VI. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that BofA's Motion for Summary Judgment be denied.

Dated: September 9, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Dated: September 9, 2011.

Lorenz M. Prüss, Esq.

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

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION

MDL No. 2106

This document relates to all actions.

_____ /

TERM LENDER PLAINTIFFS' RESPONSE TO 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

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The Term Lender Plaintiffs, in accordance with Federal Rule of Civil Procedure 56 and Local Rule 7.5, respectfully submit this Response to Defendant Bank of America, N.A.'s ("BofA") Statement of Undisputed Material Facts and Statement of Additional Material Facts in Opposition to Defendant BofA's Motion for Summary Judgment.[1]

Plaintiffs have not included in this Response the facts that are undisputed or are immaterial and/or irrelevant to BofA's Motion or Plaintiffs' Opposition thereto. Plaintiffs only accept or dispute the facts presented in BofA's Statement of Undisputed Material Facts for purposes of this Response and their Opposition to BofA's Motion for Summary Judgment and for no other purpose. Plaintiffs reserve the right to dispute, challenge or otherwise respond to the facts presented in BofA's Statement of Undisputed Material Facts. Plaintiffs do not dispute the following facts: 1-4, 8, 9, 12, 14-17, 19, 22, 24-27, 31-34, 36-38, 40, 41, 44-48, 51, 52, 54, 55, 61, 62, 64, 65, 67-71, 77, 78, 80, 83, 84, 87-96, 98, 99, 101, 102, 109-114, 119, 126, 127, 132-136, 138, 139, 142-145, 147-153, 155-165, 167, 169, 172, 173, 175-187, 189, 190. Plaintiffs dispute the following facts because they are immaterial and irrelevant: 5-7, 10, 11, 13, 18, 23, 29, 43, 129, 130, 168, 174, 188, 194, 198.

I. PLAINTIFFS' RESPONSE TO BOFA'S STATEMENT OF UNDISPUTED FACTS

20. The Project's resort and retail components each had their own separate credit facilities and construction budgets. (*See* Cantor Decl. Ex. 23 (Susman Dep. at 173:18-174:3); *see* also Disbursement Agmt., Recital C.)

Plaintiffs' Response: Disputed. The statement is inaccurate and misleading. While the resort and retail components each had their own separate facilities and construction budgets, the resort budget included "Shared Costs," which were costs "to be paid for using both the Resort Sources and (to the extent of the Retail Lenders Shared Cost Commitment) the Retail Facility (primarily costs associated with the Podium)."[2] Plaintiffs further dispute that the cited testimony supports the factual proposition for which it is cited. (D.A. Recitals B and C, Ex. A.)

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[1] Plaintiffs' Response is less than the 30 page limit. However, for the convenience of the Court, Plaintiffs have included a recital of BofA's facts in their Response, which is not required by Local Rule 7.5, thereby resulting in this document exceeding the page limit. If requested, Plaintiffs will provide a copy of this Response without including BofA's facts.

[2] Unless otherwise indicated, capitalized terms used herein refer to the defined terms in the Credit Agreement ("C.A."), Disbursement Agreement ("D.A.") and Retail Facility Agreement ("R.A."). (C.A., § 1.1.; D.A. Ex. A; R.A. § 1.1.) The Disbursement Agreement is attached as

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21. FBR specifically designed the retail space's financing to be separate and distinct from the Senior Credit Facility. (*See* Cantor Decl. Ex. 23 (Susman Dep. at 173:18-174:3).)

Plaintiffs' Response: Disputed. While the Senior Credit Facility was separate from the Retail Facility, the resort budget included Shared Costs. Further, the cited evidence does not support the statement. (*See* Response to No. 20.)

28. The Retail Facility was syndicated under a separate confidential agreement among the Retail Co-Lenders (the "Retail Co-Lending Agreement"). (*See* Cantor Decl. Ex. 85 [Dep Ex. 9].)

Plaintiffs' Response: Disputed. The evidence cited does not support the statement that the Retail Co-Lending Agreement was confidential.

30. The identity of the Retail Co-Lenders was unknown to BANA until the Borrowers revealed the participants in late 2008. (Susman Decl. ¶ 10.)

Plaintiffs' Response: Disputed. The statement is ambiguous as to "late 2008." BofA knew the identity of the Retail Co-Lenders by, at the latest, October 16, 2008. (Exs. 231, 232.)[3]

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

Plaintiffs' Response: Disputed. The statement is ambiguous as to which "certain terms and conditions" and which "Lenders" BofA is referencing. The statement is an inaccurate and misleading characterization of the Disbursement Agreement to the extent it suggests that the referenced funding process applied to Initial Term Loans. A Notice of Borrowing was only submitted by the Borrowers when seeking Delay Draw Term Loans and/or Revolving Loans. The Initial Term Loans were funded into the Bank Proceeds Account upon closing of the credit facility. (C.A. §§ 2.1(a), (b) and (c), 2.4, 5.2(a); D.A. § 2.1.1.)

Exhibits 1-5 to the Declaration of Brandon Bolio ("Bolio Decl."). The Credit and Retail Agreements are attached as Exhibits 2 and 35, respectively, to the Declaration of Daniel L. Cantor ("Cantor Decl.").

[3] Exhibits submitted by BofA in support of its Motion are referred to by the exhibit number assigned to them by BofA. Exhibits not included by BofA are attached to the accompanying Appendix of Exhibits and cited by their deposition exhibit number. Exhibits that were not marked at a deposition are numbered sequentially beginning with No. 1501. All deposition testimony is attached to the accompanying Appendix of Testimony.

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

Plaintiffs' Response: Disputed. The statement mischaracterizes the cited evidence, and is misleading to the extent it suggests that BofA's responsibility with respect to an Advance Request set forth in Section 2.4.6 was satisfied by simply confirming the Advance Request contained the necessary information. Rather, BofA was required to determine whether the conditions precedent were satisfied. Section 2.4.6 requires that: "When the applicable conditions precedent set forth in Article 3 have been satisfied, the Disbursement Agent shall notify the Project Entities and the Project Entities and Disbursement Agent shall execute an Advance Confirmation Notice setting forth the amount of the Advances to be made pursuant to each Financing Agreement on the Advance Date . . . ." Similarly, Section 2.5.1 required BofA to identify the conditions precedent it "determined have not been satisfied" in issuing a Stop Funding Notice. Further, certain conditions precedent, e.g., Sections 3.3.21 and 3.3.24, could not be confirmed simply by reference to materials contained in the Advance Request. (D.A. §§ 2.4.6, 2.5.1, 3.3.21, 3.3.24.)

42. Each Advance Request required Fontainebleau, among other things, to "represent, warrant and certify" that "the conditions set forth in Section[] 3.3 … of the Disbursement Agreement are satisfied as of the Requested Advance Date." (*See* Bolio Decl. ¶ 6, Ex. 2 (Disbursement Agmt. Ex. C-1, at 8).) The Advance Request also included multiple specific representations that generally tracked the substance of Section 3.3's conditions precedent. (*Id.* at 5-8.) In addition, Fontainebleau certified that each of the seventeen Advance Request attachments "is what it purports to be, is accurate in all material respects, . . . and reflects the information required by the Disbursement Agreement to be reflected therein." (*Id.* at 1.)

Plaintiffs' Response: Disputed. The statement is ambiguous as to "generally tracked." The last sentence of the statement is an incomplete and misleading excerpt from the Advance Request, which specifically states: "Each of the following attachments to this Advance Request is what it purports to be, is accurate in all material respects, is consistent with the requirements of the Disbursement Agreement, and reflects the information required by the Disbursement Agreement to be reflected therein, in each case as of the Advance Date specified above." Further, the statement is misleading in that it incorrectly implies that submission of a facially conforming Advance Request would satisfy all conditions precedent. (D.A. Ex. C-1 at pp. 1-2.)

49. After receiving the Retail Co-Lenders' funds, TriMont sent a single wire transfer for the entire requested Shared Cost amount to BANA—it did not identify the specific amounts funded by each Retail Co-Lender. (*See* Cantor Decl. [redacted] Cantor Decl. Ex. 23 (Susman Dep. at 204:9-10).)

Plaintiffs' Response: Disputed. The statement is an inaccurate and misleading characterization insofar as TriMont did not always send a single wire transfer, but rather sometimes sent multiple wires. The statement is also misleading because it was TriMont's custom and practice to keep its contact at BofA, Jeanne Brown, informed about the status of the loans under the Retail Facility. (Bolio Decl. Ex. 29; Rafeedie Dep., 34:19-35:18.)

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

Plaintiffs' Response: Disputed. The statement mischaracterizes Section 3.3.23 of the Disbursement Agreement and is misleading to the extent it suggests that Section 3.3.23 provides that as long as the entire amount of Shared Costs due under the Retail Facility was funded, regardless of whether the Retail Agent and each Retail Lender funded their respective portions, the funds could be disbursed to Fontainebleau from the Bank Proceeds Account. It does not. Section 3.3.23 requires that the Retail Agent and each Retail Lender fund its portion: "In the case of each Advance from the Bank Proceeds Account made concurrently with or after Exhaustion of the Second Mortgage Proceeds Account, the Retail Agent and the Retail Lenders shall, on the date specified in the relevant Advance Request, make any Advances required of them pursuant to that Advance Request." (D.A. § 3.3.23.)

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

Plaintiffs' Response: Disputed. The statement mischaracterizes the cited evidence and is misleading to the extent it suggests the transfer of funds from the Bank Proceeds Account to payment accounts was not subject to the satisfaction of conditions precedent. BofA as Bank Agent was not permitted to transfer the requested funds unless "the applicable conditions precedent set forth in Article 3 have been satisfied." Further Section 3.3 provides that "[t]he obligation . . . of the Bank Agent to make Advances from the Bank Proceeds Account are each

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subject to the prior satisfaction of each of the conditions precedent set forth in this Section 3.3 . . . ." (D.A. §§ 2.4.6, 3.3.)

