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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case 09-MD-02106

IN RE:

FONTAINEBLEAU LAS VEGAS HOLDINGS, LLC,
et al.,

Debtors.

FONTAINEBLEAU LAS VEGAS
HOLDINGS, LLC, et al.,

Plaintiffs,

vs.

BANK OF AMERICA, N.A., et al.,

Defendants.

COURTROOM 11-1

MIAMI, FLORIDA

NOVEMBER 18, 2011

(Pages 1 - 113)

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE ALAN S. GOLD
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES :

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09:00:24 1 **MR. HASBUN:** All rise. The Honorable Alan S. Gold
09:00:26 2 presiding. This Court is in session.

09:00:28 3 **THE COURT:** Good morning.

09:00:33 4 **MR. HENNIGAN:** Good morning, Your Honor.

09:00:34 5 **MR. CANTOR:** Good morning, Your Honor.

09:00:56 6 **THE COURT:** Please be seated. I need just one moment,
09:00:58 7 please. So, let me begin by welcoming everyone. I wish you and
09:01:14 8 your family a very happy holiday to come.

09:01:17 9 **MR. HENNIGAN:** Thank you.

09:01:17 10 **MR. CANTOR:** Thank you, Your Honor.

09:01:18 11 **THE COURT:** And at this time I will call
09:01:20 12 Case 09-MD-02106, and let me start with appearances, please, on
09:01:32 13 that side.

09:01:33 14 **MR. HENNIGAN:** Good morning, Your Honor. Michael
09:01:34 15 Hennigan on behalf of the plaintiffs.

09:01:35 16 **THE COURT:** I'm only going to ask everybody, if you
09:01:37 17 don't mind, since I can only hear and Mr. Millikan can only
09:01:43 18 hear, to speak directly in a microphone.

09:01:46 19 **MR. HENNIGAN:** I forgot. Good morning.

09:01:48 20 **MR. DILLMAN:** Good morning, Your Honor. Kirk Dillman
09:01:50 21 on behalf of the plaintiffs.

09:01:53 22 **THE COURT:** All right. Thank you. Would you like to
09:01:55 23 introduce who else is present today?

09:01:58 24 **MR. CANTOR:** Good morning, Your Honor. Dan Cantor from
09:02:00 25 O'Melveny & Myers on behalf of Bank of America.

09:02:04 1 **MR. MURATA:** Ken Murata also from O'Melveny & Myers for
09:02:09 2 Bank of America.

09:02:10 3 **THE COURT:** Thank you.

09:02:11 4 **MS. ISANI:** Jamie Isani of Hunton & Williams on behalf
09:02:16 5 of Bank of America.

09:02:17 6 **THE COURT:** All right. What I would like to do -- and
09:02:20 7 I know you've prepared PowerPoints® and I'll listen to them -- by
09:02:25 8 the way, I do have others who are listening by telephone. Let
09:02:33 9 me get the calls transferred in now, although they're muted,
09:02:46 10 right?

09:02:46 11 **MR. HASBUN:** They should be, but let me go inside,
09:02:46 12 Judge.

09:02:46 13 **THE COURT:** Okay. Let me welcome everybody else who
09:02:48 14 has now transferred in on the telephone. I've had appearances
09:02:57 15 from counsel, and I understand that your participation is muted.
09:03:05 16 It would help me, before I hear your specific arguments
09:03:11 17 and get into the PowerPoint®, to walk through some of the matters
09:03:18 18 that I'm trying to figure out and, if you don't mind, have more
09:03:24 19 of a conversation about these matters where I can engage both
09:03:27 20 sides, rather than start with the formal presentations, counter,
09:03:35 21 then, you know, the rest of it.

09:03:39 22 Often this gives me more clarity on positions and helps
09:03:45 23 frame the issues. So I'm going to invite you for the moment to
09:03:49 24 stay seated and you'll have your papers in front of you -- that
09:03:54 25 will be helpful -- and you may consult with each other as you

09:03:57 1 need in addressing some of these questions.

09:04:00 2 Fair enough?

09:04:01 3 **MR. CANTOR:** Yes, Your Honor.

09:04:03 4 **THE COURT:** All right. So let's go through the matter
09:04:11 5 in the following way: What I would like to try to start with is
09:04:17 6 to focus on the key agreement which is before me in this aspect
09:04:27 7 of the litigation and that's the Master Disbursement Agreement,
09:04:32 8 correct?

09:04:32 9 **MR. CANTOR:** Correct, Your Honor.

09:04:33 10 **THE COURT:** Okay. And let me preface this: My
09:04:41 11 questions are not trying to lead one side or another down a
09:04:46 12 rabbit hole and into admissions or a trap, so please understand
09:04:53 13 I don't have an agenda for that purpose in starting to ask these
09:04:57 14 questions. It's really to help me clarify everybody's position.

09:05:01 15 But is it a correct statement of position with regard
09:05:06 16 to, starting with the plaintiffs' summary judgment motions, that
09:05:12 17 the motions are directed against Bank of America solely in its
09:05:19 18 capacity as Disbursement Agent under the Master Disbursement
09:05:25 19 Agreement?

09:05:26 20 Would you agree to that or not?

09:05:29 21 **MR. HENNIGAN:** And as Administrative Agent, Your Honor.

09:05:32 22 **THE COURT:** And as what?

09:05:33 23 **MR. HENNIGAN:** Administrative agent under the Credit
09:05:37 24 Agreement.

09:05:43 25 **THE COURT:** Okay. But that's a different phase of the

09:05:45 1 case, isn't it?

09:05:47 2 In terms of what we're here for today, aren't we
09:05:52 3 focusing on what Bank of America did or did not do as the
09:06:06 4 administrating agent under the Master Disbursement Agreement?

09:06:09 5 **MR. HENNIGAN:** Your Honor, absolutely what we're
09:06:11 6 focusing on is the conduct of BofA as Disbursement Agent.

09:06:17 7 Their role as Administrative Agent becomes relevant in
09:06:20 8 terms of their knowledge of the Credit Agreement and aspects of
09:06:23 9 the Credit Agreement, but their conduct, actions and inactions
09:06:28 10 absolutely as Disbursement Agent.

09:06:33 11 **THE COURT:** Any comments?

09:06:34 12 **MR. CANTOR:** My only comment would be that I just
09:06:37 13 thought it was more simple and straightforward than that; that
09:06:40 14 this is about whether Bank of America complied with its duties
09:06:43 15 as Disbursement Agent full stop.

09:06:49 16 **THE COURT:** I really do want to hear your position on
09:06:53 17 this, so help me understand a little bit more about how their
09:07:00 18 role as Administrative Agent under the Credit Agreement
09:07:07 19 interplays here.

09:07:12 20 **MR. HENNIGAN:** Only to the extent, Your Honor, that
09:07:14 21 there are interlocking agreements, that one agreement refers to
09:07:17 22 the other agreement; but I agree with counsel that the conduct
09:07:20 23 at question in these motions is conduct as Disbursement Agent.

09:07:24 24 **THE COURT:** Okay. That's what I'm trying to focus on
09:07:27 25 and see if my understanding of the matters before me were just

09:07:34 1 that and, yet, I do want further to ask questions about the
09:07:41 2 interrelationships of agreements because there are times when
09:07:46 3 Bank of America refers to the Credit Agreement, such as on
09:07:52 4 notice requirements, and there are no comparable requirements
09:07:57 5 that I saw written in the same way in the Disbursement
09:07:59 6 Agreement.

09:08:02 7 So let me ask both sides about some of these matters.
09:08:11 8 Do you have the Disbursement Agreement in front of you?

09:08:13 9 **MR. CANTOR:** I do, Your Honor.

09:08:15 10 **MR. HENNIGAN:** About to.

09:08:16 11 **THE COURT:** Yes. If you don't mind, can you turn to
09:08:19 12 Page 80? Take a moment.

09:09:00 13 **MR. DILLMAN:** Sorry for the delay, Your Honor.

09:09:01 14 **THE COURT:** No. That's all right. Take a moment. Let
09:09:03 15 me know when you get there.

09:09:16 16 **MR. HENNIGAN:** We're there.

09:09:18 17 **THE COURT:** All right. Before I focus on 9.1 for a
09:09:22 18 moment, let me rephrase that. What is each side's position on
09:09:32 19 how I am supposed to read the Disbursement Agreement in
09:09:37 20 relationship to the Credit Agreement?

09:09:40 21 In other words, where there are notice provisions in
09:09:43 22 the Credit Agreement that are referred to in Bank of America's
09:09:47 23 briefs, from the plaintiffs' standpoint, do those notice
09:09:55 24 provisions apply and sort of fill in a gap with regard to how
09:10:00 25 notice is given in the Disbursement Agreement?

09:10:05 1 Do both sides agree that these agreements are one and
09:10:09 2 the same and intertwined?

09:10:14 3 **MR. CANTOR:** Your Honor, I don't know that I would say
09:10:15 4 that they are one and the same. I certainly would agree that
09:10:18 5 they are intertwined.

09:10:20 6 They were all executed at the same time. At various
09:10:23 7 points in each of the agreements they are referred to as the
09:10:29 8 loan agreements or other terms that make it clear that this was
09:10:34 9 a complete set of documents that was meant to be referred to in
09:10:38 10 an integrated fashion.

09:10:40 11 That said, Your Honor, you know, I will --

09:10:42 12 **THE COURT:** Well, let me not mislead anybody. I want
09:10:46 13 to refer to the Disbursement Agreement, § 11.5, which talks
09:10:52 14 about the entire agreement. It says:

09:10:55 15 "This agreement, and any agreement, document or
09:10:58 16 instrument attached hereto, or referred to herein,
09:11:02 17 integrate all the terms and conditions mentioned herein, or
09:11:07 18 incidental hereto, and supersede all oral negotiations,
09:11:11 19 prior writings," et cetera.

09:11:16 20 So what am I to make of that?

09:11:21 21 **MR. HENNIGAN:** Your Honor, I believe the agreements in
09:11:24 22 that regard need to be read, from the disbursement agreement's
09:11:28 23 perspective, as integrated documents, remembering that the
09:11:31 24 lenders that we represent are not signatories to the
09:11:34 25 Disbursement Agreement. They're signatories to the Credit

09:11:38 1 Agreement only.

09:11:41 2 **THE COURT:** Okay. But there's no argument -- well, let
09:11:53 3 me turn to Bank of America.

09:11:56 4 Under the Disbursement Agreement, Bank of America, as
09:12:02 5 the Disbursement Agent, has responsibilities to the Term
09:12:05 6 Lenders --

09:12:08 7 **MR. CANTOR:** Yes, Your Honor.

09:12:09 8 **THE COURT:** -- independent, even if they're not
09:12:11 9 signatories to it.

09:12:12 10 **MR. CANTOR:** Well, they are appointed as Disbursement
09:12:14 11 Agent for the process of disbursing funds and in that sense they
09:12:21 12 have obligation -- let me put a finer point on it.

09:12:26 13 We have never contended, Your Honor, that because the
09:12:28 14 Term Lenders are not signatories to the Disbursement Agent that
09:12:31 15 they don't have the right to sue Bank of America for breaching
09:12:36 16 its duties as Disbursement Agent. We've never raised that
09:12:40 17 argument.

09:12:40 18 **THE COURT:** All right. So let's go back to 9.1 for a
09:12:47 19 minute and just the beginning of that section:

09:12:52 20 "Each of the funding agents hereby irrevocably appoints
09:12:57 21 an authorized Disbursement Agent to act on its behalf
09:13:01 22 hereunder and under the control agreements."

09:13:06 23 I've never seen anything called "control agreements" in
09:13:09 24 the record. Did anybody put any control agreements in their
09:13:18 25 summary judgment motions that we've missed here?

09:13:22 1 **MR. CANTOR:** The control agreements -- that's
09:13:26 2 interesting. I'm looking at the definitions, and it doesn't
09:13:30 3 seem to be defined.

09:13:32 4 I think everyone had always understood that the control
09:13:37 5 agreements included, among other things, the Credit Agreement,
09:13:41 6 and this would be one place where there's an interplay.

09:13:45 7 **THE COURT:** My question is very narrow.

09:13:47 8 **MR. CANTOR:** Okay.

09:13:48 9 **THE COURT:** Is there a document called "control
09:13:50 10 agreement"?

09:13:50 11 **MR. CANTOR:** I do not believe so, Your Honor. I
09:13:52 12 believe "control agreement" is a defined term referring to other
09:13:54 13 agreements.

09:13:59 14 **THE COURT:** What about from the plaintiffs' standpoint?
09:14:04 15 Is there something independent that was signed called "control
09:14:09 16 agreement?" I'll give you something specific in reference to
09:14:15 17 that in a moment.

09:14:16 18 What's your understanding of that? Doesn't that have
09:14:23 19 some significance to that clause which is an issue in this case?

