susman and/or David Howard, the Managing Director of Syndications at Banc of America Securities,[59] that he did not want to have the meeting because there were "limitations on what we were and weren't allowed to say, based on our discussions with counsel."[60]

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[52] Motion at p. 12.

[53] BofA SOUF ¶ 69.

[54] BofA SOUF ¶ 71.

[55] BofA SOUF ¶ 70; Plts. Add'l SS ¶ 40.

[56] Plts. Opp. SS ¶ 74.

[57] Plts. Add'l SS ¶ 33. *See United States v. Nektalov,* 461 F.3d 309, 315 (2d Cir. 2006) (court applied "conscious avoidance" concept to charge defendant with knowledge where he "suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge").

[58] BofA SOUF ¶¶ 87, 89; Plts. Add'l SS ¶ 34.

[59] Plts. Add'l SS ¶ 14.

[60] Plts. Add'l SS ¶ 35. Later, Mr. Freeman referred to his inability to discuss the Lehman situation again when reporting to BofA about a conversation he had with Highland. Plts. Add'l SS ¶ 36.

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BofA certainly knew by late September that Lehman had not funded. Mr. Bolio's contemporaneous notes reflect exactly that.[61] He may have learned this from TriMont, the servicer on the Retail Facility responsible for routing payments under the Retail Facility to BofA.[62] TriMont's McLendon Rafeedie testified that it was his custom and practice to keep his contact at BofA, Jeanne Brown, informed about the status of the loans under the Retail Facility and that, consistent with that practice, it was likely that he informed Ms. Brown that Fontainebleau was funding Lehman's portion of the September Advance.[63] Although Ms. Brown does not recall the specific conversation with Mr. Rafeedie, she does recall learning that Lehman stopped funding "when the market crashed and they filed for bankruptcy" and that Mr. Rafeedie "was having problems getting the money" starting from the time Lehman filed bankruptcy.[64]

Lehman's bankruptcy was of substantial concern to the Lenders. On September 26, 2008, Highland Capital Management (one of the original Term Lenders), notified Mr. Susman that Lehman's bankruptcy meant that "[n]o disbursements may be made under the Loan Facility."[65] Highland sent another email to BofA on September 30, explaining that Lehman's bankruptcy caused a Material Adverse Effect.[66] [redacted]

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[61] Plts. Add'l SS ¶ 37. Although, BofA asserts that "contemporaneous internal BANA documents reflect BANA's belief that Lehman had funded" in September, the only evidence BofA offers is a general statement by Mr. Susman in late December 2008, some three months after the fact. BofA SOUF ¶ 79.

[62] BofA SOUF ¶ 32.

[63] Plts. Add'l SS ¶ 39.

[64] Plts. Opp. SS ¶ 82. Mr. Rafeedie's testimony is hardly "unsupported speculation," as BofA contends. Motion at p. 32 n.37. It is Mr. Rafeedie's best recollection, consistent with his custom and practice, and is fully supported by Ms. Brown's parallel testimony that she learned that Lehman had stopped funding when it filed for bankruptcy. All inferences must be drawn in the favor of the Term Lenders. *See Reeves*, 530 U.S. at 150.

[65] BofA SOUF ¶ 110. [redacted] BofA SOUF ¶¶ 122, 123. BofA has no grounds for this argument. [redacted] Plts. Opp. SS ¶ 123.

[66] BofA SOUF ¶ 114. BofA claims it dismissed Highland's emails because it determined that Highland was wrong even though one of the drafters of the Disbursement Agreement viewed Lehman's bankruptcy as the "death nail" for the Project. Plts. Opp. SS ¶ 121.

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[redacted].[67] Highland even sent to BofA's outside counsel, Bill Scott, a report from a Merrill Lynch industry analyst stating that Fontainebleau had "funded the amount required from Lehman on the retail credit facility"[68] and confirming with Mr. Scott their mutual understanding "that Lehman has not made any disbursements while in bankruptcy."[69] Highland also informed BofA and its counsel that Fontainebleau's funding of Lehman's share would cause the condition in Section 3.3.23 to fail (a conclusion BofA had already reached on its own).[70]

Under pressure from the Lenders, on September 30, 2008, BofA wrote to Mr. Freeman and again requested a call to discuss issues related to Lehman's bankruptcy.[71] Specifically, BofA asked:

> Did Lehman fund its portion of the requested $3,789,276.00 of Shared Costs last Friday (9/26/08) or was this made up from other sources? If Lehman did not fund its portion, what were the other sources?[72]

BofA already knew that the retail portion had been paid.[73] What it wanted to know was the *source* of that payment. Rather than participating in a call in which the Lenders would be able to press for an answer to this question, Mr. Freeman sent a memo on October 7, 2008

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[67] Plts. Opp. SS ¶¶ 116, 117.

[68] Plts. Opp. SS ¶ 117.

[69] Plts. Add'l SS ¶ 41. The Merrill Lynch report was widely disseminated within BofA and to Fontainebleau. Plts. Add'l SS ¶ 42. BofA now asserts that it disregarded the report because the source for the statements was not identified and the analyst report was somehow "suspect" because it overstated Lehman's share of the September Shared Costs and contained only a brief discussion of the Project. Motion at pp. 16, 33. The research analyst who authored the report, however, was a reputable analyst followed by a number of Lenders and had been in direct communication with Fontainebleau prior to October 2008; and [redacted] Plts. Add'l SS ¶¶ 43, 44.

[70] Plts. Add'l SS ¶ 51.

[71] Plts. Add'l SS ¶ 46.

[72] The fact BofA asked this question on September 30, four days after disbursing the September draw, undercuts BofA's claim that it determined the conditions precedent to the Advance were satisfied because it received a single wire from TriMont for the entire requested Shared Costs. Motion at p. 11.

[73] Plts. Add'l SS ¶ 47.

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stating: "In August and September, the retail portion of . . . shared costs was $5mm and $3.8mm respectively, all of which was funded."[74] This shift to the passive voice effectively answered the first question.[75] The funding was from other sources.[76]

Eliminating any doubt that Lehman had not paid its share, [redacted]. [78] So was the fact that the other Retail Lenders were not willing to assume Lehman's commitment under the Retail Facility.[79] Indeed, Fontainebleau and the Retail Lenders asked BofA to take over Lehman's remaining commitment and fill the funding gap.[80] Although it was entitled to do so under an Intercreditor Agreement with Lehman and the Retail Borrower, BofA refused.[81]

The only reasonable inference from these undisputed facts is that BofA knew that Fontainebleau paid Lehman's share of the September 2008 Advance.[82]

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[74] BofA SOUF ¶¶ 90, 91; Plts. Add'l SS ¶ 48.

[75] If BofA failed to realize the significance of Mr. Freeman's choice of words, Highland immediately pointed it out, noting that the October 7, 2008 memo failed to directly answer BofA's question regarding the source of the funding. Plts. Add'l SS ¶¶ 49, 50.