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

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

57. For each Advance Request from September 2008 through March 2009, BANA received all the required advance certifications from Fontainebleau, TWC, IVI and BWA:

- Fontainebleau certified the satisfaction of all conditions precedent and accuracy of all representations and warranties, including the absence of defaults under the Loan Documents. (*See* Bolio Decl. ¶ 13, Exs. 7-19);
- TWC certified and confirmed that the Control Estimate reflected the costs it expected to be incurred to complete the Project. (*Id.*);
- BWA certified that the construction performed on the Project to date was in accordance with the Project's plans and specifications. (*Id.*); and
- IVI certified that the Remaining Cost Report accompanying the Advance Request accurately reflected the remaining costs required to complete the Project. (*See* Bolio Decl. ¶ 15, Exs. 21-28.)

Plaintiffs' Response: Disputed. IVI rejected the initial March 2009 Advance Request because it included material misstatements. Further, the statement incorrectly suggests that receipt of certifications was all that was required for satisfaction of the conditions precedent. (Bolio Decl. Ex. 36 [Dep. Ex. 860]; Barone Dep., 60:24-62:16; *see also* Response to No. 39.)

58. In exchange for managing the $1.85 billion Senior Credit Facility, the Disbursement Agent and Administrative Agent earned just $40,000 and $125,000 per year, respectively. (*See* Bolio Decl. ¶ 12, Ex. 6; Cantor Decl. Ex. 17 (Naval Dep. at 17:17-18:25).)

Plaintiffs' Response: Disputed. The statement is misleading to the extent it suggests that the agency fees BofA received were less than the typical agency fee. In fact, BofA's fees were much greater than the typical fee of $25,000. (RICHARD NIGHT, WARREN COOKE AND RICHARD GRAY, THE LSTA'S COMPLETE CREDIT AGREEMENT GUIDE 465 (McGraw Hill 2009); Lupiani Dep., 150:1-8.)

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59. Disbursement Agreement Article 9 sets forth the Disbursement Agent's rights and responsibilities. Section 9.3.2 expressly provides, among other things, that BANA "may rely and shall be protected in acting or refraining from acting upon" certifications and other statements by Fontainebleau and IVI, and that "[n]otwithstanding anything else in this Agreement to the contrary, in … approving any Advance Requests, … [BANA] "shall be entitled to rely on certifications from the Project Entities . . . as to satisfaction of any requirements and/or conditions imposed by this Agreement." Section 9.3.2 also states that BANA "shall not be required to conduct any independent investigation as to the accuracy, veracity or completeness of any such items [in the Advance Request] or to investigate any other facts or circumstances to verify compliance by the Project Entities with their [Disbursement Agreement] obligations." (Disbursement Agmt. § 9.3.2.)

Plaintiffs' Response: Disputed. The statement is misleading to the extent it suggests that the Disbursement Agent's rights and responsibilities were only set forth in Article 9 of the Disbursement Agreement. Article 9.2.2 provides that the Disbursement Agent's rights and responsibilities are set forth in the entire Agreement: "The Disbursement Agent is authorized to take such actions and to exercise such powers, rights and remedies under this Agreement . . . as are specifically delegated or granted to the Disbursement Agent by the terms hereof . . . , together with such powers, rights and remedies as are reasonably incidental thereto." (D.A. § 9.2.2.)

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

Plaintiffs' Response: Disputed. The statement mischaracterizes the cited evidence, which provides that Fontainebleau was only required to provide notification of Defaults of which it was aware. Further, the statement is also ambiguous because it confuses a "default" with a "Default" as defined in the Disbursement Agreement. The statement is misleading to the extent it suggests that the only way the Disbursement Agent received notice of a default or a Default was by written notice from Fontainebleau. Nothing in the Disbursement Agreement prevents the Disbursement Agent from determining the existence of a default or a Default on its own, or from receiving notice of a default or a Default by any other means. For example, the Disbursement

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Agent can be notified of a Default by a Controlling Person, who is BofA in its role as Bank Agent. As Bank Agent, BofA is deemed to have knowledge of a Default when it receives notice from any Lender or from the Issuing Lender, which is also BofA. (C.A. §§ 1.1, 9.3; D.A. § 2.5.1, Ex. A.)

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

Plaintiffs' Response: Disputed. The statement mischaracterizes the cited provisions and suggests that they are identical to the Disbursement Agreement. The cited provisions and the Credit Agreement as a whole speak for themselves. (*See* Responses to Nos. 59-60.)

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

Plaintiffs' Response: Disputed. (*See* Response to No. 50.)

72. BANA believed that it was required to honor Fontainebleau's September 2008 Advance Request if the entire requested Shared Costs were received from TriMont, and the Advance Request certifications remained in effect. (Cantor Decl. Exs. 23, 10 (Susman Dep. at 173:22-174:3; Howard Dep. at 80:21-81:8).)

Plaintiffs' Response: Disputed. The statement misleadingly suggests that BofA believed it was correct to honor the September 2008 Advance Request. BofA knew that Fontainebleau had funded Lehman's share and knew that this did not satisfy the Advance Request's conditions precedent, and so BofA could not approve the September 2008 Advance Request. (*See* Plaintiffs' Statement of Additional Material Facts in Opposition to BofA's Motion for Summary Judgment ("Plts. Add'l SS") ¶¶ 17-19, 29-53.)

73. On September 26, 2008, TriMont sent BANA a single wire transfer for the entire Retail Shared Costs requested amount. (Cantor Decl. Ex. 38 [Dep. Ex. 241]; *see also* Cantor Decl. Ex. 12 (Brown Dep. at 78:20-79:5).)

Plaintiffs' Response: Disputed. The cited evidence does not indicate that TriMont sent BofA a single wire transfer for the entire Retail Shared Costs on September 26, 2008. The cited

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e-mail merely indicates the "Lehman portion has arrived." Ms. Brown's testimony is contradictory: she testified that she does not remember writing the email but claims she was referring to the entire amount due under the Retail Facility because, before Lehman's bankruptcy, she was unaware that there were Retail Lenders other than Lehman. However, the email was written on September 26, 11 days after Lehman's bankruptcy, and Ms. Brown does not remember when she learned there were additional Retail Lenders other than it being "at some point after the Lehman bankruptcy." She also does not remember whether it was a day or a month later. Other evidence demonstrates that sometimes TriMont sent individual wires of the Retail Lenders' money. (Bolio Decl. Ex. 29; Brown Dep., 77:4-81:23.)

74. On September 26, 2008, before disbursing funds to Fontainebleau, BANA received representations from Fontainebleau CFO Jim Freeman re-affirming the Advance Request's certifications that all conditions precedent to funding—including funding by the Retail Lenders—were satisfied. (Cantor Decl. Ex. 39 [Dep. Ex. 75]; *see also* Cantor Decl. Exs. 6, 13 (Yunker Dep. at 143:23-145:2; Freeman Dep. at 215:18-217:14).)

Plaintiffs' Response: Disputed. The statement mischaracterizes the cited evidence, and is misleading to the extent it suggests the cited email indicates that the Retail Lenders funded. It does not. Mr. Freeman affirmed "that the representations and warranties which the Companies made pursuant to the Advance Request and Advance Confirmation Notice" "remain accurate and may be relied upon in making of the Advance . . . ." Further, the statement incorrectly suggests that BofA could blindly rely on Mr. Freeman's representation even in the face of known contradictory evidence.

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

Plaintiffs' Response: Disputed. Mr. Susman's statement in his declaration conflicts with and is outweighed by the other evidence. BofA had many reasons to believe the Retail Agreement was invalid. On September 26, 2008, one of the Term Lenders, Highland Capital Management ("Highland"), notified BofA and BofA's outside counsel that the Retail Agreement was no longer valid and that "[n]o disbursements may be made under the Loan Facility." BofA also knew that Lehman had breached is obligation under the Retail Agreement by not funding its share of the September 26, 2008 Advance Request. (Cantor Decl. Ex. 41 [Dep. Ex. 455]; Ex. 473; Ex. 475 at BANA_FB00846433; Ex. 898; Bolio Dep., 59:15-60:25.)

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76. Based on information from Fontainebleau and BANA's own involvement in other syndicated loans, BANA understood in September 2008 and thereafter that Lehman was continuing to honor some loan commitments. (Cantor Decl. Ex. 23 (Susman Dep. at 176:21-177:12); *see also* Susman Decl. ¶ 20.)

Plaintiffs' Response: Disputed. The evidence cited contradicts each other. Mr. Susman testified that "in September . . . there was no consistent response to whether [Lehman] were funding their advance requests or not. . . . [S]o our view was, we didn't know if they would fund or not." Mr. Susman's deposition testimony is confirmed by other evidence that BofA understood in September 2008 and thereafter that there were no assurances that Lehman would continue to honor its commitment. (Cantor Decl. Ex. 54 at FBR01280966 [Dep. Ex. 286]; Exs. 67, 68; Ex. 206 at p. 3; Ex. 251; Ex. 831 at p. 4; Exs. 896, 899, 907; Bolio Dep., 40:17-41:10; Brown Dep., 85:17-86:4, 112:19-113:4, 130:11-19; Howard Dep., 27:22-28:9, 109:8-112:7; Susman Dep., 145:16-147:24, 176:21-177:12, 213:14-21, 220:22-221:18, 277:19-278:9; Varnell Dep., 69:7-10; Yunker Dep., 24:17-25:6, 52:13-53:4, 63:19-64:10.)

79. Internal BANA documents reflect BANA's belief in 2008 that Lehman funded in September 2008. *(See, e.g.,* Cantor Decl. Ex. 56 [Dep. Ex. 905].)

Plaintiffs' Response: Disputed. The cited evidence is dated December 30, 2008, over three months after the September 26, 2008 Advance, and conflicts with other BofA internal documents that were contemporaneous with the September Advance that demonstrate BofA knew that "Lehman did not fund their share." (Ex. 204; Ex. 475 at BANA_FB00846433; Bolio Dep., 59:15-60:25.)

81. Mac Rafeedie testified that he could not "recall the exact things that were discussed in that call" with BANA but that "consistent with [his] practice," he "could have" told BANA that FBR funded for Lehman; but he also testified that the discussion "could have been just that Lehman's dollars were funded, not necessarily who funded what." (Cantor Decl. Ex. 5 (Rafeedie Dep. at 57:13-58:19).)