09:14:35 20 **MR. HENNIGAN:** Your Honor, we've never focused on that
09:14:38 21 issue.

09:14:38 22 **THE COURT:** Well, if you turn to your appendix of
09:14:43 23 definitions on Page 9, it says:

09:14:47 24 "'Control agreements' means the control agreements of
09:14:51 25 even date herewith, executed by the project entities, in

09:14:56 1 respect of the accounts in favor of the Disbursement
09:14:59 2 Agent," et cetera, et cetera.

09:15:02 3 So I beg to differ. There is, according to the
09:15:08 4 definitions, a document which was executed at the time of the
09:15:13 5 Disbursement Agreement called the control agreement which is
09:15:18 6 referenced in 9.1 and seems to have perhaps some significance
09:15:25 7 and, yet, I can't find it in the materials referenced by either
09:15:32 8 party.

09:15:32 9 **MR. CANTOR:** Your Honor, I think this is going to be a
09:15:36 10 slightly imperfect answer but in the definition there, it refers
09:15:40 11 to § 2.2.

09:15:44 12 If you turn to § 2.2, which is Pages 3, 4, and 5 of the
09:15:50 13 agreement, I think what you will see is that the control
09:15:53 14 agreements seem to refer to agreements that essentially allow
09:15:56 15 the Disbursement Agent to move funds from bank accounts which
09:16:04 16 are in the name of the project entities.

09:16:09 17 **THE COURT:** Okay. But let me give you a specific
09:16:14 18 example of one of the problems that I'm having trying to
09:16:20 19 understand the document that is at issue here.

09:16:24 20 If you turn to Page 10 under § 2.5.1, the stop funding
09:16:34 21 notices, and look at subpart 2, it refers to the controlling
09:16:47 22 person notifying the Disbursement Agent that a default or Event
09:16:51 23 of Default has occurred.

09:16:53 24 Isn't "controlling person" and all of its
09:16:59 25 responsibilities defined in the control agreement?

09:17:01 1 **MR. CANTOR:** No, Your Honor. It is defined in this
09:17:03 2 agreement as until the exhaustion of the second mortgage
09:17:09 3 proceeds -- I am looking at Page 10 of the appendix -- as until
09:17:13 4 the exhaustion of the second mortgage proceeds account, the
09:17:18 5 trustee and thereafter the Bank Agent.

09:17:25 6 **THE COURT:** So when we're discussing who is being sued
09:17:30 7 here, Bank of America, I get back to which hat is Bank of
09:17:35 8 America wearing where it is being sued? Is it only its hat as
09:17:43 9 the Disbursement Agent?

09:17:46 10 **MR. CANTOR:** That's my understanding, Your Honor, and
09:17:48 11 that's how we've approached the case.

09:17:50 12 **MR. HENNIGAN:** I think that's the way we look at it as
09:17:53 13 well, although the Bank Agent is the Bank of America under
09:17:59 14 2.2 -- 2.5.1, subpart 2.

09:18:05 15 **THE COURT:** Okay. So one of the things we will get
09:18:12 16 into a discussion about is some of the later language under
09:18:18 17 Article 9 where Bank of America is wearing one hat other than
09:18:27 18 Disbursement Agent and gains certain information, and then under
09:18:36 19 certain language it's not obligated to recognize that
09:18:41 20 information under the other half as Disbursement Agent.

09:18:46 21 I'm trying to sort all that out as to in which capacity
09:18:57 22 is Bank of America acting at any particular point in time
09:19:01 23 factually, but I don't want to get there quite yet.

09:19:04 24 So let's continue our discussion of the structure of
09:19:09 25 the agreement itself. Now, is it the parties' position that in

09:19:28 1 interpreting this language in 9.1, I don't need to worry about
09:19:38 2 or look at anything called control agreements?

09:19:42 3 **MR. CANTOR:** Yes, Your Honor, that would be our
09:19:43 4 position.

09:19:43 5 **MR. HENNIGAN:** That's our position as well.

09:19:45 6 **THE COURT:** Okay. So I should ignore all that --

09:19:47 7 **MR. CANTOR:** Yes, sir.

09:19:48 8 **THE COURT:** -- right? That's your mutual position.

09:19:54 9 Does either party contend that the Disbursement
09:20:00 10 Agreement contains an ambiguity --

09:20:04 11 **MR. CANTOR:** Defendants --

09:20:04 12 **THE COURT:** -- under New York law?

09:20:06 13 **MR. CANTOR:** Defendants do not, Your Honor.

09:20:16 14 **MR. HENNIGAN:** There is a potential ambiguity, Your
09:20:19 15 Honor.

09:20:19 16 **THE COURT:** Well, how did you argue it in your briefs?

09:20:21 17 **MR. HENNIGAN:** We have argued no ambiguity.

09:20:24 18 **THE COURT:** Okay. Thank you. That's what I'm trying
09:20:29 19 to find out, everybody's position.

09:20:32 20 So let me give you a question about that. The second
09:20:48 21 sentence -- let's see -- of 9.1 talks about the Disbursement
09:20:55 22 Agent accepts such appointments and agrees to exercise
09:21:01 23 commercially reasonable efforts and utilize commercially prudent
09:21:05 24 practices in the performance of its duties hereunder, consistent
09:21:10 25 with those of similar institutions holding collateral,

09:21:15 1 et cetera, and disbursing control funds.

09:21:22 2 Doesn't that refer necessarily to extrinsic evidence?

09:21:30 3 How do I know what that standard is? It is not defined in the

09:21:36 4 agreement as a specific definition.

09:21:40 5 **MR. CANTOR:** Well, I think, Your Honor, that when it
09:21:44 6 comes time to apply that definition to specific conduct, it's a
09:21:53 7 determination that one, you know, will make.

09:21:59 8 Obviously, it has to be based on the evidence before
09:22:01 9 you, and the trier of fact is entitled to apply its judgment as
09:22:05 10 to whether something is or is not commercially reasonable,
09:22:10 11 recognizing, Your Honor, our position that § 9.1 is just sort of
09:22:16 12 a general introductory provision.

09:22:19 13 **THE COURT:** We will talk about that.

09:22:20 14 **MR. CANTOR:** Correct.

09:22:20 15 **THE COURT:** I am only talking about 9.1.

09:22:22 16 **MR. CANTOR:** Okay.

09:22:23 17 **THE COURT:** It references something outside of the four
09:22:29 18 corners of the agreement as a standard, does it not?

09:22:34 19 **MR. CANTOR:** It does in the sense that it is not a
09:22:36 20 check-the-box provision. You need to say was something
09:22:40 21 commercially reasonable or was it not commercially reasonable.

09:22:43 22 **THE COURT:** Okay. So as to that section, is there an
09:22:46 23 ambiguity under New York law that invites extrinsic evidence as
09:22:52 24 to what that is, to the extent it's material?

09:22:58 25 **MR. CANTOR:** To the extent it's material and leaving

09:23:03 1 that question aside, I think I am struggling with how to answer
09:23:07 2 it because it is an odd provision in the sense that it is
09:23:10 3 essentially imposing a tort standard into a contract.

09:23:16 4 I don't know that it requires extrinsic evidence in the
09:23:20 5 sense that it's a contract interpretation point and thus it is
09:23:25 6 an ambiguous contract provision.

09:23:29 7 The determination as to whether someone is or is not
09:23:32 8 acting commercially reasonable is necessarily going to be a
09:23:37 9 judgment that's committed to the trier of fact.

09:23:45 10 **THE COURT:** Well, I have this expert submission which
09:23:59 11 Bank of America says, well, you know, that shouldn't be
09:24:02 12 considered, but it raised the question of extrinsic evidence in
09:24:11 13 terms of this motion for summary judgment.

09:24:20 14 New York law, as best as my independent research
09:24:24 15 discloses, is different than Florida law in terms of when
09:24:29 16 extrinsic evidence is permitted and how it determines ambiguity.

09:24:37 17 There's no latent versus patent distinction under New
09:24:41 18 York law as I understand it.

09:24:42 19 **MR. CANTOR:** Right.

09:24:47 20 **THE COURT:** There seems to be some language in the case
09:24:51 21 law that in the face of ambiguity, recourse to extrinsic
09:24:56 22 evidence is permissible insofar as that evidence tends to
09:25:00 23 clarify the meaning of the language employed by the parties.

09:25:03 24 So here the parties employed language which by its very
09:25:12 25 nature refers to a standard that is not defined in the agreement

09:25:17 1 itself and adds somewhat to the confusion here as to what that
09:25:23 2 actually is and means.

09:25:26 3 **MR. CANTOR:** Yeah, I see your point, Your Honor.

09:25:28 4 I guess my point from a contract interpretation
09:25:31 5 perspective would be that -- and you are right, New York law
09:25:36 6 does not allow the Court to consider extrinsic evidence for the
09:25:39 7 purpose of proving that there is an ambiguity in the first
09:25:42 8 place.

09:25:45 9 There is no ambiguity as to what the contract says and
09:25:51 10 what the contract sets up as its standard under 9.1, to the
09:25:57 11 extent that 9.1 applies in any given situation.

09:26:03 12 When the time comes for someone to determine whether a
09:26:07 13 party has complied with that standard, I think, like any other
09:26:13 14 contract determination, that's going to be based on the evidence
09:26:16 15 and that will be within the province of the finder of fact.

09:26:21 16 But I don't think, if I am understanding your question
09:26:24 17 correctly, Your Honor, I don't believe that that makes the
09:26:26 18 agreement ambiguous or requires a reference to extrinsic
09:26:34 19 evidence in the way that one normally talks about it in the
09:26:38 20 contract interpretation context if I'm understanding you.

09:26:42 21 **THE COURT:** Any comments from plaintiffs' side?

09:26:45 22 **MR. HENNIGAN:** If I followed Mr. Cantor along, I think
09:26:50 23 I agree with him.

09:26:51 24 **THE COURT:** So let's talk -- I know there is a lot of
09:26:55 25 discussion about this in the briefing, but I'd like to talk

09:27:01 1 about 9.1 and then the other parameters under 9.2 and 9.3. But
09:27:11 2 before getting into that discussion, I'd like to go back into
09:27:16 3 structure again.

09:27:19 4 So the way the agreement works as I understand it --
09:27:29 5 and please help me with your own thoughts on this -- is the
09:27:39 6 borrowers make an advance request, along with retail affiliates,
09:27:52 7 in the form specified in Exhibit C-1, and this is in accordance
09:27:55 8 with § 2.4 of the agreement and that's what kicks off the
09:28:02 9 process, correct?

09:28:03 10 **MR. HENNIGAN:** Yes.

09:28:04 11 **MR. CANTOR:** Yes, Your Honor.

09:28:06 12 **THE COURT:** Let me see if I can impose upon my staff to
09:28:16 13 bring in some water. Oh, thank you very much.

09:28:23 14 C-1 is pretty much a complete document in and of itself
09:28:33 15 drafted by the parties --

09:28:35 16 **MR. CANTOR:** Yes, Your Honor.

09:28:36 17 **THE COURT:** -- correct?

09:28:42 18 **MR. HENNIGAN:** Drafted by the parties to the
09:28:44 19 Disbursement Agreement.

09:28:45 20 **THE COURT:** Right.

09:28:46 21 **MR. HENNIGAN:** BofA and the borrowers.

09:28:48 22 **THE COURT:** Yes. I mean, it is a drafted agreement,
09:28:54 23 excuse me, a drafted document incorporated into the Disbursement
09:28:57 24 Agreement.

09:28:58 25 **MR. HENNIGAN:** Correct.

09:29:03 1 **THE COURT:** It contains all of these affirmative
09:29:07 2 statements and representations and the like so that the request
09:29:18 3 is made in accordance with this C-1 document and in the C-1
09:29:26 4 document on all these representations --

09:29:29 5 **MR. CANTOR:** Yes, Your Honor.

09:29:31 6 **THE COURT:** -- there are blanks to be filled in, date,
09:29:35 7 amount, signatures, things like that.

09:29:37 8 **MR. CANTOR:** Right.

09:29:38 9 **THE COURT:** Okay. So after the request, C-1, is
09:29:54 10 submitted, under 2.4.4, the Disbursement Agent and the
09:30:00 11 construction consultant have to review and determine whether all
09:30:08 12 the documentation was provided.

09:30:13 13 Then here are these words again, "and use commercially
09:30:17 14 reasonable efforts to notify project entities of any
09:30:21 15 deficiency."

09:30:23 16 So that's the next step in this process, correct?

09:30:30 17 **MR. CANTOR:** Yes, Your Honor.

09:30:36 18 **THE COURT:** I wanted to note one thing in this process
09:30:40 19 and ask about it because in regard to Bank of America's role
09:30:52 20 wearing the hat of Disbursement Agent, of course Bank of America
09:30:57 21 says, "Look, our job here is ministerial. We are, in effect,
09:31:04 22 going through the checklist," right?