[76] BofA asserts that Fontainebleau informed both Mr. Susman and Mr. Newby that the Retail Lenders had funded in September. BofA SOUF ¶¶ 85, 86. Mr. Susman testified that he was told this by someone at Fontainebleau, but he could not recall who. Plts Opp. SS ¶ 85. Mr. Newby testified that he was told simply that "somebody in the Lehman context was funding their obligations on a as-they-go basis." Plts. Opp. SS ¶ 86. Notably, if BofA believed that it had information establishing that Lehman had funded, there would have been no need to press the issue in its September 30 letter to Mr. Freeman.

[77] Plts. Add'l SS ¶ 52. BofA's claim that it did not know who the Retail Lenders were is belied by the evidence from BofA's own files showing that BofA representatives spoke to and met with these very Lenders regarding the Lehman problem. *See* Motion at p. 3.

[78] Plts. Add'l SS ¶ 53.

[79] Plts. Add'l SS ¶ 54.

[80] Plts. Add'l SS ¶ 55.

[81] Plts. Add'l SS ¶ 56.

[82] Accordingly, Plaintiffs' Motion for Partial Summary Judgment should be granted. At the very

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2. BofA Knew that Lehman Failed to Make Its Required Retail Advance from December 2008 through March 2009.

[redacted] ULLICO, however, refused to assume Lehman's obligations under the Retail Facility.[86]

BofA concedes that it knew that ULLICO funded Lehman's portion of the Advances.[87] BofA also knew that ULLICO had not and would not agree to assume Lehman's remaining commitment.[88] And Fontainebleau's financial statements clearly stated that "there can be no assurances that Lehman Brothers will continue to fund all or any portion of its remaining obligation under the Retail Construction Loan, or that the co-lenders will fund any Lehman

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least, disputed issues of material fact preclude granting BofA's Motion.

[83] Plts. Add'l SS ¶ 58.

[84] Plts. Opp. SS ¶¶ 104, 105.

[85] Plts. Opp. SS ¶¶ 104, 105.

[86] Plts. Add'l SS ¶ 59.

[87] Motion at p. 14; *see also* Plts. Add'l SS ¶ 60.

[88] Plts. Add'l SS ¶ 61.

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Brothers shortfall in funding."[89] BofA at all times knew that the financing gap created by Lehman's bankruptcy had not been cured.[90]

On February 20, 2009, at the Lenders' insistence, BofA again demanded that the Borrowers "comment on the status of the Retail Facility, and the commitments of the Retail Lenders to fund under the Retail Facility, in particular, whether you anticipate that Lehman Brothers Holdings, Inc. will fund its share of requested loans, and whether the other Lenders under the Retail Facility intend to cover any shortfalls."[91] Again, the Borrowers failed to provide a meaningful response.[92] And, again, BofA continued disbursing Term Lender Loans. The Borrowers never found a permanent solution to the Lehman problem. On April 13, 2009, the Borrowers notified the Lenders that the April Retail Advance "may not be fully funded."[93]

3. Lehman's Bankruptcy and Failure to Fund Its Loan Commitments Caused Numerous Conditions Precedent to Fail.[94]

3.3.23. To ensure that loan proceeds were not disbursed if funding under the Retail Facility became impaired, Section 3.3.23 required that the "the Retail Agent and the Retail Lenders shall . . . make any Advances required of them . . . ." Section 2.6.3 amplified this condition: "The Disbursement Agent shall not release any Advances to the Project Entities until . . . the Retail Lenders have made any requested Loans under the Retail Facility." The plain meaning of Section 3.3.23 required Lehman, the Retail Agent, to fund its respective share.[95]

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[89] Plts. Add'l SS ¶ 62. This flatly contradicts BofA's claim that Fontainebleau continued to reassure it that Lehman's share would be funded. Motion at pp. 13-14.

[90] Plts. Add'l SS ¶ 63.

[91] Plts. Add'l SS ¶ 64.

[92] Plts. Add'l SS ¶ 65.

[93] BofA SOUF ¶ 167.

[94] BofA fails to address many of the conditions precedent that the Term Lenders have long asserted failed as a result of Lehman's bankruptcy and failure to fund Advance Requests under the Retail Facility, including Sections 3.3.11, 3.3.21 and 3.3.24. It cannot seek on reply to inject new arguments regarding conditions it did not address in its moving papers. *Bumpers*, 2011 U.S. Dist. LEXIS 57488 at *12.

[95] BofA asserts that Lehman "delegated to ULLICO the Retail Agent's duty to deliver the Shared Costs to BANA." Motion at p. 33. This clearly was not the case. Plaintiffs assume that BofA means TriMont, the designated Servicer on the Retail Facility, not ULLICO. *See* Cantor Decl.

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The "Advances required of" the Retail Lenders were several, not joint. (R.A. § 9.7.2(b).) No Retail Lender was required to make any Advance on behalf of any other Retail Lender; and the failure by any Retail Lender to make an Advance required of it created a potential funding gap that could threaten the Project. By conditioning disbursements upon the payment by each Retail Lender of the Advances required of it, Section 3.3.23 provided an early-warning system for funding issues under the Retail Facility. BofA's concession that payment by non-Retail Lenders violated Section 3.3.23[96] establishes that the critical question was not simply *whether* all of the Retail Advances were made but also *who* made them. If receipt of the Retail Advances from any source were sufficient, Section 3.3.23 would have read, simply: "receipt of the Retail Advance."[97]

At all times, BofA was aware that there was no permanent solution to the Lehman portion of the Retail Facility.[98] Whether it was Fontainebleau, ULLICO or any other person stepping in for Lehman on a month by month basis, Section 3.3.23 failed.[99]

3.3.11. Lehman's bankruptcy had a Material Adverse Effect on the Project. At a minimum, it could reasonably have been expected to have a Material Adverse Effect, resulting in the failure of the condition precedent in Section 3.3.11. BofA does not argue otherwise. Indeed, BofA recognized that any failure to fund by Lehman created a hole in the financing that could

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Ex. 35 [Dep. Ex. 8] (Retail Loan Agreement ("R.A.")) § 9.3. But even with that clarification, BofA's argument is misplaced. Although Lehman delegated its duty to deliver Shared Costs to TriMont, Lehman did not assign TriMont its funding obligation. The fact that TriMont collected the funds from the Retail Lenders and advanced them to BofA does not abrogate Section 3.3.23's requirement that Lehman, as Retail Agent, make its own Advances.

[96] BofA SOUF ¶ 71; *see also* Plts. Add'l SS ¶ 32.

[97] BofA attempts to avoid the clear language of Section 3.3.23 by claiming that the Retail Facility was syndicated under a confidential process and that BofA thus had no ability to determine the amount of each Co-Lender's contribution. Motion at p. 33. This misses the point. BofA knew that ULLICO was funding on behalf of Lehman. Therefore, it could not disburse.