Plaintiffs' Response: Disputed. The statement mischaracterizes Mr. Rafeedie's testimony by selectively quoting excerpts of the testimony. Mr. Rafeedie also testified that it was "[c]orrect" that consistent with his general practice and custom of keeping BofA apprised of significant events with respect to the retail facility, he would have told Ms. Brown about the fact that Lehman did not fund. (Rafeedie Dep., 34:19-35:18, 53:5-54:5, 54:22-58:19, 62:14-63:9.)

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82. BANA's Jeanne Brown testified that she did not recall ever having discussed with Mac Rafeedie whether Lehman itself funded in September 2008. (Cantor Decl. Ex. 12 (Brown Dep. at 57:1-8; 64:17-65:3; 66:15-24).)

Plaintiffs' Response: Disputed. The statement mischaracterizes Ms. Brown's testimony and is misleading. Ms. Brown testified that she does not recall whether she did or did not discuss with Mr. Rafeedie whether Lehman itself funded in September 2008. However, she also testified that she does recall learning that Lehman stopped funding "[w]hen the market crashed and they filed for bankruptcy" and that Mr. Rafeedie "was having problems getting the money" starting from the time Lehman filed for bankruptcy. (Brown Dep., 55:6-21, 56:13-22, 66:10-67:2.)

85. Jim Freeman told BANA's Jeff Susman that Retail Lenders had funded the September 2008 Shared Costs. (Cantor Decl. Ex. 23 (Susman Dep. at 193:20-194:4).)

Plaintiffs' Response: Disputed. The statement overstates Mr. Susman's testimony and is contrary to other evidence in the record. Mr. Susman only testified that he vaguely recalls someone at Fontainebleau (although he could not recall who or when) saying that the Retail Lenders funded for Lehman. His recollection is contradicted by the fact that BofA, under his direction, continued to ask Mr. Freeman who funded Lehman's share of the September Advance. (Cantor Decl. Ex. 42 [Dep. Ex. 76]; Susman Dep., 193:20-196:25.)

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

Plaintiffs' Response: Disputed. The statement misstates Mr. Newby's testimony. Mr. Newby testified that he was simply told that "somebody in the Lehman context was funding their obligations on a as-they-go basis" but that he never knew precisely who funded in Lehman's place. (Newby Dep., 63:22-64:22.)

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

Plaintiffs' Response: Disputed. The statement is misleading to the extent it selectively quotes a portion of the document cited and takes the quoted language out of context. FBR's financial statements also include the following language: "[t]here can be no assurances that Lehman Brothers will continue to fund all or any portion of its remaining obligation under the Retail Construction Loan, or that the co-lenders will fund any Lehman Brothers shortfall in funding." (Cantor Decl. Ex. 54 at FBR01280966 [Dep. Ex. 286].)

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100. In December 2008, BANA learned that Union Labor Life Insurance Company ("ULLICO") would fund Lehman's Shared Costs portion. (Cantor Decl. Ex. 23 (Susman Dep. at 269:24-270:19); Cantor Decl. Ex. 56 [Dep. Ex. 905].)

Plaintiffs' Response: Disputed. The statement is ambiguous to the extent it suggests that BofA learned that ULLICO would fund Lehman's entire Shared Costs portion. While BofA learned in December 2008 that ULLICO would front Lehman's Shared Cost portion for that month, BofA was aware ULLICO's funding was temporary. (*See* Plts. Add'l SS ¶¶ 54, 59-65.)

103. There is no evidence that BANA was aware that ULLICO's payments on behalf of Lehman were effectively made by Jeff Soffer, FBR and Turnberry Residential Limited Partners ("TRLP").

Plaintiffs' Response: Disputed. The statement is completely unsupported by evidence and therefore violates Local Rule 7.5(c)(2)'s requirement that each statement "[b]e supported by specific references to pleadings, depositions, answers to interrogatories, admissions, and affidavits on file with the Court." Further, evidence in the record suggests that BofA knew that ULLICO's payments were made by Jeff Soffer, FBR and TRLP. (*See* Rafeedie Dep., 34:19-35:18, 55:16-24.)

104. In December 2008, ULLICO entered an agreement with Soffer, FBR and TRLP under which ULLICO would pay Lehman's December 2008 Retail Advance portion, and Soffer, FBR and TRLP would guaranty repayment within ninety days. (*See* Cantor Decl. Ex. 55 [Dep. Ex. 24].)

Plaintiffs' Response: Disputed. The statement is inaccurate and ambiguous. On December 29, 2008, ULLICO entered into a Guaranty Agreement with Soffer, FBR and TRLP ("Guarantors"). The Guaranty did not provide that the Guarantors would repay ULLICO Lehman's December 2008 Retail Advance portion within ninety days. Rather, the Guaranty provided that the Guarantors would repay ULLICO "upon demand by ULLICO after the earlier to occur of: (i) Lehman fails to fund its pro rata share of any subsequent advance . . . and substitute loan or equity proceeds in the full amount of Lehman's pro rata share of the advance are not advanced in lieu thereof by any . . . other party, or (ii) March 29, 2009 . . . ."

105. [redacted] (*See* Cantor Decl. Exs. 58, 60, 78 [Dep. Exs. 30, 36, 42].)

Plaintiffs' Response: Disputed. The statement is inaccurate and misstates the evidence. [redacted]

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[redacted] Under the Third Amendment, in March 2009: (1) the Guarantors repaid ULLICO a portion of the outstanding guaranteed amount in the amount of $1,000,0000; (2) Mr. Soffer pledged his distributions for a certain shopping mall to ULLICO; (3) ULLICO paid Lehman's portion of the March Advance (using in part the $1,000,000), which the Guarantors agreed to repay; and (4) the Guaranty was modified to provide that the outstanding guaranteed obligations would be repaid upon ULLICO's demand after the earlier of "(i) Lehman fails to fund it pro rata share of any subsequent advance . . . or (ii) May 29, 2009." (Cantor Decl. Exs. 55, 58, 60, 78 [Dep. Exs. 24, 30, 36, 42]; Exs. 23, 26, 29, 31, 32, 35, 37, 38, 41, 43-48, 53, 54, 59, 61-63; Freeman Dep., 126:25-127:12, 128:16-129:16; [redacted] Rafeedie Dep., 83:16-84:2, 98:19-99:2.)

106. [redacted]

Plaintiffs' Response: Disputed. The statement is inaccurate and misstates the evidence. (*See* Response to No. 105.)

107. [redacted]

Plaintiffs' Response: Disputed. The statement is inaccurate and misstates the evidence. (*See* Response to No. 105.)

108. [redacted]

Plaintiffs' Response: Disputed. (*See* Response to No. 103.)

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

Plaintiffs' Response: Disputed. Mr. Susman's declaration is outweighed by the evidence that shows that BofA knew that there would be a shortfall in Retail Funds due to Lehman's bankruptcy. Lehman was the largest Retail Lender; Lehman's bankruptcy rendered uncertain the availability of its committed funds; conditions in the credit markets made it unlikely that a replacement lender could be found; and the existing Retail Lenders had refused to take over Lehman's commitment. Further, BofA knew Lehman failed to fund its share of the September 2008 Advance. (Cantor Decl. Exs. 38, 42, 47, 62, 63 [Dep. Exs. 241, 76, 77, 498, 811]; Cantor Decl. Ex. 54 at FBR01280966 [Dep. Ex. 286]; Cantor Decl. Ex. 85 at Ex. A [Dep. Ex. 9]; Exs. 16, 18; Ex. 19 at p. 3; Exs. 23, 67, 68, 78, 80, 115; Ex. 206 at p. 3; Exs. 230-233, 251, 254; Ex. 475 at BANA_FB00846433; Exs. 493, 497, 609, 814; Ex. 831 at p. 4; Exs. 834, 896, 899, 903; Ex. 906 at BANA_FB00811830; Exs. 907, 1502, 1504; Bolio Dep., 40:17-41:10, 59:15-60:25, 79:18-81:6; Brown Dep., 42:4-8, 43:18-24, 85:17-86:4, 112:19-113:4, 130:11-19; Freeman Dep., 56:24-57:3, 74:12-24, 92:17-94:3, 106:11-109:9, 226:24-227:20; Howard Dep., 10:16-23, 21:3-23, 27:22-28:9, 39:13-40:6, 104:14-106:23, 109:8-114:4, 117:17-24, 142:13-146:13, 147:25-148:6; [redacted] Kotite Dep., 18:10-15; Rafeedie Dep., 18:22-19:8, 34:19-35:10, 40:22-43:7, 53:5-54:5, 54:21-58:12, 62:14-63:9, 111:12-112:20; Susman Dep., 145:16-148:9, 150:22-151:5, 154:13-155:5, 213:14-21, 220:22-221:18, 247:4-248:18, 252:2-10, 273:7-275:10, 277:19-278:9; Varnell Dep., 69:7-10, 192:19-193:1; Yu Dep., 125:25-126:14; Yunker Dep., 24:17-25:6, 35:22-38:8, 38:16-39:23, 52:13-53:4, 63:19-64:10, 96:11-98:6, 111:3-112:12, 147:19-148:7, 167:17-169:6; *see also* Exs. 205, 463.)

116. [redacted] Cantor Decl. Ex. 45 [Dep. Ex. 458].) [redacted]

Plaintiffs' Response: Disputed to the extent the statement is misleading by characterizing the public reports as "unidentified." At least one public report was identified as the report by Merrill Lynch analyst, John Maxwell, dated October 3, 2008. (Cantor Decl. Ex. 50 [Dep. Ex. 459]; *see also* Ex. 230.)

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117. On October 13, Highland forwarded to BANA a Merrill Lynch research analyst's e-mail that discussed nine industry developments and, in the only sentence referring to Fontainebleau, stated: "We understand that FBLEAU equity sponsors have funded the amount required from Lehman on the retail credit facility due this month ($4 million)." (Cantor Decl. Ex. 50 [Dep. Ex. 459].) The Merrill Lynch research e-mail that Highland forwarded to BANA did not identify a source or basis for the statement, and it overstated Lehman's Shared Costs portion. (*Id.*)

Plaintiffs' Response: Disputed. [redacted]

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

Plaintiffs' Response: Disputed. The statement is misleading to the extent it suggests that the fact equity sponsors funded Lehman's September 2008 Shared Costs portion was only a rumor. Fontainebleau did in fact fund Lehman's September 2008 Shared Costs portion and Mr. Maxwell reported that he understood that fact. BofA also knew that Fontainebleau had funded for Lehman in September 2008. (BofA SOUF ¶ 78; Cantor Decl. Exs. 40, 50 [Dep. Exs. 14, 459]; Exs. 56, 61, 78, 80, 1502; Freeman Dep., 75:13-76:4; [redacted] Kotite Dep., 22:13-16; Susman Dep., 264:24-265:3; *see* Plts. Add'l SS ¶¶ 17-19, 33-37, 39-53.)