09:31:07 23 **MR. CANTOR:** Yes, Your Honor.

09:31:08 24 **THE COURT:** "We're doing this and, by the way, we're
09:31:13 25 only paid a relatively small amount of money for this function."

09:31:20 1 MR. CANTOR: Yes, Your Honor.

09:31:21 2 THE COURT: I didn't see anywhere in the agreements any
09:31:27 3 obligation or the like for Bank of America to carry some type of
09:31:35 4 insurance for its function.

09:31:41 5 There wasn't any insurance criteria, right?

09:31:44 6 MR. CANTOR: Not that I'm aware of, Your Honor, no.

09:31:47 7 THE COURT: In fact, did it have sort of malpractice
09:31:50 8 insurance?

09:31:50 9 MR. CANTOR: Not specifically. I don't know whether
09:31:53 10 somewhere within the organization there would be a policy that
09:31:58 11 might cover this, but there was no insurance specifically
09:32:01 12 obtained for this role.

09:32:03 13 THE COURT: It probably wouldn't cover gross negligence
09:32:07 14 anyway, right?

09:32:08 15 MR. CANTOR: Probably not.

09:32:09 16 THE COURT: All right.

09:32:10 17 So turn to Page 9 for a moment. In the paragraph below
09:32:19 18 debt service notifications, do you see that paragraph that
09:32:24 19 begins with "the Disbursement Agent shall"?

09:32:26 20 MR. CANTOR: Uh-huh.

09:32:35 21 THE COURT: Here is an example of one place in the
09:32:38 22 agreement where there is an affirmative obligation on the
09:32:42 23 Disbursement Agent to do more than just ministerial acts. It
09:32:47 24 has to use reasonable diligence to assure the construction
09:32:53 25 consultant performs its review of the materials required,

09:33:02 1 et cetera.

09:33:02 2 I noted this as a higher standard of obligation than
09:33:10 3 just ministerial checklists.

09:33:12 4 Would you agree from Bank of America's side?

09:33:15 5 **MR. CANTOR:** It certainly is more than just a
09:33:20 6 checklist.

09:33:22 7 I think, though, that using reasonable diligence -- by
09:33:25 8 the way, this would be an instance where the commercial
09:33:27 9 reasonableness requirement would apply.

09:33:29 10 But I think using reasonable diligence to assure that
09:33:32 11 the construction consultant performs its review of the
09:33:35 12 materials, I don't think that it is a terribly high standard.

09:33:38 13 It's not checking a box; it's making sure that the
09:33:42 14 construction consultant is doing its job.

09:33:44 15 **THE COURT:** Let me back up. The construction
09:33:48 16 consultant files its own piece of paper --

09:33:50 17 **MR. CANTOR:** Right.

09:33:51 18 **THE COURT:** -- Saying, "We looked at everything and the
09:33:56 19 advance is within the projected budget" --

09:34:00 20 **MR. CANTOR:** Right.

09:34:01 21 **THE COURT:** -- "and the projected construction cost."

09:34:04 22 **MR. CANTOR:** Right.

09:34:05 23 **THE COURT:** So it files its piece of paper and it
09:34:12 24 certifies that.

09:34:13 25 **MR. CANTOR:** Right.

09:34:14 1 **THE COURT:** Now, you have all your Article 9 things
09:34:20 2 which you point out and argue. You say, we, Bank of America,
09:34:22 3 don't have to do anything more than accept representations.

09:34:29 4 **MR. CANTOR:** Right.

09:34:30 5 **THE COURT:** I'm pointing out one other part of the
09:34:32 6 agreement that seemed to me to impose, trying to read these
09:34:38 7 things together, a higher standard on Bank of America to do
09:34:44 8 reasonable diligence.

09:34:45 9 **MR. CANTOR:** I think, Your Honor, it works the other
09:34:47 10 way. What Bank of America is required to do in this provision
09:34:51 11 is use reasonable diligence to make sure that the construction
09:34:55 12 consultant is doing the work and is doing it in a way that will
09:34:59 13 allow the advance request ultimately to be processed in a timely
09:35:04 14 fashion.

09:35:04 15 When it comes to the substance of the review that the
09:35:09 16 construction consultant performs, that's where § 9.3.2 would
09:35:15 17 kick in and says that Bank of America is entitled to rely on the
09:35:21 18 certification that the construction consultant provides in
09:35:26 19 determining that the things that the construction consultant is
09:35:29 20 responsible for have been satisfied.

09:35:31 21 The reasonable diligence to assure that it performs its
09:35:34 22 reviews as required by § 2.4 is just to make sure that the
09:35:40 23 process is moving forward and is moving forward in a timely
09:35:43 24 fashion.

09:35:45 25 **THE COURT:** All right. Well, let me hold on that for a

09:35:47 1 second and turn to the plaintiffs' side.

09:35:52 2 I'd like to have your comments on the question. Is
09:36:00 3 there, by this provision -- and I know this isn't the issue
09:36:04 4 which is on summary judgment. It is not about the construction
09:36:10 5 costs per se.

09:36:15 6 In terms of the structure of the agreement, what is
09:36:18 7 your position with regard to this aspect? Does the Disbursement
09:36:25 8 Agent have a higher standard with regard to reviewing the
09:36:34 9 construction consultant's performance, et cetera, than it does
09:36:42 10 with regard to other obligations?

09:36:47 11 **MR. HENNIGAN:** Let me answer that and I would like to
09:36:48 12 come back and catch something that was part of the colloquy on
09:36:52 13 the other side.

09:36:52 14 **THE COURT:** Go ahead.

09:36:53 15 **MR. HENNIGAN:** I think their standard remains roughly
09:36:56 16 the same, which is commercially reasonable, and I believe that
09:37:00 17 this articulation of reasonable diligence, I don't read it
09:37:05 18 different from commercially reasonable efforts to make sure the
09:37:08 19 construction consultant is doing his job.

09:37:10 20 **THE COURT:** Okay.

09:37:10 21 **MR. HENNIGAN:** So I think there are, you know, I would
09:37:13 22 say, plenary obligations throughout the agreement that Bank of
09:37:19 23 America use commercially reasonable diligence, efforts,
09:37:22 24 whatever, to make sure that the conditions are fulfilled.

09:37:27 25 The part I wanted to bounce back to, Your Honor, was

09:37:32 1 the point that you referred to, the relatively modest fee that
09:37:37 2 Bank of America was earning for this. Bank of America was the
09:37:41 3 underwriter of these loans, Your Honor. Bank of America earned
09:37:45 4 tens of millions of dollars in putting this package together.

09:37:50 5 This Disbursement Agreement was an essential part of
09:37:56 6 the comfort assurances that lenders look to in order to put
09:38:01 7 their money into the deal and so, yeah, they may have only made
09:38:04 8 \$40,000 on this one, but it was an integral part of the overall
09:38:10 9 financing package. It had to be here and it had to be performed
09:38:13 10 by somebody that people trusted.

09:38:15 11 **THE COURT:** All right. I knew I was going to invite
09:38:18 12 some debate on this issue but in terms of the Disbursement Agent
09:38:24 13 hat and function, there is no dispute that Bank of America was
09:38:31 14 being paid a limited amount of money for that job.

09:38:37 15 **MR. HENNIGAN:** I would say in terms of funds that were
09:38:40 16 earmarked specifically for that job, it was a very modest amount
09:38:44 17 of money.

09:38:46 18 **THE COURT:** Yes. That was my only point.

09:38:47 19 **MR. HENNIGAN:** It was part of the overall deal.

09:38:49 20 **THE COURT:** I understand that Bank of America has other
09:38:54 21 relations to this deal other than Disbursement Agent, but I
09:39:00 22 don't want to go there yet.

09:39:02 23 My main point in trying to address this issue is to try
09:39:12 24 to understand the general introductory language in 9.1 on
09:39:19 25 commercial reasonableness with regard to other aspects of the

09:39:23 1 agreement.

09:39:25 2 I pointed out to you this one matter where reasonable
09:39:33 3 diligence has to be done with regard to the construction
09:39:39 4 consultant's obligations.

09:39:42 5 Also, under 2.4.4(A) under general review, here again
09:39:48 6 the Disbursement Agent and the construction consultant shall
09:39:52 7 review the advance requests and attachments thereto to determine
09:39:56 8 whether all required documentation has been provided and shall
09:39:59 9 use commercially reasonable efforts, et cetera.

09:40:02 10 So when I am looking at the document and trying to
09:40:08 11 integrate the whole, one of the points that is of concern to me
09:40:18 12 is how do you apply that introductory language in 9.1 with
09:40:27 13 regard to the other parts of the agreement where there is
09:40:29 14 specific reference then to the commercial diligence or
09:40:32 15 equivalent and then the rest of Article 9 that seems to limit
09:40:41 16 how that is exercised or the conditions under which it is
09:40:46 17 exercised.

09:40:47 18 **MR. CANTOR:** Your Honor, I think the best way to think
09:40:49 19 about this is if you start with Article 9 as a whole. It is
09:40:56 20 essentially a contract within a contract. You know, for the
09:41:04 21 most part, the rest of the Disbursement Agreement deals with
09:41:09 22 mechanics for disbursing funds, but Article 9 is specifically
09:41:14 23 limited to the retention, the rights, the responsibilities of
09:41:16 24 the Disbursement Agent.

09:41:19 25 So you can look at 9.1, I think, as like a whereas

09:41:23 1 clause for this agreement within an agreement.

09:41:26 2 It sets forth the general purpose of the agreement for
09:41:33 3 retaining the Disbursement Agent, and it leaves the details for
09:41:38 4 the paragraphs that follow.

09:41:40 5 So what it says is it is an acknowledgement that Bank
09:41:42 6 of America is going generally to perform its duties in a manner
09:41:47 7 that is consistent with similarly situated institutions like
09:41:52 8 indenture trustees and the like, and it provides a general
09:41:56 9 standard of care for those Disbursement Agent obligations that
09:42:01 10 are not otherwise subject to more specific provisions.

09:42:06 11 **THE COURT:** But I have a specific purpose in asking
09:42:10 12 this question, and I want to get back to the plaintiffs'
09:42:13 13 response, what you said in a second, but let me take one step
09:42:19 14 further in our discussion and set up the question and then get
09:42:24 15 back to what we're talking about.

09:42:27 16 Could you turn your attention to Page 10 of the
09:42:29 17 Disbursement Agreement on 2.5.1? This is, to me, a very
09:42:46 18 important aspect of the flow of obligations under this
09:42:56 19 Disbursement Agreement, so let's go over this together.

09:43:05 20 "In the event that:

09:43:07 21 "1. The conditions precedent to an advance have not
22 been satisfied; or,

09:43:11 23 "2. The controlling person notifies the Disbursement
09:43:13 24 Agent that a default or an Event of Default has occurred
09:43:18 25 and is continuing, then the Disbursement Agent shall notify

09:43:24 1 the project entities, and each funding agent thereof as
09:43:29 2 soon as reasonably possible, a stop funding notice,"
09:43:33 3 et cetera, et cetera.

09:43:34 4 So let's go back and break that down. Under subpart 2
09:43:41 5 of that, the controlling person, whoever that is -- and I assume
09:43:47 6 that has to be somebody defined under the control agreement.

7 No?

09:43:53 8 **MR. CANTOR:** No, Your Honor. The controlling person is
09:43:55 9 defined in this agreement as, for purposes of our discussion,
09:44:00 10 the Bank Agent.

09:44:02 11 **THE COURT:** Well, the Bank Agent being Bank of America?

09:44:06 12 **MR. CANTOR:** Yes, Your Honor.

09:44:06 13 **THE COURT:** Okay. Okay. So this is what I'm trying to
09:44:13 14 get to. How does this work? Bank of America notifies itself?

09:44:21 15 Bank of America, as the controlling person, then writes
09:44:26 16 a formal demand to Bank of America as the Disbursement Agent
09:44:33 17 that there's a notice of default?

09:44:35 18 **MR. CANTOR:** That would be the process that the
09:44:36 19 agreement contemplates for purposes of making sure that
09:44:40 20 everything is papered in case there is a later litigation and,
09:44:44 21 by the way, Your Honor, this --

09:44:45 22 **THE COURT:** Which portion of Bank of America does this?

09:44:50 23 **MR. CANTOR:** Your Honor, the individuals who were
09:44:55 24 performing the agent functions at Bank of America were all part
09:44:59 25 of the same specific group, the credit debt products group in

09:45:09 1 Dallas, and, yes, Your Honor, it is a formulistic requirement.

09:45:16 2 **THE COURT:** Let me narrow this down. The same people
09:45:19 3 who are the controlling person at Bank of America are also the
09:45:20 4 same people who are disbursement agents?