[98] Plts. Add'l SS ¶ 63. The Lenders did not bargain for payment to be made on an ad hoc basis. Such an arrangement gave them no assurance that the loan commitments would be fully funded.

[99] The fact that the Retail Facility Agreement provides the Co-Lenders with the right, although not the obligation, to fund a defaulting Co-Lender's pro-rata share of an Advance does not circumvent the requirements of Section 3.3.23. *See* R.A. § 9.7.2(b).

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have caused the entire Project to shutdown.[100] Mr. Yunker, Vice President of the Global Gaming Team at Banc of America Securities and one of the architects of the Disbursement Agreement,[101] characterized Lehman's bankruptcy as the "death nail" of the Project.[102] Fontainebleau's ability to construct the Project and to complete it on time was compromised. The retail portion of the Project was critical to its completion;[103] Lehman was the largest Retail Lender;[104] Lehman's bankruptcy rendered uncertain the availability of its committed funds;[105] conditions in the credit markets and in Las Vegas made it unlikely that a replacement lender could be found.[106] In fact, the existing Retail Lenders refused to take over Lehman's commitment.[107] Indeed, Fontainebleau ultimately indicated that the Retail Facility would not be funded in full.[108] There is little doubt that Lehman's bankruptcy could reasonably have been anticipated to cause a Material Adverse Effect, just as it did.

3.3.21. The Borrowers were required to and did represent and warrant that all conditions precedent to disbursement, including Lehman's funding of its commitments under the Retail Facility, had been satisfied.[109] BofA knew that this was not true; that Fontainebleau, not Lehman, had funded Lehman's share of the September Advance; and [redacted] BofA also knew that no one else had or was willing to assume Lehman's continuing obligations.[110] Lehman's failure to fund was inconsistent with the information provided by the Borrowers and was, according to BofA's own

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[100] BofA SOUF ¶ 67; Plts. Add'l SS ¶ 29.

[101] Plts. Add'l SS ¶ 13.

[102] Plts. Add'l SS ¶ 31.

[103] Plts. Add'l SS ¶ 26.

[104] Plts. Add'l SS ¶ 25.

[105] Plts. Add'l SS ¶ 27.

[106] Plts. Add'l SS ¶ 28.

[107] Plts. Add'l SS ¶¶ 59, 61.

[108] BofA SOUF ¶ 167.

[109] Plts. Add'l SS ¶ 66.

[110] Plts. Add'l SS ¶ 61.

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witnesses, material and adverse to the Project.[111] BofA's awareness of this information caused Section 3.3.21 to fail. BofA does not argue this condition was satisfied.

3.3.24. Section 3.3.24 conditions disbursement on BofA (as Bank Agent) having "received such other documents and evidence as are customary for transactions of this type as the Bank Agent may reasonably request in order to evidence the satisfaction of the other conditions set forth above." BofA asked for the *source* of payment of Lehman's share of both the September[112] as well as subsequent Retail Advances.[113] Mr. Freeman effectively refused.[114] The Borrowers' failure to provide this information caused the Section 3.3.24 condition precedent to fail and prohibited BofA from disbursing Loan proceeds unless and until the requested information was provided, which it never was. BofA does not argue otherwise.

3.3.3 and 3.3.2(a). BofA conflates defaults under the Retail Facility Agreement with defined Defaults under the Disbursement Agreement. The Term Lenders do not argue that Lehman's bankruptcy and failures to fund were listed as Defaults in Section 8.1 of the Retail Facility Agreement. When Lehman filed for bankruptcy, it became a "Defaulting Lender." (R.A. § I, p. 8.) Its failures to fund Advances as they came due in breach of its obligations were additional "Lender Defaults." (R.A. § I, p. 15, § 2.1.2(c), (e)(ii).) Lehman's defaults were not cured by Fontainebleau's payment of Lehman's share in September 2008 [redacted].[115] [redacted]

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[111] Plts. Add'l SS ¶¶ 29-31, 38.

[112] Plts. Add'l SS ¶¶ 46, 47.

[113] Plts. Add'l SS ¶ 64.

[114] *See* Plts. Add'l SS ¶¶ 48, 49, 65. Without citing any authority, BofA attempts to shift this requirement to the Lenders, claiming the Lenders could have asked Fontainebleau questions. *See* Motion at p. 16. However, BofA was the Disbursement Agent and BofA was required to ask those questions if it wanted to fund in the face of inconsistent information.

[115] [redacted] *See* R.A. § 2.1.2(e)(iii).

[116] [redacted]. Plts. Add'l SS ¶ 67. [redacted] Plts. Add'l SS ¶ 67.

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These breaches and defaults prevented satisfaction of the condition of Section 3.3.3 that "no Default or Event of Default shall have occurred and be continuing."[117] They also prevented satisfaction of Section 3.3.2(a)'s condition that all representations and warranties "set forth in Article 4 . . . shall be true and correct in all material respects . . . ." In Article 4, the Project Entities represented and warranted that "[t]here is no default . . . under any of the Financing Agreements [including the Retail Agreement]" and that "[t]here is no Default or Event of Default hereunder." (D.A. § 4.9, Ex. A, pp. 12, 14.) Both of these representations and warranties were rendered false by Lehman's defaults.[118]

BofA cites Section 9.3 of the Credit Agreement for the proposition that it was not "deemed" to have notice of a Default until it received written notice from the "Borrowers, a Lender or the Issuing Lender."[119] But BofA *was* the Issuing Lender under the Credit Agreement.[120] BofA cannot seriously contend that it should be "deemed" not to have knowledge of a Default because it failed to notify itself in writing. One way or the other, Highland, a Lender, sent BofA emails notifying BofA that no further disbursements could be made due to Lehman's bankruptcy, which was a Material Adverse Effect.[121] This provided the "notice describing such Default" otherwise required under Section 9.3.

Finally, Section 9.3 requiring notice applies to capital "D" Defaults. It does not apply to small "d" defaults under the Financing Agreements (such as Lehman's bankruptcy and failures to fund) or to failed conditions precedent. BofA indisputably knew that Lehman filed for bankruptcy and defaulted on its obligations under the Retail Agreement. BofA also knew that all of Fontainebleau's representations and warranties that there were no defaults under the Retail Facility Agreement were false, preventing the satisfaction of the provision in Section 3.3.2(a). Section 9.3 also applies only to BofA in its capacity as Bank Agent and not in its capacity as

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[117] As explained in Section III(A), breaches and defaults under the Retail Facility Agreement caused defined Defaults under the Disbursement Agreement.

[118] False certifications by the Borrowers were additional Events of Default under the Disbursement Agreement. D.A. § 7.1.3(c).

[119] Motion at pp. 31, 32, 34.

[120] Plts. Add'l SS ¶ 22.

[121] Motion at p. 32.

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Disbursement Agent. Even if the Bank Agent is not deemed to have knowledge of Lehman's bankruptcy and failure to fund, BofA as Disbursement Agent most certainly did. In any event, the very same people at BofA were acting as Disbursement Agent and Bank Agent.[122]

B. BofA Improperly Disbursed Loan Proceeds Knowing that the Borrowers Repeatedly Had Failed to Disclose the True Cost to Complete the Project.