120. [redacted]

Plaintiffs' Response: Disputed. The evidence cited does not support the statement that no other analysts reported that fact. [redacted] (*See* Response to No. 118.)

121. BANA evaluated Highland's claim, but rejected it in view of the numerous representations and warranties made by Fontainebleau in the September and October 2008

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Advance Requests, the continued receipt of the requested Shared Costs from TriMont, and the other statements by Fontainebleau. (Susman Decl. ¶ 24.)

Plaintiffs' Response: Disputed. Mr. Susman's statement in his declaration is outweighed by the evidence that shows that BofA did not evaluate Highland's claims but turned a blind eye to them. Indeed, one of the drafters of the Disbursement Agreement, Mr. Yunker, viewed Lehman's bankruptcy as the "death nail" for the Project. Further, BofA could not rely on the representations and warranties made by Fontainebleau in light of the known contradictory information it had. (Exs. 67, 79; Yunker Dep., 39:3-23; *see* Plts. Add'l SS ¶¶ 17-18, 26-53.)

122. In September 2008, numerous credible publications reported that certain Highland funds had suffered staggering losses and faced a liquidity crunch. (Cantor Decl. Ex. 24 (P. Paulden, Highland Shuts Funds Amid 'Unprecedented' Disruption, BLOOMBERG (Oct. 16, 2008)).)

Plaintiffs' Response: Disputed. This statement is not material to the summary judgment motion or Plaintiffs' response thereto. There is no evidence that BofA reviewed or relied on the cited document at the time. Contemporaneous evidence shows that BofA dismissed Highland's claims out of hand. (*See* Response to No. 121.)

123. [redacted]

Plaintiffs' Response: Disputed. The statement misstates Mr. Rourke's testimony and is not material to the summary judgment motion or Plaintiffs' response thereto. [redacted] Further, there is no evidence that BofA considered Highland's motivations at the time. Contemporaneous evidence shows that BofA dismissed Highland's claims out of hand. (*See* Response to No. 121; [redacted]

124. Many Lenders contacted Fontainebleau management directly in the fall of 2008 to raise questions, among other things, about the Lehman bankruptcy's implications for the Project. (Cantor Decl. Exs. 36, 46, 48, 53 [Dep. Exs. 278, 281, 280, 282].)

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Plaintiffs' Response: Disputed. The statement is overly broad and ambiguous. The cited evidence shows that four Lenders contacted Fontainebleau management directly in the fall of 2008. Only one of the four Lenders, Brigade, raised the issue of Lehman's bankruptcy.

125. [redacted]

Plaintiffs' Response: Disputed. The statement is not supported by the cited evidence and misstates Mr. Rourke's testimony. [redacted].

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

Plaintiffs' Response: Disputed. The statement is completely unsupported by evidence and therefore violates Local Rule 7.5(c)(2)'s requirement that each statement "[b]e supported by specific references to pleadings, depositions, answers to interrogatories, admissions, and affidavits on file with the Court." Further, Highland raised the Lehman bankruptcy numerous times with BofA and specifically identified it as a default under the credit facility. There is no reference or requirement under the Disbursement Agreement or Credit Agreement for a "formal Notice of Default." Rather, the Agreements contemplated that BofA would know of a Default without a formal notice. Under the Disbursement Agreement, when BofA was "notified that an Event of Default or a Default has occurred and is continuing," BofA was required to "use the same degree of care and skill in their exercise, as a prudent person would exercise or use under the circumstances in the reasonable administration of its own affairs." Under the Credit Agreement, BofA was deemed to have knowledge of a Default upon receipt of "notice describing such Default . . . ." Notices under both Agreements could be delivered via e-mail. (D.A. §§ 9.2.3, 11.1; C.A. §§ 9.3, 10.2; Cantor Decl. Ex. 41 [Dep. Ex. 455]; Exs. 79, 456, 473, 898.)

131. Each month, the Contractor provided IVI with an Anticipated Cost Report ("ACR")—an estimate of additional costs that might be incurred in the future based, in part, on change orders submitted by subcontractors. (Cantor Decl. Ex. 22 (Barone Dep. at 16:6-20); *see also* Barone Decl. ¶ 13.)

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Plaintiffs' Response: Disputed. Plaintiffs agree that the Contractor provided ACRs to IVI for certain months. However, the cited evidence does not support the statement that the Contractor provided ACRs for all months. (Ex. 917; *see* Badala Dep., 126:7-127:5.)

137. The concerns IVI raised in PSR 21 were only "gut" feelings, and IVI had no evidence supporting its suspicions. (Barone Decl. ¶ 17.)

Plaintiffs' Response: Disputed. The concerns were based on all of the information IVI and BofA had access to, which included site visits, documents provided by the Borrowers, and e-mail and verbal conversations with Fontainebleau representatives that led them to believe the Borrowers were understating project costs. IVI's Robert Barone confirmed that he was increasingly concerned throughout early 2009 about cost overruns on the Project and skeptical of the information Fontainebleau provided. IVI's next two Project Status Reports repeated its concerns verbatim, showing that IVI and BofA had failed to receive satisfactory information to address their concerns. (Cantor Decl. Ex. 66 at pp. 7, 22-24 [Dep. Ex. 600]; Cantor Decl. Ex. 69 [Dep. Ex. 604]; Ex. 828 at pp. 7, 22; Ex. 851 at ¶¶ 11-28; Ex. 910 at ¶¶ 39, 41; Badala Dep., 25:9-16, 55:7-60:6; Barone Dep., 40:6-41:1, 75:19-76:3, 77:22-78:4; Brown Dep., 23:4-24; Yu Dep., 37:25-38:23, 156:12-24; *see also* Exs. 495, 692; Ambridge Dep., 202:20-206:22, 211:20-212:19, 213:12-15.)

140. Fontainebleau responded to BANA's letter on February 23, 2009, denying that there were "any cost overruns or acceleration costs that are not reflected in the Anticipated Cost Report" and stating that "[i]f all of these anticipated costs materialized and there were no offsetting cost savings, the In Balance test would continue to be satisfied" and that "we believe that the full amount of the [LEED] credits reflected in the Budget *will in fact be realized*," and that it was "in the process of engaging auditors to investigate and audit the subcontractors." (*See* Cantor Decl. Ex. 63 [Dep. Ex. 811].)

Plaintiffs' Response: Disputed. It is undisputed that Fontainebleau sent the letter on February 23, 2009, but the statement selectively quotes the letter and italicizes portions of the letter that were not in fact italicized.

141. Fontainebleau's February 23, 2009 letter assured BANA that it was "continuing active discussions with Lehman Brothers and the co-lenders to ensure that funding for the Project will continue on a timely basis," and that the "Retail Facility is in full force and effect, [and] there has not been an interruption in the retail funding of the Project to date." (*Id.*)

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Plaintiffs' Response: Disputed. It is undisputed that Fontainebleau sent the letter on February 23, 2009, but the letter did not provide BofA with assurance. (Cantor Decl. Ex. 63 [Dep. Ex. 811]; Yu Dep., 125:25-126:14.)

146. Because IVI still had no facts or evidence to support its hunch, it executed the Construction Consultant Advance Certificate for the February 2009 Advance Request. (Barone Decl. ¶ 20, Ex. 6.)

Plaintiffs' Response: Disputed. The citied evidence does not support the statement that IVI had no facts or evidence or that its concerns were based only on a "hunch." IVI and BofA had substantial information about the Project from site visits, documents provided by the Borrowers, and e-mail and verbal conversations with Fontainebleau representatives that led them to believe the Borrowers were understating project costs. IVI was increasingly concerned throughout early 2009 about cost overruns on the Project and skeptical of the information Fontainebleau provided. These concerns were among the reasons BofA referred the Project to its Special Assets Group. In addition, 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." (*See* Response to No. 137; *see also* Cantor Decl. Ex. 61 [Dep. Ex. 810]; Yu Dep., 21:5-15, 35:11-36:2.)

154. Based on the March 11, 2009 Advance Request and Fontainebleau's March 12 disclosures, IVI issued a Construction Consultant Advance Certificate on March 19, 2009 that, for the first time, declared that IVI had discovered material errors in the Advance Request and supporting documentation. (Cantor Decl. Ex. 73 [Dep. Ex. 610]; Barone Decl. ¶ 25, Ex. 9.)

Plaintiffs' Response: Disputed. It is undisputed that IVI issued a Construction Consultant Advance Certificate on March 19, 2009 that found material errors in the Advance Request, as stated in the cited document. However, it is disputed and unsupported by the cited evidence that this was the first time that IVI knew about such errors. (Cantor Decl. Ex. 66 at pp. 7, 22-24 [Dep. Ex. 600]; Cantor Decl. Ex. 69 [Dep. Ex. 604]; Ex. 851 at ¶¶ 11-28; Ex. 910 at ¶¶ 39, 41; Barone Dep., 40:6-41:1, 75:19-76:3, 77:22-78:4; Yu Dep., 156:12-24; Ex. 692.)

166. On March 26, 2009, having received all required documentation, including IVI's Certificate, and after receiving the Retail Shared Costs, BANA transferred the Advance to Fontainebleau. (*See* Bolio Decl. ¶ 25.)

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Plaintiffs' Response: Disputed. It is undisputed that BofA transferred the Advance to Fontainebleau. However it is disputed and unsupported by the cited evidence that BofA received "all required documentation." In fact, by March 2009, BofA had information from various sources that contradicted the documentation it received from the Borrowers and others. In addition, BofA had failed to receive documents and evidence that it had requested. (*See* Plts. Add'l SS ¶¶ 70-115, 132-136, 139-145.)