09:45:22 5 **MR. CANTOR:** Yes, Your Honor, with the exception of the
09:45:27 6 specific individuals who actually press the button and move the
09:45:32 7 money, but the people who are performing this function and
09:45:34 8 making the decisions are the same group of people.

09:45:36 9 **THE COURT:** I'm talking about the decision-makers.
09:45:39 10 Somebody under the definition of controlling person has to make
09:45:44 11 a decision to pull the trigger --

09:45:46 12 **MR. CANTOR:** Yes, Your Honor.

09:45:47 13 **THE COURT:** -- and then notifies itself, wearing a
09:45:51 14 different hat, that such a decision has been made.

09:45:56 15 **MR. CANTOR:** Right, Your Honor.

09:45:57 16 **THE COURT:** Okay. So when I started our discussion
09:46:01 17 today about how Bank of America is being sued here, is it sued
09:46:10 18 as only Disbursement Agent, or is it sued as controlling agent
09:46:20 19 or controlling person, and how do you divide up the knowledge
09:46:26 20 that Bank of America has as controlling person from that which
09:46:30 21 it has as Disbursement Agent?

09:46:33 22 **MR. CANTOR:** Well, Your Honor, let me answer that
09:46:37 23 somewhat obliquely, but I think you'll see where I'm going.

09:46:40 24 This actually goes back to one of your original
09:46:43 25 questions about what is the relevance of the Credit Agreement

09:46:46 1 here because the Credit Agreement which governs the Bank Agent,
09:46:53 2 which is synonymous with Administrative Agent, that is where you
09:46:57 3 get the provision that Your Honor alluded to earlier this
09:47:00 4 morning about knowing whether there has been a default or an
09:47:04 5 Event of Default.

09:47:05 6 There is a provision in the Credit Agreement that
09:47:08 7 specifically provides that Bank of America is not deemed to have
09:47:10 8 notice of an Event of Default or a default unless it receives an
09:47:13 9 actual notice to that effect.

09:47:16 10 So until it receives that actual notice, Bank of
09:47:21 11 America as Bank Agent is not required to notify the Disbursement
09:47:26 12 Agent under this provision here and so therefore you --

09:47:31 13 **THE COURT:** But my question is: Controlling person,
09:47:39 14 does controlling person, namely Bank of America wearing a
09:47:43 15 different hat, have an independent duty and responsibility to
09:47:51 16 review whether there has been a default and pull the trigger?

09:47:54 17 **MR. CANTOR:** I'm not sure what you mean by "review." I
09:47:58 18 think that -- I'm sorry --

09:48:02 19 **THE COURT:** Well, here's where I'm having difficulty
09:48:07 20 with the agreement before we get into the facts.

09:48:13 21 Your position -- and I am not trying to exclude
09:48:18 22 plaintiffs in this discussion -- but let me stick with them for
09:48:21 23 a second because I'd like to hear their response before
09:48:25 24 plaintiffs' response.

09:48:28 25 Your position is that Bank of America as Disbursement

09:48:34 1 Agent has certain protections?

09:48:39 2 **MR. CANTOR:** Yes.

09:48:41 3 **THE COURT:** All right. But Bank of America as
09:48:43 4 controlling person, under some authority, seems to me to have
09:48:55 5 more obligation, if you will, to monitor what's going on in this
09:49:02 6 deal.

09:49:03 7 **MR. CANTOR:** I would disagree with that, Your Honor.

09:49:05 8 **THE COURT:** Okay. Tell me why you disagree with that.

09:49:09 9 **MR. CANTOR:** Okay. There are provisions in the Credit
09:49:15 10 Agreement which mirror the provisions in the Disbursement
09:49:18 11 Agreement about the Bank Agent or the Administrative Agent,
09:49:23 12 which again is synonymous, being allowed to rely on the same
09:49:28 13 types of certifications, representations and warranties that the
09:49:33 14 Disbursement Agent relies upon.

09:49:36 15 That would be § 9.4 of the Credit Agreement, and § 9.3
09:49:43 16 of the Credit Agreement all deal with that.

09:49:45 17 When you get specific to 2.5.1, Your Honor, and the
09:49:50 18 issue about controlling person notifying the Disbursement Agent
09:49:54 19 that there has been a default or an Event of Default, the Credit
09:49:58 20 Agreement specifically provides that Bank of America doesn't
09:50:01 21 have knowledge of an Event of Default or a Default, capital D
09:50:06 22 default, unless it has received notice from someone of that
09:50:10 23 event.

09:50:10 24 So what you get is, if you focus specifically on 2.5.1,
09:50:17 25 it is undisputed that Bank of America never received a notice of

09:50:21 1 default here, and so therefore this second portion of 2.5.1
09:50:28 2 which focuses on the controlling person as opposed to the
09:50:32 3 Disbursement Agent is not part of our discussion here this
09:50:34 4 morning, Your Honor.

09:50:35 5 **THE COURT:** Well, you are saying a lot of things.

09:50:38 6 **MR. CANTOR:** Okay.

09:50:39 7 **THE COURT:** So let me go back to what you just said.

09:50:42 8 One of the issues raised by plaintiffs is, well, they
09:50:46 9 did receive notice from one of the Term Lenders that the Lehman
09:50:56 10 bankruptcy was a triggering Event of Default.

09:51:00 11 **MR. CANTOR:** I would say that is a mischaracterization.
09:51:02 12 They received an email from one of the Term Lenders who is not a
09:51:07 13 party here that expressed their views as to whether the Lehman
09:51:14 14 bankruptcy had certain consequences, but what it didn't do was
09:51:17 15 say this is an event of -- we hereby declare an Event of
09:51:20 16 Default.

09:51:21 17 **THE COURT:** Let me interrupt for a second and turn to
09:51:23 18 plaintiffs.

09:51:25 19 Since the Disbursement Agreement does not itself have
09:51:29 20 provisions on notice as to what is formal notice, leaving aside
09:51:36 21 who has to give it for a moment, does the Credit Agreement
09:51:43 22 notice requirements apply here?

09:51:46 23 Is there a formal process where that notice has to be
09:51:53 24 given in a written, certified way that creates a triggering
09:52:00 25 event, or is it enough that it be electronically transmitted?

09:52:08 1 **MR. HENNIGAN:** If I am tracking it, Your Honor, it
09:52:09 2 seems to me that the unity of control agent and -- I am using
09:52:14 3 the right word, right, control agent?

4 **THE COURT:** Control person.

09:52:19 5 **MR. HENNIGAN:** The unity of the controlling person
09:52:20 6 being the Bank Agent and that same person being the disbursing
09:52:25 7 agent makes notice under that circumstance self-executing.

09:52:29 8 Notice to one is notice to the other automatically.

09:52:32 9 **THE COURT:** Yes. But let's say one of the Term
09:52:34 10 Lenders, like in this situation --

11 **MR. HENNIGAN:** Gotcha.

09:52:37 12 **THE COURT:** -- sends an email. Does that qualify as
09:52:43 13 notice in this formal sense under the Credit Agreement which
09:52:50 14 then is notice of appropriate communication for purposes of the
09:52:54 15 Disbursement Agreement?

09:52:55 16 **MR. HENNIGAN:** It is absolutely a notice of default.

09:52:59 17 **MR. CANTOR:** Your Honor, the issue is not the means of
09:53:01 18 transmission; the issue is the content of the transmission.

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09:53:30 1 **THE COURT:** So let me get back to 2.5.1. We talked
09:53:37 2 about controlling person notifies, which is a triggering event
09:53:43 3 if that provision was met, but it wasn't met here.

09:53:47 4 **MR. CANTOR:** Correct.

09:53:48 5 **THE COURT:** So I don't have to pay any attention to
09:53:51 6 that subpart 2, right?

09:53:52 7 **MR. CANTOR:** That's my position, Your Honor.

09:53:55 8 **THE COURT:** And I don't know. Do you have a position
09:53:57 9 different? There isn't any formal notice from controlling
09:54:02 10 person to Disbursement Agent that would meet that requirement,
09:54:09 11 is there?

09:54:09 12 **MR. HENNIGAN:** As I said, Your Honor, I believe that
09:54:11 13 since they are the same entity, notice to one is by definition
09:54:17 14 notice to the other.

09:54:17 15 **THE COURT:** What do you say about that?

09:54:19 16 **MR. CANTOR:** That is not what the contract says.

09:54:21 17 The contract specifically requires -- and, again, it
09:54:24 18 might seem overly formalistic as you sit here today, but you can
09:54:29 19 imagine a litigation situation where the failure to have all of
09:54:34 20 these specified boxes checked could be important.

09:54:37 21 What 2.5.1 talks about is the controlling person
09:54:41 22 notifying the disbursing agent, and there is no evidence in the
09:54:45 23 record that that ever happened.

09:54:48 24 **THE COURT:** All right. But let's go back to Part 1:
09:54:51 25 In the event, 1, the conditions precedent to an advance have not

09:54:56 1 been satisfied.

09:55:06 2 Now, what I have tried very hard to do is look through
09:55:10 3 this Disbursement Agreement to see who triggers that, who says
09:55:17 4 that. Well, one thing I know is that Fontainebleau can say
09:55:24 5 that. Fontainebleau can give notice and eventually later in the
09:55:28 6 deal did give notice that the conditions precedent were not
09:55:37 7 satisfied.

09:55:37 8 **MR. CANTOR:** Right.

09:55:38 9 **THE COURT:** So that is one situation.

09:55:40 10 Another situation seems to me to be if Bank of America
09:55:50 11 as Disbursement Agent is doing its checklist and it
09:55:56 12 determines -- and I'm going to use something which is really not
09:55:59 13 our situation here -- but it determines that the construction
09:56:06 14 consultant has not adequately, reasonably been diligent in the
09:56:15 15 project costs and that condition has not been satisfied, or
09:56:18 16 something of that nature, that would be an event where the
09:56:28 17 Disbursement Agent is required to notify the project entities,
09:56:34 18 right?

09:56:34 19 **MR. CANTOR:** Yeah. I think the facts as you actually
09:56:38 20 put them might not work, but let me tie it to something that
09:56:41 21 happened here.

09:56:42 22 For example, in March 2009, when IVI, the construction
09:56:48 23 consultant, initially reviewed the advance request, it was
09:56:50 24 unwilling to sign off on the advance request.

09:56:53 25 Ultimately that got resolved, but if it had not, then

09:56:56 1 Bank of America would not have been allowed --

09:56:59 2 THE COURT: I'm trying to use a simple example.

09:57:01 3 MR. CANTOR: Yeah.

09:57:02 4 THE COURT: I'm trying to use a simple example where
09:57:05 5 under your ministerial checklist theory, the construction
09:57:08 6 consultant refuses to sign the document.

09:57:11 7 MR. CANTOR: Yes, Your Honor.

09:57:12 8 THE COURT: Then in the ministerial review of the
09:57:19 9 paperwork, the Disbursement Agent would determine that a
09:57:26 10 condition precedent to an advance has not been satisfied.

09:57:30 11 Would you agree?

09:57:32 12 MR. CANTOR: Yes, Your Honor.

09:57:32 13 THE COURT: Okay. And in that event, under 2.5.1, the
09:57:42 14 Disbursement Agent has an obligation, "shall" -- mandatory --
09:57:47 15 notify the project entities, et cetera.

09:57:50 16 MR. CANTOR: Right.

09:57:51 17 THE COURT: Okay. Now, where this does get confusing
09:57:57 18 to me -- and I want to have more argument from both sides on
09:58:01 19 this -- and I'm going to have more questions to you as you go
09:58:07 20 through this -- is another type of situation, and that has to do
09:58:23 21 where it is not a matter of determining whether C-1 has been
09:58:31 22 submitted correctly with all certifications.

09:58:35 23 It's a more subjective determination of whether or not
09:58:40 24 the other conditions precedent have been met and what I'm trying
09:58:53 25 to get at is the structure of the agreement as to various

09:59:01 1 alternative circumstances.

09:59:04 2 Number 1, since there is no specific language saying
09:59:13 3 Disbursement Agent shall use reasonable diligence to make sure
09:59:17 4 that each condition precedent to an advance has been satisfied,
09:59:24 5 the way it has been with the construction side, is there an
09:59:29 6 affirmative duty in any way on the part -- under the
09:59:33 7 agreement -- on the part of Bank of America to do that?

09:59:37 8 **MR. CANTOR:** No, Your Honor.

09:59:38 9 **THE COURT:** Okay. I know your position is no, but let
09:59:42 10 me just phrase these things and then we will get back to them.

09:59:49 11 Okay. In support of your position, you would go
09:59:55 12 through, you know, all the Article 9 limitations that would be
10:00:02 13 consistent with. We don't have the obligation. We are just
10:00:07 14 checklisting. Okay. I understand that.

10:00:09 15 **MR. CANTOR:** Yeah, in particular 9.3.2.