1. BofA Knew that the Borrowers Were Not Disclosing the True Costs.

In connection with each Advance Request, the Borrowers were required to certify that the "In Balance Test" was satisfied. The In Balance Test could only be satisfied if "Available Funds" from the financing sources were equal to or exceeded the "Remaining Costs" necessary to complete the Project, which were set forth in an accompanying Remaining Cost Report. (D.A. Ex. A at p. 26.) The Borrowers were required to represent and warrant in each Advance Request that the Remaining Cost Report "reflects all reasonably anticipated Project Costs required to achieve Final Completion." (D.A. Ex. C-1.)

BofA early on learned that the Borrowers were substantially under-reporting the anticipated cost to complete the Project. In May 2008, the Borrower presented BofA with $201 million of change orders that had not previously been disclosed.[123] The change order documentation revealed that a substantial amount of these change orders had been known to the Borrowers for nearly a year.[124] Jeffrey Susman of BofA stated that learning about the $201 million in additional costs was important to BofA.[125] IVI and BofA both believed that there were additional change orders that the Borrowers had not reported in May 2008, which would further increase Project costs.[126] BofA thus knew not only that prior Advance Requests had impermissibly falsified the anticipated cost to complete the Project, a breach of numerous conditions to disbursement, but that this conduct likely would continue in the future.

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[122] Plts. Add'l SS ¶ 9.

[123] Plts. Add'l SS ¶¶ 70, 71.

[124] Plts. Add'l SS ¶ 72. One change order, which increased the cost of structural steel for the project by $41 million, had been known (but undisclosed) since the weeks following closing of the credit facilities, at the latest. Plts. Add'l SS ¶¶ 73, 74.

[125] Plts. Add'l SS ¶ 75.

[126] Plts. Add'l SS ¶ 76.

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Indeed it did. In the fourth quarter of 2008, representatives of IVI reiterated their concerns to BofA that the Borrowers had not accurately and timely reported anticipated construction costs.[127] BofA and other Lenders were also concerned.[128] The concerns IVI raised in late 2008 remained unresolved by January 2009.[129] IVI reported its concerns to BofA in, among other ways, monthly Project Status Reports. IVI's Project Status Report issued in January stated: "IVI is concerned that all the subcontractor claims have not been fully incorporated into the report and potential acceleration impact to meet the schedule has not been included."[130] IVI also noted that LEED ("Leadership in Energy and Environmental Design") credits—state sales tax credits for environmentally-friendly construction—were not meeting projections, which would further increase costs of construction.[131] IVI believed that more accurate reporting of the LEED credits could increase Project costs by $15 million.[132]

Concerns about the completeness and accuracy of the Borrower's cost information continued in February 2009.[133] IVI's Project Status Report 22, dated March 3, 2009, reiterated the same concerns as the prior reports.[134] IVI again stated its belief that "all the subcontractor claims have not been fully incorporated into the report and potential acceleration impact to meet the schedule has not been included" and that "the LEED credits are tracking behind projections."[135] These concerns were among the reasons BofA referred the Project to its Special

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[127] Plts. Add'l SS ¶ 77.

[128] Plts. Add'l SS ¶ 78. In a December 2008 e-mail, Deutsche Bank raised several issues with BofA. Noting "limited visual progress and reduced activity on site," Deutsche Bank asked whether the completion date had been delayed. Referring to reports of cost overruns, Deutsche Bank asked whether the project remained in balance, and whether there were additional unreported cost overruns. Plts. Add'l SS ¶ 79.

[129] Plts. Add'l SS ¶ 80.

[130] BofA SOUF ¶ 134.

[131] BofA SOUF ¶ 136.

[132] Plts. Add'l SS ¶ 83.

[133] Plts. Add'l SS ¶ 84.

[134] BofA SOUF ¶ 145.

[135] BofA dismisses the concerns expressed by IVI as "gut" feelings, unsupported by evidence. Motion at p. 18. But IVI's Project Status Reports pointed to several specific concerns. IVI was

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Assets Group.[136] In late February, BofA requested a meeting with the Borrower to discuss, among other things, IVI's concerns about cost overruns, but the Borrower refused.[137]

In a March 5, 2009 letter to the Borrowers, copied to BofA, IVI stated that there appeared to be a delay in execution of Owner Change Orders and that the Borrowers appeared to be excluding certain costs from its reports of anticipated costs for the Project.[138] IVI also expressed its concern that the general contractor had committed to work but that the Borrowers had not approved corresponding change orders. IVI remained concerned about LEED credits.[139] IVI explained: "At this point in the project, it is hard to believe that there are no additional costs or claims out there."[140]

The Borrowers finally acknowledged in early March that they expected significant additional costs to complete the Project, stating that the project was $35 million over budget.[141] Following discussions with IVI, the Borrowers acknowledged to IVI and BofA that there were even more outstanding costs and agreed to increase the budget by an additional $50 million.[142]

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concerned about: (i) delays in the opening date; (ii) failure to include overtime in cost reports; (iii) failure to include subcontractor claims; and (iv) LEED credits. Plts. Add'l SS ¶ 81. IVI's Robert Barone confirmed that he was increasingly concerned throughout early 2009 about cost overruns on the Project and was skeptical of the information Fontainebleau provided. Plts. Add'l SS ¶ 84. IVI's next two Project Status Reports repeated its concerns verbatim. Plts. Opp. SS ¶ 137.

[136] Plts. Add'l SS ¶ 88. Other Lenders also raised concerns. On February 12, 2009, Mark Costantino, Executive Director of JP Morgan, wrote to BofA concerned about "the status of the analysis of subcontractor costs and potential cost overruns and the investigation of the LEED credits." Plts. Add'l SS ¶¶ 89, 90.

[137] BofA SOUF ¶¶ 142-143.

[138] BofA SOUF ¶ 149.

[139] Plts. Add'l SS ¶ 102.

[140] Plts. Add'l SS ¶ 94.

[141] BofA SOUF ¶ 153; Plts. Add'l SS ¶ 100.

[142] BofA SOUF ¶ 155.

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IVI believed that the Borrowers had still not reported $15 million in LEED costs.[143] The Borrowers promised an audit of LEED costs, but never provided one.[144]

On March 11, 2009, the Borrowers submitted an Advance Request (including the required Remaining Cost Report) that did not include the additional costs that the Borrowers had disclosed to BofA.[145] IVI rejected it because it did not believe that the information contained in the document was accurate.[146] The 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.[147] The delay of the opening date affected other line items on the Project budget and so resulted in additional budget increases.[148]

IVI remained skeptical about Fontainebleau's representations concerning cost overruns.[149] By this point, the Borrowers had lost IVI's trust.[150] BofA understood that IVI continued to have concerns that the Borrowers were not accurately reporting cost information and understood that IVI's statements in this regard were inconsistent with what the Borrowers were saying.[151] Although in its communications with BofA, IVI suggested an audit, BofA never agreed to an audit to verify the Borrowers' suspect information.[152]

BofA also knew that the Borrowers and their affiliates were seeking to raise hundreds of millions of dollars in additional capital for the Project, using BofA's newly acquired Merrill Lynch division as their investment bankers.[153] In early March, the Borrowers submitted a Notice

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[143] Plts. Add'l SS ¶ 102.