170. On April 17, 2009, Fontainebleau held a Lender meeting to discuss sudden construction cost increases. (Cantor Decl. Ex. 19 (Yu Dep. at 236:22-237:11).)

Plaintiffs' Response: Disputed. [redacted]. (*See* Plts. Add'l SS ¶¶ 70-115, 117-118, 132-143.)

171. [redacted] (Cantor Decl. Ex. 81 at 13, 20 [Dep. Ex. 268]); *see also* Cantor Decl. Ex. 13 (Freeman Dep. at 202:3-6); Cantor Decl. Ex. 19 (Yu Dep. at 240:16-24).)

Plaintiffs' Response: Disputed. The statement misstates the evidence cited. [redacted]

191. Two lenders—Z Capital and Guggenheim—did not immediately fund their collective $21.67 million commitment. (Cantor Decl. Ex. 19 (Yu Dep. at 168:21-169:14).)

Plaintiffs' Response: Disputed. The statement is misleading as to "immediately fund." Neither Z Capital nor Guggenheim (which together controlled a total of six lender funds) funded when their commitments were due or prior to BofA's disbursement of funds in March. (Exs. 212, 291-B, 470, 487-489, 491, 634, 637, 638, 835; Bolio Dep., 137:4-15, 141:3-15, 144:11-145:5, 148:19-25, 149:9-18; Freeman Dep., 279:2-280:8; Howard Dep., 190:18-21; Yu Dep., 168:21-169:14, 267:7-268:23.)

192. After reaching out to both Z Capital and Guggenheim, BANA decided to continue including the Guggenheim and Z Capital commitments as "Available Funds" for In Balance Test purposes because there was no conclusive evidence that they would not fund. (Cantor Decl. Ex. 19 (Yu Dep. 259:4-7).)

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Plaintiffs' Response: Disputed. It is undisputed that BofA continued to include the Guggenheim and Z Capital commitments as "Available Funds" for In Balance Test purposes. However, the statement is an inaccurate and misleading characterization and is contrary to other evidence in the record. Z Capital and Guggenheim each stated that it would not fund its obligations in response to the March Advance Request, and BofA had no assurances that they would fund. (Exs. 470, 487-489, 491, 634, 637, 638, 835; Bolio Dep., 136:11-138:15, 141:3-15, 148:19-25, 149:9-18; Yu Dep., 232:3-23, 267:7-268:23.)

193. Guggenheim advised BANA that it was "rounding up all the parties" and intended to fund its $10 million commitment—which it did several weeks later. (Cantor Decl. Ex. 19 (Yu Dep. at 228:15-229:4); Cantor Decl. Ex. 19 (Yu Dep. at 168:13-169:14).)

Plaintiffs' Response: Disputed. The statement is an inaccurate and misleading characterization of Guggenheim's representation as to whether it would fund and is contrary to other evidence in the record. Guggenheim stated that it would not fund its obligations in response to the March Advance Request, and BofA had no assurances that Guggenheim would fund. (Exs. 470, 489, 491, 634, 638, 643, 835; Bolio Dep., 148:19-25, 149:9-18; Yu Dep., 232:3-23, 267:7-268:23.)

195. Before approving the March 2009 Advance Request, BANA sent the Lenders a March 23, 2009 letter explaining why it intended to disburse the requested funds. BANA disclosed to the Lenders that Z Capital and Guggenheim had not yet funded their respective Delay Draw Term Loan commitments and that excluding those amounts "from Available Funds would result in a failure to satisfy the In-Balance test [sic]." BANA advised the Lenders that it was "willing to include" the unfunded commitment amounts in the In Balance Test's Available Funds component for the March Advance "pending further information about whether these lenders will fund." BANA invited "any Lender which does not support these interpretations [to] immediately inform [BANA] in writing of their specific position." (Cantor Decl. Ex. 76 [Dep. Ex. 104].)

Plaintiffs' Response: Disputed. It is undisputed that BofA sent a letter on March 23, 2009 that included the quoted language. However, BofA never explained why it intended to disburse the requested funds or why it was "'willing to include' the unfunded commitment amounts in the In Balance Test's Available Funds component for the March Advance."

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196. There is no evidence that any Lender contacted BANA to dispute its analysis in the March 23, 2009 letter or otherwise direct BANA not to fund the March 2009 Advance Request.

Plaintiffs' Response: Disputed. The statement is completely unsupported by evidence and therefore violates Local Rule 7.5(c)(2)'s requirement that each statement "[b]e supported by specific references to pleadings, depositions, answers to interrogatories, admissions, and affidavits on file with the Court." Further, the statement is inaccurate. Contrary to BofA's claim, both Deutsche Bank, a Revolving Lender, and Highland Capital, a Term Lender, replied. Deutsche Bank questioned why it was "appropriate to allow the inclusion of $21.7m of defaulting lender commitments in the In-Balance Test" and Highland responded that as a Lender, it was not obligated "to state a position about Bank of America's interpretation of the credit documents." BofA never addressed these concerns. (Exs. 471, 832, 1505; [redacted]

197. BANA funded the March 2009 Advance Request. (Bolio Decl. ¶ 25.)

Plaintiffs' Response: Disputed. The statement is inaccurate. BofA did not fund the March 2009 Advance Request. Rather, BofA disbursed to Fontainebleau Term Loans funded by the Term Lenders. (Exs. 252, 634-636, 637, 639-642.)

II. PLAINTIFFS' STATEMENT OF ADDITIONAL MATERIAL FACTS IN OPPOSITION TO DEFENDANT BANK OF AMERICA, N.A.'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

A. Additional Material Contract Facts

1. In addition to the conditions precedent BofA set forth in its Statement of Undisputed Material Facts, Section 3.3 of the Disbursement Agreement also includes the following conditions precedent to disbursement:

> **§ 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 . . . ." (D.A. § 3.3.4(a).)
>
> **§ 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 is inconsistent in a material and adverse manner with the information or other

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> matter disclosed to them concerning . . . the Project, taken as a whole." (D.A. § 3.3.21.)
>
> **§ 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 . . . ." (D.A. § 3.3.24.)

2. The Disbursement Agreement contains the following language in Section 7.1:

The occurrence of any of the following events shall constitute an event of default ("Event of Default") hereunder:

> **7.1.1.** The occurrence of an "Event of Default" under and as defined by any one or more of the Facility Agreements . . . . (D.A. § 7.1.1.)
>
> **7.1.3(c).** Any 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).)

3. The Disbursement Agreement contains the following language in Section 9.1:

> The Disbursement Agent . . . agrees to exercise commercially reasonable efforts and utilize commercially prudent practices in the performance of its duties hereunder consistent with those of similar institutions holding collateral, administering construction loans and disbursing disbursement control funds. (D.A. § 9.1.)

4. The Disbursement Agreement contains the following language in Section 9.2.3:

> If the Disbursement Agent is notified that an Event of Default or a Default has occurred and is continuing, the Disbursement Agent shall . . . 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.)

5. The Credit Agreement contains the following language in Section 8(j):

> If any of the following events shall occur and be continuing: . . . (j) Any . . . other Person shall breach or default under any term, condition, provision, covenant, representation or warranty contained in any Material Agreement . . . . (C.A. § 8(j).)

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6. The Credit Agreement and the Retail Agreement define "Defaulting Lender" to include "any Lender that is the subject (as a debtor) of any action or proceeding. . . relating to bankruptcy, insolvency, reorganization or relief of debtors . . . ." (C.A. § 1.1. at pp. 11-12; R.A. § 1.1 at p. 8.)

7. The Credit Agreement and the Retail Agreement define "Lender Default" to include "the failure or refusal . . . of a Lender . . . to make available . . . its portion of any Loan . . . ." (C.A. § 1.1 at p. 25; R.A. § 1.1. at p. 15.)

8. BofA received a copy of the Retail Facility Agreement and received copies of all amendments to that agreement. (C.A. § 6.2(f); Ex. 1510.)

B. Additional Material Facts Regarding BofA's Role and Responsibilities

9. BofA's activities as Administrative and Disbursement Agents for the Project were managed by the same group within its Corporate Debt Products Group. (Susman Dep., 14:20-15:25, 18:21-19:18, 39:7-40:5, 49:22-50:15, 52:2-7, 53:10-22, 59:1-25, 62:14-18, 63:24-64:5, 65:6-17, 68:8-14, 70:8-23, 253:12-254:1.)

10. The nominal Bank/Administrative Agent, Mr. Naval, and Disbursement Agent, Ms. Brown, described their roles as ministerial. (Brown Dep., 11:2-9, 30:14-31:10, 32:4-6, 32:16-34:4, 35:7-36:2, 36:8-11, 39:8-40:2, 63:22-64:16, 87:21-88:10, 95:17-96:19; Naval Dep., 14:17-25, 15:13-16:6, 20:21-22:8, 23:25-24:3, 25:17-21, 27:25-28:7, 29:4-6, 35:18-36:20, 56:10-57:7, 96:8-13, 98:23-99:4.)

11. Mr. Naval and Ms. Brown both reported to and took direction from the Corporate Debt Products Group, who made all decisions relating to the disbursement of the loans. (Bolio Dep., 24:5-12, 26:2-27:25, 28:8-29:2, 30:1-15, 32:21-33:4, 71:10-72:9, 83:3-7, 86:3-13, 279:9-18; Brown Dep., 30:14-31:10, 32:4-6, 33:10-34:4, 35:7-36:2, 49:7-50:19, 63:22-64:16, 87:21-88:10; Naval Dep., 20:21-22:8, 23:25-24:3, 29:4-6, 56:10-57:7, 58:2-8, 96:8-13, 98:23-99:4.)

12. Jeff Susman was a Senior Vice President of Corporate Debt Products of BofA. (Ex. 1; Susman Dep., 15:22-25.)

13. Mr. Yunker was the Vice President of the Global Gaming Team at Banc of America Securities and one of the architects of the Disbursement Agreement. (Ex. 1; Varnell Dep., 35:8-16, 176:8-14; Yunker Dep., 84:18-85:8.)

14. David Howard was the Managing Director of Syndications at Banc of America Securities. (Ex. 1; Howard Dep., 104:14-106:23.)