10:00:12 16 **THE COURT:** And you would also rely on 9.2.5, no
10:00:19 17 imputed knowledge.

10:00:20 18 **MR. CANTOR:** Yes, Your Honor.

10:00:23 19 **THE COURT:** So now we get to the much harder question
10:00:30 20 which is, I think, the subject of this summary judgment, as to
10:00:39 21 if Bank of America knew or should have known in the course of
10:00:47 22 its dealings with the loan as controlling person or Disbursement
10:00:56 23 Agent that a condition precedent has not been satisfied, okay,
10:01:08 24 and it -- not that it is imputed knowledge.

10:01:11 25 I mean, under the best of circumstances, let's say it

10:01:13 1 is a clean-cut advance. You are doing your checklist. You
10:01:17 2 don't know anything. There is nothing at issue. You stamp it
10:01:21 3 approved. Off it goes. You are covered by everything in this
10:01:25 4 agreement.

10:01:27 5 But here you have this issue with the retail facility
10:01:36 6 and Lehman's bankruptcy, and then the question is, well, what
10:01:43 7 did Bank of America know or what should it have known?

10:01:50 8 If it either should have known or knew, did it have an
10:01:54 9 affirmative duty at that point, under commercial reasonableness
10:02:03 10 language, to do more and, in fact, didn't it do more by looking
10:02:10 11 into the question, having its lawyer look into the question or
10:02:14 12 other thing?

10:02:15 13 **MR. CANTOR:** Well, let me start by saying to the extent
10:02:19 14 that Bank of America did more, that's not the way that you
10:02:25 15 define the standard, the minimum standard of what they were
10:02:28 16 required to do. The fact that they did more, among other
10:02:31 17 things, shows that they weren't grossly negligent here.

10:02:35 18 But in determining what it is that they need to do, I
10:02:37 19 think you need to split "knew or should have known" into two
10:02:44 20 parts.

10:02:44 21 The premise of our argument here is that, as the clear
10:02:50 22 and unambiguous language of 9.3.2 says, Bank of America is
10:02:58 23 entitled to rely without further investigation on
10:02:59 24 Fontainebleau's certifications that conditions precedent had
10:03:02 25 been met.

10:03:02 1 If Bank of America actually knew that a condition
10:03:08 2 precedent had not been satisfied, then it would not be relying
10:03:12 3 on Fontainebleau's certifications at that point, and we would
10:03:17 4 concede that they had an obligation to not allow the funding to
10:03:22 5 go forward but actually knew.

10:03:25 6 **THE COURT:** Hold right there.

10:03:29 7 So for purposes of the summary judgment, your position
10:03:34 8 is if Bank of America had actual knowledge that a condition
10:03:38 9 precedent had not been met -- in this case, I guess that
10:03:44 10 translates to the equivalent of actual knowledge that Lehman was
10:03:52 11 not funding the retail facility, right?

10:03:54 12 **MR. CANTOR:** Right.

10:03:55 13 **THE COURT:** Okay. If it knew that --

10:03:58 14 **MR. CANTOR:** Well, that Fontainebleau Resorts was,
10:04:01 15 because there are other people that could have funded that it
10:04:05 16 would have been permissible.

10:04:05 17 **THE COURT:** Let me rephrase that.

10:04:07 18 **MR. CANTOR:** Yeah.

10:04:08 19 **THE COURT:** If Bank of America had actual knowledge
10:04:14 20 that Lehman did not fund and none of the other lenders within
10:04:22 21 the retail structure funded and that Fontainebleau funded, that
10:04:30 22 is a different situation and then Bank of America did have,
10:04:35 23 notwithstanding Article 9, an affirmative duty to initiate a
10:04:43 24 default notice.

10:04:44 25 **MR. CANTOR:** Right. Bank of America in that instance

10:04:46 1 would know that the conditions precedent have not been satisfied
10:04:49 2 and, thus, it would be required under 2.5.1 to issue a stop
10:04:53 3 funding notice.

10:04:54 4 **THE COURT:** So let's hold on that for a second and
10:04:58 5 switch back to the factual issues here.

10:05:07 6 Is there from the plaintiffs' standpoint -- and I would
10:05:08 7 like more discussion -- is there a material issue of fact about
10:05:14 8 actual knowledge? Let's assume there was actual knowledge, but
10:05:28 9 no action taken.

10:05:30 10 Wouldn't that be gross negligence under New York law?

10:05:33 11 **MR. CANTOR:** It would not, Your Honor, under these
10:05:36 12 circumstances.

10:05:36 13 **THE COURT:** Okay. So let's divide the two up. Let's
10:05:39 14 start with Question 1, actual knowledge.

10:05:43 15 **MR. CANTOR:** Yes, Your Honor.

10:05:44 16 **THE COURT:** Based upon all these emails, and I've now
10:05:49 17 received some new information, other discovery, is there a
10:05:55 18 material issue of fact on actual knowledge?

10:05:57 19 **MR. CANTOR:** Let me make sure I phrase it correctly,
10:06:00 20 Your Honor.

10:06:00 21 Your Honor, we don't believe that there is a material
10:06:03 22 issue of fact that Bank of America had actual knowledge.
10:06:08 23 Plaintiffs have not submitted sufficient evidence in admissible
10:06:14 24 form to establish actual knowledge by Bank of America.

10:06:17 25 When you add up all of the emails, many of which, I

10:06:21 1 believe, they have mischaracterized -- a lot of the evidence
10:06:25 2 that they rely on they both mischaracterized and it is
10:06:30 3 inadmissible.

10:06:32 4 When you add all that up, Your Honor, all that adds up
10:06:35 5 to is, at best, a finding that Bank of America should have been
10:06:38 6 suspicious, that Bank of America should have asked more
10:06:41 7 questions. That's not actual knowledge.

10:06:44 8 **THE COURT:** Let me hold up for a second.

10:06:46 9 Does plaintiff contend that Bank of America had actual
10:06:52 10 knowledge?

10:06:52 11 **MR. HENNIGAN:** Yes.

10:06:54 12 **THE COURT:** What evidence are you relying on that
10:06:57 13 creates at least a material issue of fact of actual knowledge?

10:07:03 14 **MR. HENNIGAN:** The evidence that I am relying on, Your
10:07:04 15 Honor, that I think disposes of the question is

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10:09:40 1 were met?

10:09:40 2 **MR. HENNIGAN:** They made it with the original advance

10:09:44 3 request. I'll get to that in a second.

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In other words, when you answer the question that way, there is not a jury or a court anywhere in the country that wouldn't understand in that context that he was saying it was made in a way that violates the condition. Everyone knew it at that point. What they were doing was looking for cover.

So we think it is not that it raises a triable issue of

10:14:40 1 fact. We think there is no credible evidence on this record
10:14:44 2 that Bank of America did not know that that funding was made by
10:14:49 3 Fontainebleau and not by Lehman Brothers and now let's look at
10:14:53 4 whether or not they have denied it.

10:14:56 5 The answer is they have mealy-mouthed their way through
10:15:01 6 this thing. They never squarely say.

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10:15:41 19 **THE COURT:** Okay. So, let me ask for responses on
10:15:45 20 that.

10:15:45 21 **MR. CANTOR:** Sure, Your Honor. That was a really nice
10:15:50 22 story. It would sound great at closing, but it is an
10:15:53 23 interpretation of the evidence. It is not, in fact, what the
10:15:56 24 evidence will show.

10:15:58 25 What the evidence does show is that the conversations

10:16:02 1 that were held between Bank of America and Fontainebleau --

10:16:07 2 **THE COURT:** Let me ask you to rephrase this in a
10:16:10 3 different way.

10:16:10 4 **MR. CANTOR:** Okay.

10:16:11 5 **THE COURT:** We're not here on closing argument either.

10:16:14 6 **MR. CANTOR:** Right.

10:16:15 7 **THE COURT:** The issues have to be addressed in terms of
10:16:18 8 the standards for summary judgment --

10:16:21 9 **MR. CANTOR:** Uh-huh.

10:16:22 10 **THE COURT:** -- and whether or not there is a material
10:16:26 11 issue of fact on this.

10:16:28 12 **MR. CANTOR:** Right.

10:16:28 13 **THE COURT:** So the question is -- at least in response
10:16:33 14 to your motion, before I get to their motion -- the question is
10:16:37 15 whether they have generated enough through these emails to
10:16:42 16 trigger a material issue of fact of actual knowledge.

10:16:45 17 **MR. CANTOR:** They have not, Your Honor, because the
10:16:47 18 emails themselves don't show actual knowledge. It is only when
10:16:50 19 Mr. Hennigan gets a chance to spin them that he even gets close.

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There is no testimony in the record that Fontainebleau told Bank of America, If Lehman doesn't fund, we are going to fund for them. That conversation never happened. There is no --

THE COURT:

I don't understand quite the mechanics of what happened there.

MR. CANTOR: Basically, Bank of America is the largest bank in the United States and among its thousands and thousands of clients is Fontainebleau Las Vegas.

Just as if when Jeff Soffer goes to the ATM machine, there is a record generated somewhere in Bank of America that that happens.

But there is absolutely no evidence in the record that

10:18:37 1 anyone with any connection to the Fontainebleau Las Vegas
10:18:40 2 project had any knowledge that this wire transfer took place nor
10:18:45 3 would there have been any reason for them to know about that.

10:18:47 4 **THE COURT:** Okay. Hold on that.

10:18:49 5 Your response to that? Is there anything of record
10:18:52 6 plaintiffs are relying on that shows that anyone within the Bank
10:18:59 7 of America controlling person, disbursing agent side, knew of
10:19:07 8 that wire transfer, knew of the wire transfer?

10:19:13 9 **MR. HENNIGAN:** Your Honor, I always have these
10:19:18 10 conceptual issues about the different hats that want to be worn
10:19:23 11 here.

10:19:23 12 **THE COURT:** My question is very specific. Were you
10:19:26 13 able to determine in any manner, and where is it, that someone
10:19:32 14 within the structure, a controlling person, Administrative
10:19:36 15 Agent, somewhere in that pecking order of who pulls the trigger
10:19:43 16 down to who is working on the account had actual knowledge of
10:19:48 17 that transfer?

10:19:50 18 **MR. HENNIGAN:** The answer is yes.

10:19:54 19 **THE COURT:** Tell me specifically.

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10:20:07 23 **THE COURT:** I am not talking about

10:20:09 24 **MR. HENNIGAN:** I am talking about what his testimony
10:20:12 25 is.

10:20:12 1 THE COURT: Okay. Go ahead.

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10:20:19 4 THE COURT: Well, you know, that's not quite going to
10:20:22 5 cut it. I mean, that sounds like, at best, speculative. If
10:20:33 6 there was an objection --

10:20:33 7 MR. CANTOR: There was.

10:20:34 8 THE COURT: -- made to that, I would grant it because
10:20:38 9 it's an assumption unless established as something in terms of
10:20:46 10 habit and course of practice and all that.

10:20:47 11 MR. HENNIGAN: That is exactly what it is.

10:20:48 12 THE COURT: But I don't think that is what I am asking
10:20:50 13 you.

10:20:50 14 MR. HENNIGAN: Well, --

10:20:53 15 THE COURT: There is nothing in the record that said
10:20:55 16 that somebody from Trimont actually remembered directly telling
10:21:04 17 someone in the structure that that funding occurred, is there?

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10:21:21 21 THE COURT: Okay. That's not the question I asked.

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10:21:38 1 **THE COURT:** Okay. But that doesn't mean others didn't,
10:21:41 2 so that's Bank of America's point in terms of other lenders. It
10:21:46 3 is different than Fontainebleau made it.

10:21:51 4 **MR. HENNIGAN:** That's true.

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10:22:35 14 What occurs to us as we are preparing for this argument
10:22:39 15 is that if I were Bank of America and I wanted to know really
10:22:45 16 whether Fontainebleau funded,

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10:22:59 19 So, the fact they don't puts them, I think, into the
10:23:01 20 category of studied ignorance. They didn't want to know at that
10:23:05 21 point. They wanted to cover their tracks. They did not want
10:23:11 22 evidence in the record that, in fact, they had induced this
10:23:16 23 default and therefore were in error for having disbursed the
10:23:20 24 funds.

10:23:21 25 **THE COURT:** Okay.

10:23:21 1 **MR. HENNIGAN:** I don't think there is another
10:23:22 2 explanation for it.

10:23:23 3 **THE COURT:** But let's turn back --

10:23:25 4 **MR. CANTOR:** Okay.

10:23:26 5 **THE COURT:** -- and then we will take a break in a
10:23:28 6 minute.

10:23:29 7 **MR. CANTOR:** There has been so much thrown out that I
10:23:32 8 am not sure I am going to be able to hit all of it.