[144] Plts. Add'l SS ¶¶ 103, 104.

[145] Plts. Add'l SS ¶ 105.

[146] Plts. Add'l SS ¶ 106.

[147] Plts. Add'l SS ¶ 107.

[148] Plts. Add'l SS ¶ 107.

[149] Plts. Add'l SS ¶ 108.

[150] Plts. Add'l SS ¶¶ 101, 109.

[151] Plts. Add'l SS ¶ 110.

[152] Plts. Add'l SS ¶ 112.

[153] Plts. Add'l SS ¶ 113.

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of Borrowing that requested $1 billion in additional loan proceeds, including the entire $350 million available under the Delay Draw Term Loan and more than $650 million under the Revolver, amounts that were substantially more than the Borrowers needed in order to pay Project costs that month.[154] Shortly thereafter, the Borrowers proposed that BofA enter into a pre-negotiation agreement with the Borrowers, which increased BofA's concern that the Borrowers were not providing accurate or complete information about the Project.[155] Despite these warning signs, BofA continued to disburse funds to the Borrowers.

Only two weeks after BofA distributed more than $135 million of Term Lender Loans on March 25, 2009, the Borrowers provided BofA with change orders and anticipated change orders totaling over $350 million, nearly $190 million of which was admitted to be for previously committed construction costs.[156] On April 13, 2009, the Borrowers notified the Lenders that one or more events had "occurred which reasonably could be expected to cause the In Balance test to fail to be satisfied."[157] On April 20, 2009, after disbursing more than $787 million of Term Lender proceeds and at a time when there were no Revolver Loans outstanding, BofA, on behalf of itself and other Revolver Lenders, terminated the Revolver Loan under the Credit Agreement, asserting unspecified defaults.[158] As a result, on June 9, 2009 the Borrowers filed a Chapter 11 Petition in the United States Bankruptcy Court for the Southern District of Florida.[159]

2. The Borrowers' Failure to Disclose the True Cost to Complete the Project Caused Numerous Conditions Precedent to Fail.

3.3.2. "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." The Borrowers represented in Section 4.17.2(e) that the information in the Remaining Cost Reports, "with respect to Project Costs previously incurred, is true and correct in all material respects . . . ." This representation was not true because, as BofA knew, the Remaining Cost Reports did not

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[154] Plts. Add'l SS ¶ 114.

[155] Plts. Add'l SS ¶ 115.

[156] Plts. Add'l SS ¶ 116.

[157] BofA SOUF ¶ 167.

[158] BofA SOUF ¶ 173.

[159] In re Fontainebleau Las Vegas Holdings, LLC et al., Case No. 09-21481-BKC-AJC.

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reflect all anticipated Project Costs. Similarly, BofA could not credibly accept the Borrowers' representation in Section 4.14 that the In Balance Test was satisfied, and its representation in Section 4.25 that the Project was on schedule, in light of the information it knew regarding the underreporting of project costs and projected delays in construction.

3.3.4(a). Each Advance Request "shall request an Advance in an amount sufficient to pay all amounts due and payable for work performed on the Project through the last day of the period covered by such Advance Request . . . ." This provision failed because, as BofA knew, the Borrowers had failed to include in the Advance Requests change orders for work that was completed but remained unpaid, in some instances for as long as a year.

3.3.8. "The Project Entities shall have submitted an In Balance Report demonstrating that the In Balance Test is satisfied." This provision failed because the failure of the Project Entities to include all anticipated Project Costs in the Remaining Cost Reports meant that BofA could not determine whether the In Balance Test was satisfied.

3.3.11. "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." This condition failed because the feasibility of completing the construction of the Project was put at substantial and material risk by the substantial cost overruns and the failure of the Project Entities to include all anticipated Project Costs in the Remaining Cost Reports. As a result, BofA could not determine whether the existing financing would be sufficient to complete the Project.

3.3.21. "[T]he Bank Agent shall not have become aware after the date hereof of any information or other matter affecting any Loan Party, Turnberry Residential, the Project or the transactions contemplated hereby that taken as a whole is inconsistent in a material and adverse manner with the information or other matter disclosed to them concerning such Persons and the Project, taken as a whole." BofA's awareness that the Remaining Cost Reports did not reflect all anticipated Project Costs to complete the Project was materially inconsistent with the contrary information provided by the Borrowers.

3.3.24. "In the case of each Advance from the Bank Proceeds Account, the Bank Agent shall have received such other documents and evidence as are customary for transactions of this type as the Bank Agent may reasonably request in order to evidence the satisfaction of the other

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conditions set forth above." BofA and IVI repeatedly requested information concerning the anticipated costs to complete the Project and were repeatedly denied such information.[160]

C. BofA Improperly Disbursed Loan Proceeds Knowing that First National Bank of Nevada Had Defaulted on Its Loan Commitments.

1. BofA Knew that First National Bank of Nevada Defaulted.

First National Bank of Nevada ("FNBN") was a lender under the Credit Agreement whose unfunded commitments totaled $11.67 million ($10 million in Revolving Loans and $1.67 million in Delay Draw Term Loans).[161] FNBN was closed by the Office of the Comptroller of the Currency in July 2008, and the FDIC was thereafter appointed its Receiver.[162] The FDIC repudiated FNBN's obligations under the Credit Agreement on December 19, 2008,[163] causing FNBN to be a "Defaulting Lender."[164] No one assumed FNBN's Loan commitments.[165]

2. First National Bank of Nevada's Default Caused Numerous Conditions Precedent to Fail.

3.3.2(a). When FNBN entered into receivership, it became a "Defaulting Lender" (C.A. § 1.1), and upon its failure to fulfill its funding obligations, a "Lender Default" occurred. (C.A. §§ 1.1, 2.1(b) and (c).) Since FNBN was in default of the Credit Agreement, the representation in Fontainebleau's Advance Requests after the FDIC's repudiation that "there is no default or event of default under any of the Financing Agreements" was incorrect, therefore causing the failure of condition precedent section 3.3.2's requirement that each representation and warranty of each Project Entity set forth in Article 4 be true and correct in all material respects.

BofA does not deny that the FDIC's repudiation constituted a default under the agreements. Instead, BofA alleges that Fontainebleau's representation was not "materially false"

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[160] Plts. Add'l SS ¶¶ 86, 87, 92, 93, 99, 111.

[161] BofA SOUF ¶ 184.

[162] BofA SOUF ¶¶ 181, 182.