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15. Mr. Susman had primary management responsibility for BofA's agency activities relating to the Project until his departure in February 2009. (Bolio Dep., 24:5-12, 26:2-27:25, 28:8-29:2, 30:1-15, 32:21-33:4, 71:10-72:9, 83:3-7, 86:3-13, 279:9-18; Brown Dep., 11:2-9, 30:14-31:10, 32:4-6, 32:16-34:4, 33:10-34:4, 35:7-36:2, 36:8-11, 39:8-40:2, 49:7-50:19, 63:22-64:16, 87:21-88:10, 95:17-96:19; Naval Dep., 14:17-25, 15:13-16:6, 20:21-22:8, 23:25-24:3, 25:17-21, 27:25-28:7, 29:4-6, 35:18-36:20, 56:10-57:7, 58:2-8, 96:8-13, 98:23-99:4; Susman Dep., 18:21-19:18, 39:18-40:5, 49:22-50:15, 52:2-7, 53:10-22, 59:1-25, 62:14-18, 63:24-64:5, 65:6-17, 68:8-14, 70:8-23, 253:12-254:1.)

16. After Mr. Susman's departure, the Project was transferred to BofA's Special Assets Group under the charge of Henry Yu. (Bolio Dep., 93:19-95:12; Howard Dep., 173:22-174:15; Yu Dep., 12:9-17, 13:6-15.)

17. Mr. Susman 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. (Susman Dep. 181:9-19, 182:22-183:20.)

18. Mr. Bolio (Mr. Susman's right hand man) and Mr. Varnell (who was involved in the drafting of the Disbursement Agreement) testified that it would not be reasonable for BofA to disregard information that was inconsistent with representations of the Borrowers. (Bolio Dep., 164:20-165:12, 175:6-18; Varnell Dep., 211:13-212:5.)

19. 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. (Lupiani Dep., 89:8-90:8, 132:11-19, 151:7-17, 153:7-155:9, 166:20-167:24.)

20. Plaintiffs' expert, Shepherd Pryor, a commercial banker with over 35 years of experience, stated 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. (Ex. 1503 at ¶¶ 33-38.)

21. Mr. Pryor opined that a bank agent should refuse to disburse until all of the inconsistencies are addressed. (Ex. 1503 at ¶¶ 33-38.)

22. BofA was also the Issuing Lender under the Credit Agreement and Mr. Susman signed the agreement on behalf of BofA as Issuing Lender. (C.A. at pp. 1, 145.)

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23. BofA never waived any condition precedent to disbursement. (Howard Dep., 76:17-77:2, 77:17-20, 129:20-130:1; Varnell Dep., 182:20-183:1; *see also* Susman Dep., 171:24-172:22.)

24. BofA disbursed approximately $788 million of Term Lender funds to the Borrowers from September 2008 through March 2009. BofA disbursed: $99,332,189.81 of the Initial Term Loan on September 25, 2008; $101,914,293.51 of the Initial Term Loan on October 28, 2008; $143,838,250.93 of the Initial Term Loan on November 25, 2008; $102,800,125.34 of the Initial Term Loan on December 30, 2008; $88,801,951.38 of the Initial Term Loan on January 28, 2009; $50,241,078.79 of the Initial Term Loan on February 25, 2009; $68,000,000 of the Delay Draw Term Loan on March 10, 2009; [redacted] of the Initial Term Loan and [redacted] of the Delay Draw Term Loan on March 26, 2009. (Bolio Decl. Ex. 21 [Dep. Ex. 237]; Exs. 243-252, 622-629, 634-636, 639-642, 653-655.)

C. Additional Material Lehman Facts.

25. Lehman was the Retail Agent and the largest Retail Lender, responsible for $215 million, or $68.25% of the Retail Facility. (Cantor Decl. Ex. 85 at Ex. A [Dep. Ex. 9]; Ex. 23; Ex. 831 at p. 4; Ex. 1504.)

26. The Retail portion of the financing was critical to the completion of the Project. (Freeman Dep., 56:24-57:3; Howard Dep., 39:13-40:6; [redacted] Kotite Dep., 18:10-15; Susman Dep., 154:13-155:5; Yunker Dep., 35:22-38:8, 38:16-39:23.)

27. Lehman's bankruptcy rendered uncertain the availability of its committed funds. (Cantor Decl. Ex. 54 at FBR01280966 [Dep. Ex. 286]; Exs. 67, 68; Ex. 206 at p. 3; Ex. 251; Ex. 831 at p. 4; Exs. 896, 899, 907; Bolio Dep., 40:17-41:10; Brown Dep., 85:17-86:4, 112:19-113:4, 130:11-19; Howard Dep., 27:22-28:9, 109:8-112:7; Susman Dep., 145:16-147:24, 213:14-21, 220:22-221:18; Varnell Dep., 69:7-10; Yunker Dep., 24:17-25:6, 52:13-53:4, 63:19-64:10.)

28. Poor conditions in the credit markets made it unlikely that a replacement lender for Lehman could be found. (Howard Dep., 117:17-24; Susman Dep., 147:25-148:9; Yunker Dep., 37:19-38:8, 39:8-23.)

29. BofA recognized that any failure by Lehman to fund created a financing gap that could have caused the Project to be shutdown. (Howard Dep., 39:13-40:6; Susman Dep., 145:16-147:24, 150:22-151:5, 154:13-155:5; Yunker Dep., 35:22-38:8, 38:16-39:23.)

30. Mr. Susman understood that Lehman's bankruptcy presented a "big issue" for Fontainebleau. (Ex. 896; Susman Dep., 150:22-151:2.)

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31. Mr. Yunker characterized Lehman's bankruptcy as the "death nail" of the Project. (Ex. 67; Yunker Dep., 39:3-23.)

32. BofA knew that payment by non-Retail Lenders violated Section 3.3.23. (Exs. 204, 472; Ex. 475 at BANA_FB00846432; Ex. 804; Bolio Dep., 46:10-47:2, 57:14-58:1; Brown Dep., 72:16-73:1; Howard Dep., 118:19-119:22; Susman Dep., 159:2-162:14, 169:17-20, 175:16-23, 250:22-251:20, 258:9-16; Yunker Dep., 96:11-20, 97:18-98:6, 110:19-112:12.)

33. According to Mr. Yunker, the primary purpose of BofA's September 26, 2008 request to Mr. Freeman to re-affirm Fontainebleau's representations and warranties was "to quell concerns not only from BofA but other lenders as to compliance with the condition precedent regarding the retail funding." (Yunker Dep., 111:3-112:12.)

34. 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. (Cantor Decl. Ex. 37 [Dep. Ex. 901]; Howard Dep., 104:14-106:23; Susman Dep., 224:25-226:2, 227:7-228:13.)

35. Mr. Freeman, Fontainebleau's CFO, told Mr. Susman and/or Mr. Howard 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." (Freeman Dep., 106:11-109:9; [redacted]; *see also* Cantor Decl. Ex. 43 [Dep. Ex. 205]; Susman Dep., 247:4-248:18; Yunker Dep., 167:17-169:6.)

36. Mr. Freeman referred to his inability to discuss the Lehman situation when reporting to BofA about a conversation with Highland. (Ex. 254; *see also* Ex. 463.)

37. In late September, Mr. Bolio made a handwritten note that Lehman had not funded. (Ex. 475 at BANA_FB00846433; Bolio Dep., 59:15-60:25.)

38. According to BofA's witnesses Lehman's failure to fund was material and adverse to the Project. (Exs. 67, 68; Ex. 206 at p. 3; Ex. 251; Ex. 831 at p. 4; Exs. 896, 899, 907; Bolio Dep., 40:17-41:10; Brown Dep., 85:17-86:4, 112:19-113:4, 130:11-19; Howard Dep., 27:22-28:9, 39:13-40:6, 109:8-112:7; Susman Dep., 145:16-147:24, 150:22-151:5, 154:13-155:5, 213:14-21, 220:22-221:18; Varnell Dep., 69:7-10; Yunker Dep., 24:17-25:6, 35:22-38:8, 38:16-39:23, 52:13-53:4, 63:19-64:10.)

39. TriMont's McLendon Rafeedie testified that it was his custom and practice to keep his contact at BofA, Ms. Brown, informed about the status of the loans under the Retail Facility, and that, consistent with that practice, he likely informed Ms. Brown that Fontainebleau

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was funding Lehman's portion of the September Advance. (Rafeedie Dep., 34:19-35:10, 53:5-54:5, 54:21-58:12, 62:14-63:9, 111:12-112:20.)

40. BofA never discussed with Fontainebleau its conclusion that Fontainebleau funding for Lehman in September 2008 violated the conditions precedent to disbursement. (Freeman Dep., 74:12-24; Yunker Dep., 96:11-98:6.)

41. On October 13, 2008, Highland emailed BofA's outside counsel, Mr. Scott at Sheppard Mullin, to confirm their mutual understanding "that Lehman has not made any disbursements while in bankruptcy." (Exs. 80, 1502.)

42. The October 3, 2008 Merrill Lynch report stating that "FBLEAU equity sponsors have funded the amount required from Lehman on the retail credit facility" was widely disseminated within BofA and to Fontainebleau. (Exs. 1, 78, 80, 233, 1502.)

43. John Maxwell, the research analyst who authored the October 3, 2008 Merrill Lynch report, was a reputable analyst followed by a number of Lenders and had been in direct communication with Fontainebleau prior to October 2008. (Exs. 274, 275, 399; Freeman Dep., 228:12-229:12; Fu Dep., 155:3-8, 184:24-185:11; Mulé Dep., 50:10-18; [redacted])

44. [redacted]. (Exs. 274, 275, 399; [redacted])

45. BofA agreed to acquire Merrill Lynch & Co., Inc. in September 2008 and the transaction closed as of January 1, 2009. (Howard Dep., 116:5-117:7; Varnell Dep., 18:7-13; Yunker Dep., 39:3-23.)

46. On September 30, 2008, BofA wrote to Mr. Freeman requesting a call to discuss issues related to Lehman's bankruptcy and specifically asking:

> Did Lehman fund its portion of the requested $3,789,276.00 of Shared Costs funded 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?

(Cantor Decl. Ex. 42 [Dep. Ex. 76].)