10:23:34 9 **THE COURT:** What is being argued, as I understand it,
10:23:37 10 is equivalent to the criminal concept of deliberate ignorance,
10:23:45 11 that Bank of America, in analyzing this question which it was
10:23:51 12 discussing and asking for affirmations or explanations from
10:23:58 13 Fontainebleau about, deliberately did not verify the answer
10:24:09 14 within the confines of records it controlled.

10:24:12 15 **MR. CANTOR:** Your Honor, it didn't have any reason to
10:24:14 16 go and check the records. As I was starting to explain before,
10:24:17 17 when Mr. Hennigan says that Bank of America induced
10:24:21 18 Fontainebleau Resorts to fund, that's just false and not based
10:24:25 19 on any testimony or documents that are in the record.

10:24:29 20 What Bank of America knew is that Fontainebleau was
10:24:32 21 considering a variety of options in the event that Lehman didn't
10:24:37 22 fund.

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There is no evidence that they ever communicated to Fontainebleau that if Fontainebleau wanted to do that, it would be okay. That's an assumption that Mr. Hennigan has made. There is no evidence in the record of that, no testimony by Jim Freeman, no testimony by anyone from Bank of America that that happened.

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So there is no studied ignorance here and, as you say, that is a criminal concept that I don't think applies when you've got a contract that specifically says you can rely without investigation, but there just was no reason for Bank of America to have to do that.

THE COURT: Let me toss out two more matters and then we'll take a break.

MR. HENNIGAN: Could I respond in just a couple of sentences?

THE COURT: Yes

Number 2, they didn't have to know what the exact

10:27:25 1 amount was. They just needed to ask one question: On the 26th
10:27:29 2 of September 2008, did Fontainebleau transfer funds to Trimont?

10:27:38 3 **MR. CANTOR:** Why would they have asked that question,
10:27:40 4 Your Honor, when they don't have a contractual obligation to do
10:27:42 5 so?

10:27:43 6 **THE COURT:** Well, we're going to discuss this more in a
10:27:47 7 few minutes, but let me pose a couple of questions to you to
10:27:50 8 consider during our break.

10:27:55 9 What significance does it have that as a matter of fact
10:28:03 10 Lehman did fund in October and November? There is no dispute of
10:28:10 11 fact by and between the parties that that funding occurred from
10:28:14 12 Lehman. How is that put into this factual equation in terms of
10:28:29 13 how I should hear the evidence on summary judgment?

10:28:39 14 The second thing is -- and this is like a bigger
10:28:48 15 picture issue which is troubling to me so I'll mention it -- the
10:28:55 16 Term Lenders are wearing different hats, too, it seems to me.

10:29:02 17 One hat is, Ahhh, look at this, revolvers should have
10:29:13 18 funded their share of the deal, when is it, in March? They
10:29:17 19 should have funded it all. Because we funded, you should have
10:29:21 20 funded, and why is that? Because we wanted this project to
10:29:27 21 continue in order to protect our investment. Right?

10:29:33 22 Isn't that a fair way of looking at your first
10:29:36 23 position?

10:29:37 24 **MR. HENNIGAN:** Our first position on that subject, Your
10:29:39 25 Honor, is we absolutely, categorically wanted their money into

10:29:44 1 the bank proceeds account because we have a lien on it and we're
10:29:49 2 going to thereby share the pain with them as was contemplated by
10:29:53 3 the overall funding agreements.

10:29:55 4 We did not want this money, ours and theirs, to go down
10:30:01 5 this rat hole. We wanted them to fund.

10:30:07 6 **THE COURT:** But if there was a default, it would have
10:30:10 7 been a default all and there would have been a stoppage, if you
10:30:16 8 would, of the project for every lender back in September, right,
10:30:32 9 '08?

10:30:34 10 If your theory is correct, then Bank of America would
10:30:37 11 have pulled the plug on the whole project because of this retail
10:30:47 12 issue involving Lehman. What did you say? It was one point
10:30:51 13 something.

10:30:52 14 **MR. CANTOR:** The amount of the issue for Lehman in that
10:30:55 15 September advance was \$4 million total, 2.5 from Lehman.

10:30:59 16 **THE COURT:** 2.5 for Lehman and the whole advance was
10:31:03 17 for?

10:31:03 18 **MR. CANTOR:** The whole retail advance was 4. I don't
10:31:05 19 remember what the whole requested that month. It was probably
10:31:08 20 like \$100 million or something.

10:31:16 21 **THE COURT:** Okay. What bothers me is two-fold looking
10:31:22 22 at this from a broader perspective.

10:31:25 23 One is, notwithstanding your statement to me, it
10:31:31 24 doesn't really make sense to me for the Term Lenders to take a
10:31:37 25 position that the Revolvers were obligated to fund in March if,

10:31:45 1 in fact, your position is that none of the lenders should have
10:31:50 2 been obligated to fund anything and Bank of America shouldn't
10:31:55 3 have advanced anything, sorry, back in September. That's
10:32:00 4 Number 1.

10:32:00 5 Number 2, this project was well underway and there was
10:32:16 6 every effort being made to try to make it work to protect
10:32:23 7 everybody's money.

10:32:27 8 So what is being done here, it seems to me, is to look
10:32:33 9 back retroactively to a situation in September where there is no
10:32:39 10 question that money was coming forward to do the retail part and
10:32:49 11 that was moving forward and, in fact, Lehman did continue after
10:32:56 12 that.

10:32:56 13 So the project was being protected and everybody's
10:33:00 14 money was being protected, at least up to that point in time,
10:33:07 15 until it was discovered about all these cost overruns which
10:33:14 16 nobody here claims anybody knew at the time.

10:33:19 17 So here you have an Administrative Agent that really, I
10:33:28 18 could see, is in a bit of a dilemma. I mean, if it pulled the
10:33:32 19 plug on the whole project, based upon what you are arguing from
10:33:36 20 the Term Lenders looking in retrospect, would it have had a
10:33:44 21 massive lawsuit from Fontainebleau as well as potentially others
10:33:53 22 who were dependent upon this project going forward?

10:33:57 23 So even if I applied a commercial reasonableness
10:34:03 24 standard, what was done, was that commercially unreasonable to
10:34:08 25 allow that project go forward and maybe not look at the question

10:34:12 1 too closely? Those are a couple of things that are of concern
10:34:21 2 to me on this issue.

10:34:24 3 You know, if the situation repeated itself in October,
10:34:35 4 November and the like, where Lehman didn't fund and there were
10:34:42 5 continuing questions and whatever, it would be a tougher call
10:34:46 6 here but, I mean, we are dealing with one month which is
10:34:51 7 squirrely, followed by two months where no one contests that
10:34:56 8 Lehman actually did fund.

10:34:59 9 So I know I'm looking at this in terms of this record,
10:35:09 10 but I also think that in the real world sense it is necessary to
10:35:16 11 take a look at what was going on in this project at that time in
10:35:25 12 terms of the Term Lenders' argument on commercial reasonableness
10:35:27 13 and gross negligence. I am going to take a break and give you
10:35:31 14 time to all respond to this.

10:35:34 15 Then, even if you accept as true for purposes of
10:35:39 16 summary judgment that there may have been this funding, they
10:35:48 17 knew or should have known or deliberately ignorant in not
10:35:54 18 knowing that Fontainebleau actually directly or indirectly
10:35:57 19 funded, is that, under the standard of the agreement, gross
10:36:11 20 negligence as a matter of law?

10:36:14 21 When we return, can we deal with some of these issues?
10:36:21 22 I'll give both sides an opportunity to address it.

10:36:25 23 **MR. CANTOR:** Thank you.

10:36:26 24 **THE COURT:** Let's take fifteen minutes. In fact, I
10:36:31 25 have to break by no later than noon, so let's reconvene at 10 of

10:36:40 1 11:00.

10:36:44 2 I want to hear your arguments from this point on, as
10:36:48 3 much as you want to make them. I know you have prepared
10:36:51 4 detailed slides and all, but I think we have covered a lot and
10:36:54 5 I'm trying to get as close to the heart of the controversy as I
10:37:00 6 can.

10:37:00 7 So whatever you want to do in the remaining time, I'm
10:37:03 8 going to be quiet and let you do your thing.

10:37:06 9 **MR. CANTOR:** Thank you, Your Honor.

10:37:08 10 **THE COURT:** But keep in mind some of these questions I
10:37:11 11 have posed to you. All right. 10 of 11:00 we will be back.
10:37:15 12 Thank you.

10:37:16 13 Those on the phone, please remain on the phone and we
10:37:18 14 will reconvene because we're not going to call everybody or have
10:37:22 15 people call in again.

10:37:24 16 [There was a short recess taken at 10:37 a.m.]

17 AFTER RECESS

10:54:10 18 [The proceedings in this cause resumed at 10:54 a.m.]

10:55:11 19 **THE COURT:** All right. Are we back on the record, Joe?

10:55:15 20 Just so everybody knows, during the interim there was a
10:55:21 21 problem with the call-in. Someone on the line did something
10:55:29 22 which created a necessity to hang up and require everybody to
10:55:35 23 call in again, so you may hear about that later from those who
10:55:41 24 are interested, but I don't want to delay the proceedings
10:55:45 25 waiting for everybody to come in.

10:55:47 1 So let me open the argument again to some of the
10:55:58 2 issues. Why don't you start and then I would appreciate if you
10:56:05 3 would argue in point and counterpoint.

10:56:08 4 **MR. CANTOR:** Sure, Your Honor. I am not going to do
10:56:10 5 any kind of a formal presentation because so much of what I
10:56:14 6 would have done has been covered earlier today, but I do want to
10:56:21 7 try and address some of the issues that have been raised this
10:56:25 8 morning as well as the questions that you left us with.

10:56:30 9 I think, Your Honor, what I will do as to the more
10:56:34 10 specific factual issues that opposing counsel has raised, I
10:56:39 11 think I'm going to leave them either for the end or for further
10:56:43 12 rebuttal because where the argument has taken us, I have got
10:56:48 13 lots to say about the factual issues and, in particular, the
10:56:53 14 inability of plaintiffs to create a triable issue of fact on
10:56:57 15 actual knowledge.

10:56:59 16 I think a lot of the factual material that they have
10:57:01 17 discussed has been mischaracterized and is inadmissible, but
10:57:07 18 unless Your Honor wants me to, I think that may be something
10:57:10 19 that I'll come to a little later on.

10:57:14 20 What I would like to focus on, Your Honor, first is
10:57:17 21 just briefly on the basic issue of breach of contract because we
10:57:21 22 have covered so much of it.

10:57:23 23 Just to reiterate, Your Honor, our position is this is
10:57:26 24 a very simple case, that the obligations of Bank of America as
10:57:33 25 Disbursement Agent are limited. Your Honor pointed out the two

10:57:37 1 obligations essentially: determining that the required
10:57:40 2 documentation has been submitted with each advance request and
10:57:43 3 confirming that all of the conditions precedent to disbursement
10:57:48 4 have been met.

10:57:48 5 From our perspective, in performing the obligation to
10:57:52 6 ensure that the conditions precedent to disbursement have been
10:57:56 7 met, the key provision is obviously 9.3.2 which in relevant part
10:58:03 8 provides, notwithstanding anything else in this agreement to the
10:58:07 9 contrary, in performing its duties hereunder, including
10:58:11 10 approving advance requests or making other determinations or
10:58:14 11 taking other actions hereunder, the Disbursement Agent shall be
10:58:18 12 entitled to rely on certifications from the project entities as
10:58:23 13 to the satisfaction of any requirements and/or conditions
10:58:26 14 imposed by this agreement.

10:58:28 15 So it's clear, Your Honor, that Bank of America was
10:58:35 16 entitled to rely without further investigation on the
10:58:38 17 representations that it received from Fontainebleau.

10:58:42 18 At the motion to dismiss hearing, Your Honor, you
10:58:44 19 correctly pointed out that the record at that point was
10:58:46 20 incomplete because plaintiffs' complaint had not alleged whether
10:58:50 21 or not Fontainebleau had submitted all of the necessary
10:58:52 22 certifications. That's no longer an issue here, Your Honor.

10:58:55 23 It is undisputed that for every single advance request
10:58:59 24 that's at issue in this case, Bank of America received all of
10:59:02 25 the required certifications, representations and warranties from

10:59:07 1 Fontainebleau; and from our perspective, Your Honor, that should
10:59:10 2 be the end of the case.

10:59:11 3 Bank of America has done everything that the
10:59:15 4 Disbursement Agreement expressly required it to do and § 9.10
10:59:19 5 leaves no doubt that unless the agreement specifically says that
10:59:23 6 Bank of America has to do something, it does not have any
10:59:27 7 additional duties.

10:59:28 8 9.10, as Your Honor probably knows, in relevant part
10:59:32 9 provides that the Disbursement Agent shall have no duties or
10:59:36 10 obligations hereunder except as expressly set forth herein,
10:59:40 11 shall be responsible only for the performance of such duties and
10:59:43 12 obligations and shall not be required to take any action
10:59:46 13 otherwise in accordance with the terms hereof.