[163] BofA SOUF ¶ 183. The FDIC's repudiation letter constituted notice to BofA of a default by a Lender. C.A. § 9.3.

[164] C.A. § 1.1. Even Mr. Susman recognized that the FDIC's repudiation resulted in FNBN defaulting on its obligations. Plts. Add'l SS ¶ 119.

[165] Plts. Add'l SS ¶ 120.

because FNBN's default was immaterial.[166] As a threshold issue, materiality is a mixed question of law and fact[167] and thus is inappropriate for summary judgment where the underlying facts are disputed.

BofA focuses exclusively on the relatively small percentage of FNBN's commitments to the overall financing for the Project. Materiality, however, depends on the totality of the circumstances.[168] In *ECA & Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co.*, a case cited by BofA, the Second Circuit held that "both quantitative and qualitative factors should be considered in assessing a statement's materiality," citing with approval SEC Staff Accounting Bulletin ("SAB") No. 99 regarding the proper assessment of materiality.[169] The non-exhaustive list of qualitative factors that "may affect the materiality of a quantitatively small misstatement" highlighted in SAB No. 99 include whether the misstatement affected compliance with loan covenants or other contractual requirements.[170] The SEC Bulletin also explains that an omission or misstatement is material if, "in the light of surrounding circumstances, the magnitude of the item is such that it is probable that the judgment of a reasonable person relying upon the [misstatement] would have been changed or influenced by the . . . correction of the item."[171] All three cases cited by BofA rejected a bright-line mathematical test of materiality and instead examined the total mix of information available.[172]

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[166] Motion at pp. 34-35.

[167] ECA & Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co., 553 F.3d 187, 197 (2d Cir. 2009); Ganino v. Citizens Utils. Co., 228 F.3d 154, 162 (2d Cir. 2000); see also *United States v. Boffil-Rivera*, 607 F.3d 736, 741 (11th Cir. 2010).

[168] *Ganino*, 228 F.3d at 162 (materiality "necessarily depends on all relevant circumstances of the particular case").

[169] 553 F.3d at 197.

[170] SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45150, 45152 (1999) (to be codified at 17 C.F.R. pt. 211, subpt. B) (representing interpretations and practices followed by the SEC's Division of Corporation Finance and the Office of the Chief Accountant in administering disclosure requirements of federal securities law).

[171] *Id.* at 45151. *See also Parnes v. Gateway 2000*, 122 F.3d 539, 546 (8th Cir. 1997) (finding misrepresentation or omission material if reasonable investor would have viewed disclosure of the omitted fact to have "significantly altered the total mix of information made available"); *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 714 (3d Cir. 1996) (same).

[172] *See ECA*, 553 F.3d at 197-98, 204-05 (adopting the quantitative and qualitative factors set

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A lender default is always material.[173] A default, regardless of the size of the lender's obligation, would have required BofA to deny the Advance Request even under BofA's incorrect position that it simply had to verify that the Advance Request included all of the necessary representations, warranties and certifications. FNBN's default upon the heels of Lehman's collapse was particularly so. Taken in the overall context of the Project and the credit markets as of December 2008, it was unlikely that replacement lenders could be found for either Lehman or FNBN, leaving the Project unfunded in an increasing amount. While FNBN's commitment was relatively small in the overall context of the financing, there was no assurance that the Project could be completed without those funds. BofA's mounting evidence that the Borrowers were concealing the true cost to complete the Project only added to the concern that the remaining funding would be insufficient. As did BofA's knowledge that the deteriorating real estate market had caused the Borrowers to consider as early as October 2007 eliminating the sale of condos from the Project.[174] Although the condos were not scrapped at that time, condo sales lagged well behind schedule and below projections.[175] Without condo sales, the Project faced the prospect of being in default upon opening.[176]

3.3.3. FNBN's defaults under the Credit Agreement created Defaults under both the Credit and Disbursement Agreements. (C.A. § 8(j); D.A. §§ 7.1.1, 7.1.3(c).)[177] Similarly, this caused Section 4.9.2's representation and warranty that there exists no Default or Event of Default under the Disbursement Agreement to be incorrect, further causing Section 3.3.2(a) to fail.

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forth in SAB No. 99 and *Ganino*); *Parnes*, 122 F.3d at 547 (defendant's slight overstatement of assets was found to be immaterial "[t]aken in context" of an initial public offering where investors were faced with a high-risk/high-yield investment opportunity); *Westinghouse*, 90 F.3d at 714-15 (recognizing that the question of materiality must be considered on a case-by-case basis, and "the single rule-of-thumb materiality criterion of 5%-10% of net income or loss should be used—if at all, and by itself—with extreme caution.").

[173] Plts. Add'l SS ¶ 122.

[174] Plts. Add'l SS ¶ 141.

[175] Plts. Add'l SS ¶ 142.

[176] Plts. Add'l SS ¶¶ 139, 140.

[177] *See* Section III(A), *supra*.

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3.3.21. BofA's knowledge of FNBN's repudiation of its loan commitments was materially and adversely inconsistent with the Borrowers' representations to the contrary, triggering the failure of condition precedent Section 3.3.21.

3.3.11. FNBN's default added to the increasing body of adverse facts that BofA possessed beginning in December 2008. Certain of these facts individually could have reasonably been expected to have a Material Adverse Effect on the Project, and by March 2009, they incontrovertibly had a Material Adverse Effect, causing condition precedent Section 3.3.11 to fail.

D. BofA Improperly Disbursed Loan Proceeds Knowing that Numerous Delay Draw Term Lenders Had Defaulted on Their Loan Commitments.

Z Capital Finance LLC, Copper River CLO Ltd, LFC2 Loan Funding LLC, Orpheus Funding LLC, Orpheus Holdings LLC, and Sands Point Funding Ltd (the "Defaulting DDTL Lenders") were Delay Draw Term Loan Lenders with approximately $21.6 million in Delay Draw Term Loan obligations under the Term Loan Facility.[178] The Defaulting DDTL Lenders failed to fund their obligations in response to the Borrowers' March 9, 2009 Notice of Borrowing.[179] This caused a "Lender Default" under the Credit Agreement and caused these Lenders to become "Defaulting Lenders."[180]

The defaults caused Section 3.3.2(a) and the same additional conditions precedent to fail as had FNBN's failure to pay and were material[181] for the same reasons. These defaults were also material because, as BofA acknowledges, reducing the Available Funds to complete the Project by the $21.67 million in defaulted Delay Draw Term Loans caused the critical In Balance

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[178] Plts. Add'l SS ¶ 123.

[179] BofA SOUF ¶ 189.

[180] C.A. § 1.1. Mr. Howard recognized that a lender who failed to fund became a "defaulting lender." Plts. Add'l SS ¶ 124.

[181] BofA's assertion that the missing $21.6 million was not material because BofA had already collected enough Delay Draw Term Loans to fund the requested $138 million in March (Motion at p. 35) is illogical, and taken to the extreme, would mean that BofA believes no default matters until the Project runs out of money. At a minimum, summary judgment is inappropriate because the issue of materiality is a question of fact.