47. When BofA sent its September 30, 2008 letter to Fontainebleau, BofA already knew that the retail portion had been paid. (Cantor Decl. Ex. 38 [Dep. Ex. 241]; Brown Dep., 42:4-8, 43:18-24; Rafeedie Dep., 18:22-19:8, 40:22-43:7.)

48. Rather than participating in a call with the Lenders, Mr. Freeman sent a memo on October 7, 2008 stating: "In August and September, the retail portion of . . . shared costs was

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$5mm and $3.8mm, respectively, all of which was funded." (Cantor Decl. Ex. 47 [Dep. Ex. 77].)

49. Fontainebleau's October 7, 2008 memo did not answer BofA's question regarding the source of Lehman's payment. (Cantor Decl. Ex. 47 [Dep. Ex. 77]; Ex. 903; Bolio Dep., 79:18-81:6; Freeman Dep., 92:17-94:3, 226:24-227:20; Susman Dep., 252:2-10; Varnell Dep., 192:19-193:1; Yunker Dep., 147:19-148:7.)

50. Highland immediately brought to BofA's attention the fact that Fontainebleau's October 7, 2008 memo did not answer BofA's question regarding the source of Lehman's payment. (Ex. 903.)

51. On October 13, 2008, Highland informed BofA and its counsel that Fontainebleau's funding of Lehman's share would cause the condition precedent in Section 3.3.23 to fail. (Ex. 472, 834.)

52. [redacted]. (Exs. 16, 18, 231, 232.)

53. [redacted]

54. The fact that the other Retail Lenders were not willing to assume Lehman's commitment under the Retail Facility was discussed openly at the October 2008 meeting that BofA attended with the Retail Lenders. (Ex. 19 at p. 3; [redacted]

55. At the October 2008 meeting, Fontainebleau and the Retail Lenders asked BofA to take over Lehman's remaining commitment and fill the funding gap. (Ex. 907; Howard Dep., 112:9-114:4, 143:18-146:13; Susman Dep., 277:19-278:9.)

56. Although BofA was entitled to take over Lehman's remaining commitment under an Intercreditor Agreement with Lehman and the Retail Borrower, BofA refused. (Ex. 884 at § 7.1, Howard Dep., 112:9-114:9, 143:18-146:13.)

57. Although Lehman ultimately funded in October and November 2008, whether it would fund was "touch and go." (Rafeedie Dep., 66:8-23.)

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58. [redacted]. (Exs. 21, 22, 28, 34, 40, 804; Freeman Dep., 117:13-22, 118:24-119:2.)

59. ULLICO refused to assume Lehman's obligations under the Retail Facility. (Cantor Decl. Ex. 68 [Dep. Ex. 814]; Ex. 206 at p. 3; Ex. 609; Ex. 831 at p. 4; Ex. 906 at BANA_FB00811830; Ex. 907; [redacted]

60. BofA knew that ULLICO funded Lehman's portion of every Advance from December 2008 through March 2009. (Cantor Decl. Ex. 56 [Dep. Ex. 905]; Exs. 58, 62, 239, 240, 479, 481; Ex. 607 at BANA_FB00846453; Ex. 804; Ex. 906 at BANA_FB00811830; Bolio Dep., 83:13-84:12, 90:1-91:12; Rafeedie Dep., 79:25-80:2, 86:11-22, 97:9-19, 103:24-104:6, 105:16-107:1; Susman Dep., 269:24-270:19.)

61. BofA knew that none of the existing Retail Lenders, including ULLICO, would agree to assume Lehman's remaining commitment. (Cantor Decl. Ex. 68 [Dep. Ex. 814]; Ex. 115; Ex. 206 at p. 3; Exs. 251, 493, 609; Ex. 831 at p. 4; Ex. 906 at BANA_FB00811830; Ex. 907; Howard Dep., 111:7-113:10, 142:13-146:13, 147:25-148:6; [redacted] Susman Dep., 273:7-275:10, 277:19-278:9.)

62. Fontainebleau's financial statements for the third quarter 2008 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 Brothers shortfall in funding." (Cantor Decl. Ex. 54 at FBR01280966 [Dep. Ex. 286].)

63. BofA at all times knew that the financing gap created by Lehman's bankruptcy had not been cured. (Cantor Decl. Ex. 54 at FBR01280966 [Dep. Ex. 286]; Cantor Decl. Ex. 68 [Dep. Ex. 814]; Ex. 115; Ex. 206 at p. 3; Exs. 251, 493, 609; Ex. 831 at p. 4; Ex. 906 at BANA_FB00811830; Ex. 907; Howard Dep., 111:7-114:4, 142:13-146:13, 147:25-148:6; [redacted] Susman Dep., 273:7-275:10, 277:19-278:9.)

64. On February 20, 2009, at the Lenders' insistence, BofA 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." (Cantor Decl. Ex. 62 [Dep. Ex. 498]; Ex. 497.)

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65. The Borrowers did not provide a meaningful response to BofA's February 20, 2009 questions. (Cantor Decl. Ex. 63 [Dep. Ex. 811]; Yu Dep., 125:25-126:14.)

66. The Borrowers were required to and did represent and warrant that all conditions precedent to disbursement had been satisfied. (Bolio Decl. Exs. 11-14 [Dep. Exs. 269-271, 694]; Exs. 263-265, 331.)

67. [redacted] (Exs. 23, 29, 35, 41; [redacted]

D. Additional Material Facts Regarding BofA's Knowledge of Cost Overruns on the Project

68. In connection with each Advance Request, the Borrowers were required to certify that the "In Balance Test" was satisfied. The In Balance Test was 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. 15, Ex. C-1 at p. 5.)

69. 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 at p. 3.)

70. In May 2008, the Borrower presented BofA with approximately $201 million of change orders. (Ex. 216; Ex. 868 at p. 2; Susman Dep., 99:17-25.)

71. The $201 million in change orders had not been disclosed to IVI and BofA previously. (Ex. 216; Ex. 868 at p. 2; Ex. 917; Badala Dep., 126:7-127:5, 127:15-22.)

72. The documentation for the $201 million in change orders revealed that a substantial amount of these change orders had been known to the Borrowers for nearly a year. (Ex. 891; Ex. 915 at p. 18.)

73. 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 in June 2007, at the latest. (Ex. 891, Boyken Dep., 215:16-218:13, 221:22-223:1.)

74. IVI and BofA received the documentation for structural steel change order in mid 2008. (Badala Dep., 119:18-120:10.)

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75. Learning about the $201 million in additional costs was important to BofA. (Ex. 892; Susman Dep., 104:5-22, 106:8-11.)

76. 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. (Ex. 217.)

77. In the fourth quarter of 2008, representatives of IVI raised concerns that the Borrowers were not accurately and timely reporting anticipated construction costs. (Ex. 851 at ¶ 14; Susman Dep., 135:15-24.)

78. BofA and other Lenders were similarly concerned, and BofA was aware of the other Lenders' concerns. (Bolio Dep., 168:24-169:18; Howard Dep., 166:21-167:12; Newby Dep., 62:7-20; Susman Dep., 119:10-21.)

79. 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. (Ex. 493.)

80. The concerns IVI raised in late 2008 remained unresolved by January 2009. (Ex. 851 at ¶ 14; Susman Dep., 125:1-24, 130:23-132:3.)

81. IVI's Project Status Report 21, dated January 30, 2009, identified several areas of concern, including the projected opening date, inclusion of projected overtime costs in cost reports, inclusion of subcontractor claims in reports, the ability of the Project to achieve LEED credits and unreported additional project costs. (Cantor Decl. Ex. 59 [Dep. Ex. 809].)

82. The fact that IVI was concerned about unreported costs was a red flag for BofA. (Brown Dep., 96:3-7.)

83. IVI believed that more accurate reporting of the LEED credits could increase Project costs by $15 million. (Cantor Decl. Ex. 84 at ¶ 20 [Dep. Ex. 808]; Ex. 851 at ¶ 15; Yu Dep., 105:12-23.)

84. IVI was increasingly concerned throughout early 2009 about cost overruns on the Project and skeptical of the information Fontainebleau provided. (Cantor Decl. Ex. 69 [Dep. Ex. 604]; Exs. 495, 692, 828; Ex. 851 at ¶¶ 11-28; Ambridge Dep., 202:20-205:4, 206:2-22, 211:20-212:19, 213:12-15; Barone Dep., 40:6-41:1, 75:19-76:3, 77:22-78:4; Yu Dep., 137:4-138:25, 156:12-24.)

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85. BofA expected and requested IVI to ask questions of Fontainebleau to satisfy their concerns. (Bolio Dep., 204:9-24.)

86. IVI and BofA did not receive satisfactory information to address the concerns they had in late 2008 and early 2009. (Cantor Decl. Ex. 66 at pp. 7, 22-24 [Dep. Ex. 600]; Ex. 828 at pp. 7, 22-23; Bolio Dep., 204:9-205:5, 205:19-206:19; Yu Dep., 49:24-51:5.)

87. BofA repeatedly tried to get information from Fontainebleau regarding the status of LEED credits and was frustrated by the lack of information they were receiving from Fontainebleau. (Yu Dep., 24:6-21.)

88. Concerns about unreported cost overruns were among the reasons BofA referred the Project to its Special Assets Group. (Yu Dep., 37:25-38:23.)

89. On February 12, 2009, Mark Costantino, Executive Director of JP Morgan Chase, wrote to BofA concerned about "the status of the analysis of subcontractor costs and potential cost overruns and the investigation of the LEED credits." (Cantor Decl. Ex. 61 [Dep. Ex. 810].)

90. BofA respected JP Morgan Chase's workout group, which had sent the letter. (Yu Dep., 35:11-36:2.)

91. BofA thought it was a bad sign that Fontainebleau refused to meet with Lenders in February 2009. (Yu Dep., 128:1-13; *see also* BofA SOUF ¶¶ 142-143.)

92. In a March 4, 2009 letter, BofA requested a meeting with Fontainebleau to discuss a list of topics, including the adequacy of contingency, project costs, the absence of condo sales and any plans Fontainebleau or its affiliates had to raise capital. (Cantor Decl. Ex. 68 [Dep. Ex. 814].)