10:59:49 14 That is the fundamental flaw with plaintiffs' breach of
10:59:54 15 contract argument, Your Honor, is that their entire case is
10:59:56 16 premised on ignoring 9.3.2 and 9.10 and imposing additional
11:00:02 17 unwritten obligations on Bank of America.

11:00:05 18 There is a second independent reason why Bank of
11:00:08 19 America is entitled to summary judgment here, Your Honor, and I
11:00:12 20 think it ties into some of the issues that you raised just
11:00:16 21 before the break.

11:00:17 22 It is undisputed, as Your Honor mentioned, that the
11:00:22 23 contract limits Bank of America's liability to gross negligence
11:00:26 24 or worse.

11:00:27 25 There is no dispute between the parties that such

11:00:29 1 clauses are fully enforceable under New York law, and plaintiffs
11:00:35 2 have acknowledged in their papers that gross negligence is a
11:00:37 3 very high standard requiring either reckless disregard for the
11:00:41 4 rights of others or conduct that smacks of intentional
11:00:44 5 wrongdoing or, as the one that they cite in their papers, as
11:00:47 6 that case put it, an absence of even slight diligence.

11:00:51 7 There is nothing even approaching that level of
11:00:55 8 culpable conduct here, especially when Bank of America's actions
11:00:59 9 are considered in context and without hindsight and that is, I
11:01:02 10 think, what Your Honor was alluding to just before the break.

11:01:07 11 **THE COURT:** Well, I am violating my own prohibition
11:01:11 12 against asking too much and giving you a chance, but I asked you
11:01:17 13 before if it is assumed there is a material issue of fact on
11:01:41 14 actual knowledge, is there a further question that if there was
11:01:47 15 actual knowledge, that that would equate to gross negligence and
11:01:52 16 not following through with the terms of the agreement.

11:01:55 17 **MR. CANTOR:** In these circumstances, Your Honor, actual
11:02:00 18 knowledge of what we are talking about is the Lehman issue, for
11:02:04 19 example.

11:02:05 20 **THE COURT:** Right. Yes, that Fontainebleau actually
11:02:09 21 was doing the funding. If there were actual knowledge --

11:02:13 22 **MR. CANTOR:** Yeah.

11:02:14 23 **THE COURT:** -- I think you have conceded that would
11:02:15 24 have been a default.

11:02:17 25 Would it then be gross -- would it necessarily follow

11:02:25 1 that as -- it is at least a jury question at that point on
11:02:29 2 whether or not Bank of America was grossly negligent in not
11:02:37 3 declaring the default.

11:02:37 4 **MR. CANTOR:** I don't think it is, Your Honor, because I
11:02:39 5 think what you have got, as you have alluded to, is a situation
11:02:43 6 where you have got, you know, Bank of America was the
11:02:44 7 Disbursement Agent for all of the different lenders to the
11:02:48 8 Senior Credit Facility, the initial Term Loan Lenders who had
11:02:52 9 money already in the project, the Delay Draw Term Lenders who
11:02:56 10 were going to be the next ones asked to fund and the Revolving
11:02:58 11 Lenders.

11:02:59 12 So when Bank of America was asked to make a
11:03:02 13 determination as to whether the September funding should go
11:03:08 14 forward in light of the fact that there was no failure of
11:03:13 15 funding here -- as Your Honor pointed out, the money showed up.

11:03:16 16 This is not a situation where Fontainebleau was
11:03:19 17 supposed to get X dollars and it ended up getting X minus \$2.5
11:03:26 18 million. The money was there.

11:03:27 19 I don't think, Your Honor, that it even rises to the
11:03:31 20 level of a question of fact to say that Bank of America was
11:03:37 21 recklessly disregarding the rights of all of the lenders if it
11:03:43 22 had actual knowledge, which we say they did not, of
11:03:49 23 Fontainebleau Resorts funding for Lehman, given everything else
11:03:54 24 that was going on with the project, given the amount of money
11:03:58 25 that was involved, given that there were undoubtedly numerous

11:04:01 1 lenders who would have wanted to see the project go forward
11:04:05 2 especially since the money actually showed up.

11:04:06 3 **THE COURT:** Well, in effect, would it have been
11:04:11 4 reckless to pull the plug in terms of all the lenders'
11:04:17 5 investment up to that point --

11:04:19 6 **MR. CANTOR:** I would say --

11:04:21 7 **THE COURT:** -- when, in fact, the money was there?

11:04:22 8 **MR. CANTOR:** Absolutely, Your Honor.

11:04:23 9 You can imagine what Fontainebleau's reaction would
11:04:27 10 have been. Remember, again, we dispute that Bank of America
11:04:31 11 knew this, but the facts are that an affiliate of the borrower
11:04:35 12 put in money as equity, in other words, it wanted the project to
11:04:40 13 go forward and it was willing to put its money where its mouth
11:04:43 14 is.

11:04:43 15 You can imagine what the reaction of the borrower would
11:04:45 16 have been if Bank of America had come to it and said that \$2.5
11:04:50 17 million came from the wrong place. I am glad -- it is great
11:04:55 18 that it showed up, but it came from the wrong place and
11:04:57 19 therefore we are pulling the plug on this project and you don't
11:05:01 20 get the \$100 some odd million in Term Lender money that you
11:05:06 21 otherwise requested and that you need to pay ongoing
11:05:09 22 construction costs.

11:05:11 23 Fontainebleau sued Bank of America and the other
11:05:16 24 Revolving Lenders for closing down the Revolver facility after
11:05:22 25 Fontainebleau admitted publicly that there were hundreds of

11:05:25 1 millions of dollars of undisclosed costs.

11:05:27 2 If they were going to sue someone at that point, you
11:05:29 3 can being sure that if Bank of America had stopped the funding
11:05:32 4 to this project in September 2008, because \$4 million didn't
11:05:37 5 come from the right place, that there would have been a lawsuit.

11:05:40 6 Bank of America would have also been in the middle of a
11:05:42 7 lawsuit from any lender that decided that they wanted the
11:05:48 8 project to continue, or any lender that decided, Gee,
11:05:51 9 Fontainebleau is suing us. One way for us to get out from
11:05:55 10 Fontainebleau suing us is for us to claim over against Bank of
11:05:59 11 America.

11:05:59 12 I think that when you are talking about a payment of
11:06:02 13 this magnitude that it absolutely would have been reckless in
11:06:10 14 the other direction for Bank of America to simply shut down the
11:06:15 15 project at that point.

11:06:17 16 **THE COURT:** How much did the Term Lenders have in the
11:06:19 17 deal by September '08? Do you remember?

11:06:22 18 **MR. CANTOR:** Well, the initial Term Lenders had put up
11:06:28 19 their -- I want to say -- I can't remember whether it was \$700
11:06:31 20 or \$800 million at closing, and so it was sitting in the bank
11:06:38 21 proceeds account and a couple of hundred million of it had
11:06:41 22 already been disbursed to Fontainebleau for project costs.

11:06:46 23 So the money was out of their pocket. It was sitting
11:06:51 24 in an account that was under the control of Bank of America.
11:06:55 25 Some of it had been spent on project costs; some of it had not.

11:06:59 1 I can get you the exact figures. I don't have them at
11:07:01 2 the tip of my fingers at the moment, Your Honor.

11:07:06 3 This all goes back to the point I am making, Your
11:07:08 4 Honor, that you need to view all of this in context.

11:07:12 5 Okay. Bank of America, you have to remember, was
11:07:17 6 working off of the Disbursement Agreement as it was written,
11:07:22 7 okay, which has, as we have discussed, multiple different
11:07:26 8 provisions telling it that it can rely on representations and
11:07:32 9 warranties from Fontainebleau and that it doesn't need to
11:07:36 10 investigate them further.

11:07:38 11 We are going here on the assumption, for purposes of
11:07:41 12 this part of the argument, that as a matter of law that it would
11:07:45 13 not be sufficient for Bank of America to allow funding if it had
11:07:49 14 actual knowledge, but that's not what Bank of America's state of
11:07:54 15 mind was at the time. I think that has to be an important
11:07:57 16 consideration in determining whether Bank of America was
11:08:00 17 recklessly disregarding the rights of others.

11:08:04 18 In addition, as we have just discussed, it wasn't clear
11:08:06 19 that shutting down the project as soon as possible was going to
11:08:09 20 be consistent with all of the lenders' rights and interests.

11:08:13 21 They could have had different views on this and to the
11:08:15 22 extent that Bank of America is taking all of these different
11:08:19 23 views into account, I don't think you can say that they were
11:08:23 24 recklessly disregarding anybody's rights even if at the end of
11:08:27 25 the day someone's rights were handled in a way that that party

11:08:31 1 doesn't agree with.

11:08:32 2 In addition, Your Honor, and, again, you sort of
11:08:35 3 alluded to this prior to the break, in evaluating Bank of
11:08:39 4 America's conduct here, it is important to consider what the
11:08:42 5 Term Lenders were doing or, more importantly, what the Term
11:08:45 6 Lenders were not doing.

11:08:47 7 With the sole exception of who is not
11:08:50 8 even a party here, not a single Term Lender ever demanded that
11:08:55 9 Bank of America take any kind of action here, much less did any
11:09:01 10 of these Term Lenders actually stick their neck out and put
11:09:05 11 themselves on the line by issuing a Notice of Default which
11:09:09 12 would have left them in the position of potentially being sued
11:09:13 13 by Fontainebleau.

11:09:14 14 Obviously, Your Honor, the events that we're all
11:09:16 15 talking about here that resulted in the failed conditions
11:09:19 16 precedent, particularly Lehman, but really everything else that
11:09:23 17 is a part of the parties' papers, these are facts that were
11:09:26 18 well-known to all of the Term Lenders and yet the Term Lenders,
11:09:30 19 for whatever reasons, chose not to act. They could have. They
11:09:33 20 had the right to act, but they chose not to.

11:09:36 21 So you have to consider whether it is even possible for
11:09:39 22 Bank of America to have recklessly disregarded plaintiffs'
11:09:43 23 rights when they were unwilling to assert those rights
11:09:47 24 themselves.

11:09:47 25 I think one of the most telling incidents here, Your

11:09:50 1 Honor, is from March 2009, but it certainly illustrates the
11:09:57 2 position that Bank of America was in and which you, yourself,
11:09:59 3 alluded to earlier this morning.

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11:10:28 11 Bank of America, after studying the situation and
11:10:29 12 figuring out what made the most sense, made the decision that
11:10:32 13 they were going to go ahead and allow funding that month; that
11:10:36 14 they were going to continue to include those entities' money in
11:10:42 15 the in balance test because they had had conversations with
11:10:45 16 these entities and,

11:10:49 17 , it was unclear whether, in fact,
11:10:52 18 these entities were ultimately going to fund and one of them
11:10:54 19 ultimately did.

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Your Honor, not a single one of the Term Lenders put forward any kind of an objection whatsoever to what Bank of America --

THE COURT: I'm sorry. March 23, '08?

MR. CANTOR: '09. Excuse me.

Not a single one of the Term Lenders put forward any kind of an objection.

So this is what Bank of America is dealing with not just in March but throughout. It's got all of these Term Lenders out there. It's got all of these Delayed Term Lenders out there. It's got all of these Revolver Term Lenders out there, and they all conceivably have differing views on what the right thing to do is.

All of these events are public. Lehman couldn't have been more public, but all of the events that are at issue here are either public or were available to the lenders through the interlinks system and none of the lenders ever come forward to Bank of America and say Do this, don't do that, with the one exception being .

So how could it be that Bank of America is recklessly

11:12:30 1 disregarding these lenders' rights when these lenders aren't
11:12:33 2 even standing up for their rights on their own, as they had the
11:12:37 3 right to do and certainly they had knowledge of what was going
11:12:39 4 on.

11:12:40 5 If you look at gross negligence in terms of slight
11:12:43 6 diligence, it is clear that Bank of America's actions here were
11:12:47 7 much more than slight diligence.

11:12:49 8 The record is clear that Bank of America was responsive
11:12:52 9 to questions that were raised by the lenders, attempted to get
11:12:55 10 answers to questions that they raised, that it pressed
11:12:58 11 Fontainebleau for additional information when the lenders had
11:13:02 12 questions, that it facilitated direct communications between the
11:13:05 13 lenders and Fontainebleau.

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11:13:22 18 On an internal basis Bank of America, it is clear, is
11:13:25 19 thinking through these issues, vetting them, discussing them
11:13:28 20 internally, including discussing them with counsel, and that all
11:13:32 21 of their actions here are the result of careful and
11:13:36 22 contemplative deliberation before they take an action.