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Test to fail.[182] Nonetheless, on March 25, 2009, BofA elected to disburse more than $136 million of Term Lender Loans to the Borrowers.[183]

BofA asserts that there was no conclusive evidence that the Defaulting DDTL Lenders would not fund.[184] But that hardly matters. The Defaulting DDTL Lenders did not fund prior to BofA's disbursement of funds; and, despite requests to the DDTL Lenders, BofA had no assurance that they would.[185] Indeed, BofA's Mr. Yu testified that while the manager for some of the Defaulting DDTL Lenders claimed that it was trying to round up payment, Mr. Yu was "never sure" whether payment would be made.[186] Ultimately, only approximately half of the outstanding amount was paid.[187]

BofA also asserts that it requested Lenders to notify it if they disagreed with BofA's intent to include the unfunded portion in Available Funds.[188] Contrary to BofA's claim,[189] both Deutsche Bank, a Revolving Lender, and Highland Capital replied.[190] Deutsche Bank questioned why it was "appropriate to allow the inclusion of $21.7m of defaulting lender commitments in the In Balance Test"[191] and Highland responded that as a Lender, it was not obligated "to state a

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[182] Plts. Add'l SS ¶ 125. BofA opted to include the unfunded amount in the Available Funds calculation without providing a rationale for doing so. Plts. Opp. SS ¶ 195.

[183] Plts. Add'l SS ¶ 24. Disbursement to the Borrowers after receipt of only partial funds violated BofA's protocol. Plts. Add'l SS ¶ 126.

[184] Motion at p. 23.

[185] Plts. Opp. SS ¶ 192.

[186] Plts. Add'l SS ¶ 127.

[187] Plts. Add'l SS ¶ 128.

[188] Motion at pp. 23-24.

[189] Motion at p. 24.

[190] Plts. Opp. SS ¶ 196. Mr. Yu acknowledged there were Lenders who disagreed with BofA's interpretation. Plts. Add'l SS ¶ 129.

[191] Plts. Opp. SS ¶ 196.

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position about BofA's interpretation of the credit documents."[192] BofA never addressed these concerns.[193]

E. BofA Improperly Disbursed Loan Proceeds in March 2009 Knowing that the Borrowers Had Failed to Submit a Timely Advance Request and Knowing of the Deterioration of the Project and the Growing List of Failed Conditions Precedent.

The Disbursement Agreement sets forth deadlines for submission, review and approval of Advance Requests. In March 2009, the Borrowers failed to meet these deadlines. As a result, BofA was obligated to reject the Advance Request or, at most, to exercise reasonable discretion in determining whether to process it. BofA's decision to process the March Advance Request in the face of Lehman's bankruptcy, multiple Lender defaults and the substantial and long-running concerns that the Borrowers had concealed the known costs to complete the Project was not reasonable.

1. BofA Was Not Allowed to Request a Revised Advance Request Following IVI's Rejection of the Initial March 2009 Advance Request for Material Misstatements.

When the Borrowers submitted their February Advance Request two days late, BofA demanded that "the Company strictly observe the required deadline for any future draw requests in order to avoid disruption of the funding process."[194] BofA warned that "the Lenders are entitled to insist upon timely deliveries of the Advance Request and you should understand that we will in any event require strict compliance with this deadline going forward." BofA quickly disregarded its own admonition.

On March 11, 2009, the Borrowers submitted an Advance Request with an Advance Date of March 25, 2009.[195] IVI rejected the March 11 Advance Request because of material errors in the Request and the supporting documentation.[196] As Mr. Barone explained, "we no longer

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[192] Plts. Opp. SS ¶ 196.

[193] Plts. Opp. SS ¶ 196.

[194] Plts. Add'l SS ¶ 130.

[195] BofA SOUF ¶ 151.

[196] Plts. Add'l SS ¶ 106; *see also* BofA SOUF ¶ 154.

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believed it."[197] On March 24, 2009, well past the March 11 deadline and less than a day before the Scheduled Advance Date of March 25, 2009 (D.A. § 2.4.1), the Borrowers submitted and BofA accepted a revised Advance Request.[198] Despite its continuing skepticism, IVI ultimately approved the revised Advance Request and submitted a Construction Consultant Certificate.[199] Following additional discussions with BofA, the Borrowers revised the Advance Request yet a second time on March 25, 2009, the same day as the Scheduled Advance Date.[200] The In Balance Report included with the March 25 Advance Request showed that the Project was in balance by a mere $14,084,701.[201]

BofA had no authority to accept either the revised March 24 or March 25 Advance Requests. Section 2.4.4(b) of the Disbursement Agreement only allows resubmission of an Advance Request where it has been rejected for "minor or purely mathematical errors," not where the Construction Consultant has rejected it for material misstatements. In addition, Section 2.4.4(b) required that IVI "deliver to the Disbursement Agent . . . a Construction Consultant Advance Certificate either approving or disapproving the Advance Request" "[n]ot later than four Banking Days prior to the requested Advance Date." IVI's delivery of its Certificate the day before the Advance Date clearly did not allow for this deadline to be met.

2. Even if BofA Were Authorized To Consider The Borrower's Untimely Advance Request, It Could Not in Good Faith Approve It

Where a revised Advance Request is otherwise appropriate, Section 2.4.5 provides that "the Disbursement Agent shall not be required to accept any such updates or revisions, but shall consider their submission in good faith." In light of the deteriorating prospects for the Project and the known failure of multiple conditions precedent, BofA should not in good faith have approved the Request.

By mid-March, there were increasing questions concerning the sources of funding of the Project due to the failure to obtain permanent commitments to fill the financing holes left by

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[197] Plts. Add'l SS ¶ 106.

[198] Plts. Add'l SS ¶ 131; *see also* BofA SOUF ¶¶ 161-164.

[199] BofA SOUF ¶ 163.

[200] BofA SOUF ¶ 165.

[201] BofA SOUF ¶ 165.

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Lehman, FNBN and the Defaulting DDTL Lenders. Lehman repeatedly had failed to fund its portion of the Retail Facility, no replacement had been found, and [redacted]. At the same time, this process also represented a Default each time it occurred. Additionally, the FDIC's repudiation of FNBN's obligations removed those commitments from the available financing sources. Finally, the failure of the Defaulting DDTL Lenders to fund represented further threats to the overall funding schema.