93. Fontainebleau did not provide adequate answers to the questions included in BofA's March 4, 2009 letter. (Yu Dep., 143:17-144:4.)

94. In a March 5, 2009 letter to the Borrowers, IVI stated that there appeared to be a delay in execution of Owner Change Orders; that the Borrowers appeared to be excluding certain costs from its reports of anticipated costs for the Project; that it appeared that the general contractor had committed to work but that the Borrowers had not approved corresponding change orders; and that IVI remained concerned about LEED credits. IVI explained: "At this point in the project, it is hard to believe that there are no additional costs or claims out there." (Cantor Decl. Ex. 69 [Dep. Ex. 604]; Ex. 851 at ¶¶ 19-25; Barone Dep., 48:17-49:9; Bolio Dep., 224:25-226:4, 227:4-229:1.)

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95. The concerns raised in IVI's March 5, 2009 letter were motivated in part by a comparison of Turnberry's construction requisitions and the anticipated cost reports submitted to IVI. (Cantor Decl. Ex. 69 [Dep. Ex. 604].)

96. BofA believed that IVI's concerns about unreported project costs were "a big deal." (Bolio Dep., 229:20-230:5.)

97. BofA again requested a meeting with Fontainebleau verbally the weekend of March 7-8 but Fontainebleau refused. (Cantor Decl. Ex. 71 [Dep. Ex. 819].)

98. BofA sent a letter to Fontainebleau on March 10, 2009, which included yet another request for a meeting. (Cantor Decl. Ex. 71 [Dep. Ex. 819].)

99. The March 10, 2009 letter included a list of issues to which Fontainebleau had not provided sufficient answers. (Cantor Decl. Ex. 71 [Dep. Ex. 819]; Yu Dep., 175:12-22.)

100. Following discussions with IVI in mid-2009, the Borrowers acknowledged that there were even more outstanding costs than the $35 million initially disclosed, and agreed to increase the budget by an additional $50 million. (Ex. 851 at ¶ 26; *see also* BofA SOUF ¶ 153.)

101. IVI understood that Fontainebleau's disclosure of some of the unreported Project costs meant that Fontainebleau had effectively been lying to IVI and BofA. (Cantor Decl. Ex. 72 [Dep. Ex. 608]; Barone Dep., 75:19-76:3.)

102. In mid-March 2009, IVI believed that the Borrowers had still not reported $15 million in LEED costs. (Yu Dep., 145:6-24.)

103. The Borrowers promised an audit of LEED costs, but never provided one. (Ex. 851 at ¶ 25; Yu Dep., 124:16-20; *see also* Barone Dep., 36:24:-37:10.)

104. BofA told Mr. Freeman that the audit should be completed as soon as possible, but never gave him a deadline. (Yu Dep., 121:6-15.)

105. On March 11, 2009, the Borrowers submitted an Advance Request that did not include the additional costs that had been disclosed. (Ex. 851 at ¶ 27.)

106. IVI rejected the March 11 Advance Request because of material errors in the Request and the supporting documentation. As Mr. Barone explained, "we no longer believed it." (Bolio Decl. Ex. 36 [Dep. Ex. 860]; Barone Decl. at ¶ 25; Barone Dep., 60:24-62:16; Yu Dep., 193:5-9.)

107. The March 2009 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, which would increase other line items on the Project budget. (Bolio

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Decl. Ex. 36 at p. 2 [Dep. Ex. 860]; Ex. 862 at IVI 080517; Badala Dep., 25:12-26:14, Barone Dep., 71:3-25.)

108. Even after Turnberry and Fontainebleau disclosed additional costs in March 2009, IVI remained skeptical about Fontainebleau's representations about cost overruns. (Ex. 828 at pp. 7, 21-22; Barone Dep., 75:19-76:3.)

109. By March 2009, the Borrowers had lost IVI's trust. (Barone Dep., 75:19-76-3.)

110. BofA understood in early 2009 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. (Susman Dep., 128:11-16, 129:1-8.)

111. BofA and IVI made several inquiries but never got answers to questions and concerns that had been pending since January 2009. (Yu Dep., 195:2-10.)

112. Although in its communications with BofA, IVI raised the possibility of an audit of construction costs, BofA never agreed to an audit to verify the information presented by the Borrowers. (Ex. 861; Barone Dep., 66:6-16; Yu Dep., 124:16-20.)

113. BofA 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. (Exs. 68, 69, 218, 220, 222, 227, 228, 902, 1506; Varnell Dep., 105:16-106:6, 107:17-108:14, 125:18-126:18, 147:15-148:11, 150:10-15; Yunker Dep., 32:5-11, 32:22-33:14, 53:5-22, 56:3-10, 58:2-19.)

114. In early March, the Borrowers submitted a Notice 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. (Ex. 1507.)

115. Shortly after the Borrowers submitted the Notice of Borrowing in early March, they 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. (Ex. 820; Yu Dep., 178:11-179:22.)

116. By the middle of April of 2009, the Borrowers provided BofA with change orders and anticipated change orders totaling over $350 million, nearly $190 million of which were admitted to be for previously committed construction costs. (Cantor Decl. Ex. 83 at p. 2 [Dep. Ex. 298]; Ex. 864.)

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117. The disclosure of additional unreported costs in April 2009 did not surprise IVI. (Exs. 865, 866; Barone Dep., 84:4-9.)

118. When shown the details of the additional construction costs, on April 13, 2009, IVI's Paul Bonvicino stated that the costs were "Pretty close to my 150 mil!!!" (Ex. 866.)

E. Additional Material FNBN Facts.

119. Mr. Susman recognized that the FDIC's repudiation resulted in FNBN defaulting on its obligations. (Susman Dep., 78:20-79:18.)

120. No one assumed FNBN's Loan commitments. (Susman Dep., 80:22-81:24; Yu Dep., 134:22-135:4.)

121. BofA did not issue a Stop Funding Notice after FNBN defaulted on its loan obligations. (Susman Dep., 87:17-89:13.)

122. A lender default is always material. (Ex. 1503 at ¶ 35; Badala Dep., 145:2-12.)

F. Additional Material Delay Draw Term Lender Facts

123. 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 holding approximately $21.6 million in delay draw term loans under the Term Loan Facility. (Exs. 660, 291-B.)

124. Mr. Howard recognized that a lender who failed to fund became a "defaulting lender." (Howard Dep., 190:18-191:25; *see also* Ex. 291-B.)

125. BofA acknowledged that reducing the Available Funds to complete the Project by the $21.67 million in defaulted DDTL Loans caused the critical In Balance Test to fail. (Cantor Decl. Ex. 76 [Dep. Ex. 104]; Ex. 825 at p. 5 of 18; Yu Dep., 226:7-22; *see* BofA SOUF ¶¶ 164-165.)

126. Disbursement to the Borrowers after receipt of only partial funds violated BofA's protocol. (Brown Dep., 110:19-23.)

127. 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. (Exs. 491, 835; Yu Dep., 232:3-23, 267:7-268:23.)

128. Approximately half of the outstanding amount owed by the Defaulting DDTL Lenders was paid in April 2009; the remainder was never funded. (Ex. 643; Yu Dep., 169:5-14.)

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129. Mr. Yu acknowledged that there were Lenders that disagreed with BofA's decision to include the Defaulting Delay Draw Lenders' money in the Available Sources for purposes of the In Balance Test. (Yu Dep., 214:13-216:9.)

G. Additional Material Facts Regarding BofA's Disbursement of Funds in March 2009

130. 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." BofA warned that "[t]he 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." (Ex. 696.)

131. On March 24, 2009, well past the March 11 deadline and less than a day before the Scheduled Advance Date of March 25, 2009, the Borrowers submitted and BofA accepted a revised Advance Request. (Cantor Decl. Ex. 84 at ¶ 33 [Dep. Ex. 808]; Ex. 265; Yu Dep., 197:20-200:5, 210:20-211:20.)

132. 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. (Cantor Decl. Ex. 84 at ¶ 34 [Dep. Ex. 808]; Ex. 825; Yu Dep., 203:7-16.)

133. Early 2009 was a time of economic stress in the financial markets in general and in the Las Vegas market in particular. (Bolio Dep., 34:20-35:7; Freeman Dep., 274:10-275:6; Yunker Dep., 36:3-9, 37:19-38:8, 39:3-23, 42:19-43:6, 43:16-44:17.)

134. BofA recognized internally the serious and increasing risks the Project presented. (Exs. 614, 804, 805; Bolio Dep., 34:20-35:7; Newby Dep., 33:16-34:16; Yu Dep., 37:25-39:10.)

135. 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. (Exs. 614, 804; Yu Dep., 40:13-41:2, 41:23-42:1.)

136. 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. (Ex. 829; Yu Dep., 40:25-42:4, 250:10-19.)

137. 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 . . . ." (Ex. 831 at p. 4.)

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138. The downgrade was due in part to BofA's continuing 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." (Ex. 831 at p. 4.)

139. Financial projections for the Project had contemplated that sales of condos would substantially repay outstanding debt following opening of the Resort. (C.A. § 2.11(a)(ii); Ex. 3 at pp. 41-43, 49, 50; Ex. 4 at pp. 29-32, 38; Ex. 5 at pp. 50, 68 of 108; Corleto Dep., 42:12-20; Varnell Dep., 67:6-11; Yunker Dep., 43:16-44:17.)

140. Without condo sales, the Project faced the prospect of being in default upon opening. (Bolio Dep., 34:20-35:21.)

141. BofA knew as early as October 2007 that the deteriorating real estate market caused the Borrowers to consider eliminating the sale of condos from the Project. (Ex. 1508.)

142. Condo sales lagged well behind schedule and below projections. (Ex. 1509; Ex. 831 at p. 4; Varnell Dep., 69:7-70:7; Yu Dep., 200:21-25.)

143. By March 2009, Fontainebleau had given up any hope of selling condos. (Ex. 831 at p. 4; Yu Dep., 200:11-25.)

Dated: September 9, 2011

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **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** was filed with the Clerk of the Court. I also certify that the foregoing document is being electronically served this day on all counsel of record or pro se parties identified on the attached Service List by agreement of all counsel.

Dated: September 9, 2011.

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