On the other side of the ledger, the cost to complete the Project had increased as the Borrowers' credibility in reporting anticipated costs decreased. The In Balance Reports submitted in March showed that if the Project was in balance, it was only by a razor thin margin.[202] IVI's concerns about additional unreported costs to complete not only indicated that the numbers being supplied by the Borrowers were unreliable, but also resurfaced issues that should have served as warning signs to BofA regarding the integrity of the Borrowers. All of this was occurring at a time of economic stress in the financial markets in general and in the Las Vegas market in particular.[203]

BofA recognized internally the serious and increasing risks the Project presented.[204] When BofA's Special Assets Group became involved with the Project in February 2009, the Project had been assigned a risk rating of 8, the first category of concern on BofA's internal risk rating scale, corresponding to the "special mention" category in United States banking regulations.[205] On March 21, 2009, however, BofA projected a downgrade of the Project to risk rating 9, corresponding to the "substandard" designation under United States banking regulations.[206] BofA implemented the downgrade in early April, noting a "high probability of default at the first covenant test date" and a "50% probability that interest coverage will fall below 1.00x in two quarters . . . ."[207] This downgrade was due in part to BofA's continuing

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[202] BofA SOUF ¶¶ 164, 165.

[203] Plts. Add'l SS ¶ 133.

[204] Plts. Add'l SS ¶ 134.

[205] Plts. Add'l SS ¶ 135.

[206] Plts. Add'l SS ¶ 136.

[207] Plts. Add'l SS ¶ 137.

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concern that "[d]ue to a non-existent condo market on the Las Vegas strip, [Corporate Debt Products] anticipates that none of the 933 condo-hotel units will be sold."[208]

Each of these circumstances should have caused BofA to refuse to disburse and to issue a Stop Funding Notice. Taken together, they formed a series of failed conditions, Defaults and risks that could not be ignored. BofA could not reasonably disburse under these circumstances. Regardless of the other issues, disputed material facts regarding BofA's disbursement of funds on March 2009 preclude granting BofA's Motion.

V. BOFA'S DISBURSEMENT OF TERM LENDER LOANS IN THE FACE OF NUMEROUS KNOWN FAILURES OF CONDITIONS PRECEDENT WAS, AT A MINIMUM, GROSSLY NEGLIGENT

BofA is liable for all loss, including any "loss that may occur by reason of . . . false representations," caused by BofA's gross negligence in the performance of its obligations under the Disbursement Agreement. (D.A. § 9.10.) Gross negligence under New York law is "conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing."[209] A defendant is grossly negligent if it "not only acted carelessly in making a mistake, but [] was so extremely careless that it was equivalent to recklessness."[210]

DRS Optronics, Inc. v. North Fork Bank is instructive.[211] *DRS* involved a custodial agreement governing the disbursement of payments from the US Army Aviation & Missile Command ("AMCOM") under a prime contract with defendant Electro Design Manufacturing, Inc. ("EDM"). DRS was a subcontractor to EDM. DRS and EDM entered into a custodial agreement with North Fork Bank by which the bank agreed to hold payment deposits made by AMCOM and to disburse such payments only pursuant to joint written instructions from EDM and DRS. The custodial agreement provided that the bank's responsibilities were "purely ministerial" and that its liability was limited to conduct constituting "willful misconduct or gross

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[208] Plts. Add'l SS ¶¶ 138, 143.

[209] *Colnaghi, USA. v. Jewelers Protection Servs., Ltd.*, 81 N.Y.2d 821, 823-824 (1993) (internal quotations omitted).

[210] Travelers Indemnity Company of Connecticut v. The Losco Group, Inc., 204 F. Supp. 2d 639, 644 (S.D.N.Y. 2002) (internal citation and quotations omitted).

[211] 843 N.Y.S.2d 124 (2007).

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negligence." When the bank disbursed funds to EDM without DRS's approval or knowledge, DRS sued.

Following discovery, DRS moved for summary judgment on its cause of action against North Fork Bank for breach of the custodial agreement. The trial court denied the motion. The Appellate Division of the New York Supreme Court reversed, concluding that the undisputed facts established that the bank not only had breached the custodial agreement but that "its breach was grossly negligent, since North Fork failed to 'exercise even slight care' or 'slight diligence'" in performing its contractual obligations.[212] In reaching its conclusion, the Court stated:

> Knowing that the plaintiff was relying on the establishment of a secure custodial account to protect its right to receive payment under the subcontract with EDM, North Fork wholly failed to fulfill its contractual obligations to establish such an account as custodian on behalf of EDM and DRS, or to implement any procedure to ensure that the two-signature requirement would be enforced.[213]

BofA's conduct here was far worse. BofA was the gatekeeper for more than a billion dollars of Term Lender Loans, entrusted with the responsibility to disburse such funds to the Borrowers only if each of the express conditions precedent to disbursement was satisfied. BofA did not simply fail to "exercise even slight diligence" when it disbursed Term Lender Loans, it did so knowing that these disbursements were not permitted under the Disbursement Agreement.

Contrary to BofA's assertion that when issues arose BofA gave proper consideration to the Lenders' rights,[214] BofA elected to disregard the knowledge it had and the warnings it had received. Instead, BofA disbursed hundreds of millions of dollars of Term Lender Loans in the face of the numerous failed conditions precedent created by Lehman's bankruptcy and its failures to fund its commitments under the Retail Facility, undisclosed project cost overruns, and the financing holes left by FNBN and the Defaulting DDTL Lenders. Under these circumstances, BofA's conduct was knowing and intentional. At a minimum it was recklessly

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[212] *Id.* at 127.

[213] *Id.* at 127-128.

[214] Motion at p. 30. BofA asserts that it consulted with counsel when issues arose. *Id.* However, BofA has waived any defense premised on the reliance of counsel. Mockler Decl., Ex. A (BofA's Responses and Objections to Plaintiff Term Lenders' Second Set of Rule 21.6.G Interrogatories, Response No. 12).

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indifferent to the rights and interests of the Term Lenders to have their Term Loans disbursed to the Borrowers only if all conditions precedent to disbursement were satisfied.[215]

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[215] None of the cases BofA cites in support of its claim that courts "routinely grant summary judgment" on issues of gross negligence involve even remotely comparable conduct. Motion at p. 29, fn. 29. *See Colnaghi, U.S.A., Ltd. v. Jewelers Protection Services, Ltd.*, 81 N.Y.2d 821 (1993) (failure to properly install burglar alarm); *David Gutter Furs v. Jewelers Protection Services, Ltd.*, 79 N.E.2d 1027 (N.Y. 1992) (same); *Net2Globe Int'l, Inc. v. Time Warner Telecom of New York*, 273 F. Supp. 2d 436, 450-52 (S.D.N.Y. 2003) (termination of long distance service); *Stuart Rudnick, Inc. v. Jewelers Protection Services, Ltd.*, 598 N.Y.S.2d 235 (N.Y. App. Div. 1993) (failure to maintain video camera); *Global Crossing Telecommunications, Inc. v. CCT Communications, Inc. (In re CCT Communications, Inc.)*, 2011 Bankr. LEXIS 2738, at *42-44, 2011 WL 3023501 (S.D.N.Y. July 22, 2011) (termination of service); *Alitalia Linee Aeree Italiane, S.p.A. v. Airline Tariff Publishing Co.*, 580 F. Supp. 2d 285, 294 & n.2 (S.D.N.Y. 2008) (publication of incorrect airline rates).

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