11:13:40 23 There can be no legitimate dispute here, Your Honor,
11:13:43 24 that Bank of America was not in any way acting with ill will
11:13:47 25 towards the Term Lenders.

11:13:49 1 Bank of America wanted to do the right thing here. We
11:13:53 2 can argue about whether they ultimately did the right thing or
11:13:55 3 not, but the bottom line is they wanted to try to do the right
11:13:59 4 thing and that, of course, is the complete antithesis of
11:14:03 5 recklessly disregarding the lenders' rights.

11:14:06 6 The plaintiffs here bear the burden of proof on gross
11:14:11 7 negligence. They have to not only refute the evidence that we
11:14:15 8 have come forward showing that Bank of America acted properly,
11:14:19 9 they are going to have to come forward with evidence sufficient
11:14:23 10 to establish gross negligence, their own evidence, and for the
11:14:26 11 most part they have not bothered to do that.

11:14:29 12 Their briefs -- essentially all they do is repeat their
11:14:33 13 breach of contract argument and argue that Bank of America
11:14:36 14 ignored facts and ignored warnings but, Your Honor, those are
11:14:41 15 negligence arguments.

11:14:41 16 Those are arguments that say that Bank of America
11:14:44 17 didn't act as a reasonable Disbursement Agent should have acted.
11:14:50 18 Even if such arguments aren't foreclosed by § 9.3.2, as we say
11:14:55 19 they are, they are insufficient without more to establish this
11:15:00 20 added degree of culpability that you have to have here to find
11:15:04 21 Bank of America liable.

11:15:06 22 The bottom line is that the Term Lenders have
11:15:10 23 completely failed to satisfy their burden on summary judgment of
11:15:14 24 creating a triable issue of fact on the issue of gross
11:15:20 25 negligence, Your Honor.

11:15:21 1 THE COURT: All right. Thank you.

11:15:23 2 MR. HENNIGAN: Thank you, Your Honor.

11:15:26 3 I think I'm -- I was inclined to start, I think I am
11:15:30 4 still going to start with Your Honor's questions prior to the
11:15:35 5 break.

11:15:36 6 THE COURT: Nobody mentioned the Lehman funding.

11:15:39 7 MR. CANTOR: I don't want to cut Mike off. If you'd
11:15:42 8 like me to, I could do it in two seconds.

11:15:45 9 THE COURT: Let him mention that because I would like
11:15:46 10 you to respond to that.

11:15:48 11 What is your position? Should I consider that? Is
11:15:52 12 that something that plays a part in this equation; and, if so,
11:15:56 13 how?

11:15:56 14 MR. CANTOR: Well, I think it plays a part in the
11:15:58 15 equation, Your Honor, in a couple of ways. I think for one
11:16:02 16 thing, to the extent that reasonableness somehow comes into this
11:16:06 17 on the breach issue -- and again our position is that all you
11:16:09 18 need to know is 9.3.2 and that 9.1 does not in any way limit our
11:16:16 19 rights under that agreement -- but to the extent that
11:16:19 20 reasonableness comes into it,

11:16:23 21 demonstrates the reasonableness of
11:16:30 22 what I was discussing earlier this morning, which is that it was
11:16:34 23 not clear to anybody in September that Lehman was not going to
11:16:39 24 fund. That was not a forgone conclusion and thus, all of the
11:16:43 25 discussions that everyone was having was about options if Lehman

11:16:49 1 didn't fund, but maybe Lehman will fund.

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11:17:03 5 were

11:17:05 6 other loans where it was not going to be stepping up.

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11:17:24 12 **THE COURT:** Does that play into the gross negligence

11:17:25 13 issue?

11:17:25 14 **MR. CANTOR:** I think it absolutely plays into the gross
11:17:29 15 negligence point, Your Honor.

11:17:30 16 Again, if Bank of America believed that at worst --
11:17:33 17 and, again, let's start with the assumption that I don't accept,
11:17:36 18 that Bank of America knew that Fontainebleau was going to fund
11:17:40 19 for Lehman in September.

11:17:42 20 But if Bank of America believed that this was going to
11:17:44 21 be a one-time occurrence because it was still possible that
11:17:48 22 Lehman was going to step back in -- remember, this is all
11:17:51 23 happening within ten days of, you know, one of the most
11:17:56 24 monumental bankruptcy filings in American business history.

11:18:00 25 IF Bank of America believed that it was still a

11:18:04 1 possibility that as we go forward and as things calm down that
11:18:07 2 Lehman was going to continue to fund here,

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11:18:36 10 in the face of one of the most monumental

11:18:40 11 bankruptcy filings and uncertain business situations of all

11:18:43 12 time.

11:18:43 13 It is only with hindsight and knowing where this case

11:18:45 14 ended up that you would say that it is grossly negligent for

11:18:51 15 Bank of America to allow the borrower essentially to put up more

11:18:55 16 of its own money to close that gap if it was going to be a

11:18:59 17 one-time gap.

11:19:00 18 **THE COURT:** All right. Thank you. I want to make sure

11:19:01 19 I have plenty of time on the plaintiffs' side.

11:19:04 20 **MR. CANTOR:** Sure.

11:19:05 21 **THE COURT:** Go ahead, sir.

11:19:06 22 **MR. HENNIGAN:** I thought I just heard Mr. Cantor say

11:19:09 23 that they were assured by Lehman Brothers that they were going

11:19:12 24 to continue funding. I do not believe that that is in this

11:19:16 25 record at all.

11:19:17 1 MR. CANTOR: That is not what I said, actually.

11:19:19 2 MR. HENNIGAN: That's what you said.

11:19:20 3 THE COURT: Okay. Well, let's continue.

11:19:22 4 MR. CANTOR: If it is what I said, I apologize because
11:19:25 5 it is not what I meant.

11:19:28 6 MR. HENNIGAN: I want to put a point on that.

11:19:29 7 THE COURT: Go ahead.

11:19:29 8 MR. HENNIGAN: There is a lot of discussion as though
11:19:32 9 this was a two-and-a-half million dollar issue on a multibillion
11:19:35 10 dollar project.

11:19:35 11 This was not a two-and-a-half million dollar issue on a
11:19:39 12 multibillion dollar project. Let's put it in context.

11:19:43 13 I am going to focus on the time period between
11:19:46 14 September 15, 2008 and the middle of October 2008.

11:19:51 15 Here is what had happened. On September 15, 2008 -- I
11:19:56 16 pick that date because that is the date of the Lehman Brothers
11:19:59 17 bankruptcy filing.

11:20:01 18 It actually probably happened late with an electronic
11:20:03 19 filing on the 14th, because there were emails that were circling
11:20:07 20 throughout the Bank of America team about the magnitude of that
11:20:14 21 funding early, 1:00 a.m. in the morning on September 15th.

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Now, we move toward September 15th. Lehman Brothers files for bankruptcy. We have just heard it was the largest bankruptcy in American history.

The issue wasn't whether they were going to make their \$2.5 million payment per se. The issue was whether we could count on them for their substantial portion of the \$190 million that was still left to be funded on the retail facility.

Lehman Brothers had over \$65 million committed to that. The filing of bankruptcy -- let us make no mistake about it -- put that \$190 million piece in question.

Let me read you the operative phrase from the condition precedent, which is that there has been no Material Adverse Effect. The requirement is nothing has happened, nothing has come to Bank of America's attention that could reasonably be expected to have a Material Adverse Effect.

So when Lehman Brothers files on the 15th, everybody knows that it could reasonably be expected to have a Material

11:22:23 1 Adverse Effect. The issue isn't whether they are going to make
11:22:27 2 the \$2.5 million payment; it is whether they are going to remain
11:22:31 3 committed to their share of the retail portion of this lending
11:22:34 4 facility because without it there is hole that is unlikely to be
11:22:40 5 filled.

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11:23:00 11 Now, Your Honor referenced the fact that in the next
11:23:02 12 two months they did make the required draws and indeed they did.
11:23:06 13 They never made up the draw from September and they never made
11:23:11 14 another payment.

11:23:13 15 So by the time we get to the March draw, they are out
11:23:17 16 of the picture.

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11:23:51 24 Well, we have looked at that. That is perfectly all
11:23:53 25 right to keep those funding commitments in the in balance test

11:23:58 1 so long as there is a reasonable expectation that they are going
11:24:01 2 to be made in the future. So it is okay to put it on that side
11:24:03 3 of the ledger.

11:24:04 4 He didn't say is it okay with you that we are going to
11:24:08 5 continue to fund this project despite the fact that there are
11:24:13 6 enormous numbers of mounting breaches.

11:24:15 7 **THE COURT:** Well, let me ask you to respond to the
11:24:19 8 argument that the Lehman bankruptcy was well known to everybody,
11:24:25 9 including the Term Lenders, and if the Term Lenders believed, or
11:24:31 10 any of them, that there was a default as a result, the Term
11:24:37 11 Lenders could have given formal notification to Bank of America
11:24:47 12 as the Administrative Agent to initiate the proceedings under
11:24:54 13 the stop order.

11:24:58 14 **MR. HENNIGAN:** Recalling that we didn't -- we were not
11:25:01 15 signatures to the Disbursement Agreement and most of our clients
11:25:05 16 didn't have access to it. There was a division here between
11:25:09 17 what we call public side and private side where information was
11:25:14 18 made available through an Internet access to people who were
11:25:18 19 willing to receive confidential information, but the public side
11:25:22 20 lenders were not. They only got information that was generally
11:25:26 21 made public.

11:25:26 22 So what we do have here is we have on
11:25:32 23 September -- right in this time period --

11:25:34 24 **THE COURT:** Let me go back because this is what I am
11:25:36 25 trying to clarify. The Term Lenders under the Credit Agreement

11:25:42 1 made payments.

11:25:43 2 **MR. HENNIGAN:** Yes.

11:25:44 3 **THE COURT:** And the issue, if I understand it, was
11:25:54 4 whether the payments that were made should have been disbursed.

11:25:57 5 **MR. HENNIGAN:** Correct.

11:25:57 6 **THE COURT:** Okay. So Bank of America is raising the
11:26:04 7 question that the Term Lenders themselves, if concerned that
11:26:12 8 there was a default, could have sufficiently made a demand on
11:26:19 9 Bank of America as the Administrative Agent under the
11:26:28 10 Disbursement Agreement or Bank Agent under the Credit Agreement
11:26:34 11 not to fund because of the default, but didn't.

11:26:38 12 **MR. HENNIGAN:** Again remembering, Your Honor, that most
11:26:41 13 of my clients are not privy to the information that would have
11:26:46 14 demonstrated the magnitude of the problem.

11:26:49 15 For example, not knowing what the retail lending --
11:26:53 16 Bank of America claims it didn't know how much Lehman Brothers
11:26:56 17 was committed to on the retail facility, but my clients
11:26:59 18 certainly didn't know how much Lehman Brothers was committed to
11:27:04 19 under the retail facility.

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THE COURT: Can your clients rely on that when Highland is not even a party here?

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MR. HENNIGAN: Well --

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THE COURT: And your clients then join in and said we agree. We demand. Can you do that after the fact?

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MR. HENNIGAN: There is no protocol for us to do that, Your Honor.

11:27:50 9

THE COURT: Well, what about the notice provisions that we have discussed?

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MR. HENNIGAN: The notice provision, that BofA is required to give notice to itself to stop funding?

11:28:02 13

THE COURT: Under the credit agreements, notice to Bank of America of default by any of the Term Lenders.

11:28:14 15

MR. HENNIGAN: Other than , it would --

11:28:16 16

THE COURT: Well, yeah.

11:28:17 17

MR. HENNIGAN: I don't think there is actually a protocol in the Credit Agreement. I could be misremembering it, but I don't think there is a protocol to do that. The Credit Agreement contemplated that we would make our funding commitments.

11:28:31 22

We made \$700 million worth of commitments, or funding, at the time of closing. That money was sitting in the bank proceeds account. It could not be disbursed. There was no authority to disburse it unless all of the conditions precedent

11:28:44 1 were met.

11:28:45 2 I am not aware of either a protocol or anything in the
11:28:50 3 record that would suggest that anybody was sitting on their
11:28:54 4 rights there. They were relying upon the Disbursement Agent
11:28:59 5 fulfilling its responsibilities.

11:29:00 6 **THE COURT:** Go ahead, sir.

11:29:02 7 **MR. HENNIGAN:** Okay. So in the earlier session we
11:29:06 8 spent a lot of time, because I do like that issue, about the
11:29:13 9 Fontainebleau funding for Lehman Brothers.

11:29:15 10 I like that issue because, Number 1, I think it is
11:29:18 11 going to be a fun issue to try, but I also like that issue
11:29:22 12 because I think they can't hide from the fact that they looked
11:29:26 13 squarely at that default and ignored it and then tried to cover
11:29:30 14 it up.

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11:29:47 18 It is also --

11:29:49 19 **THE COURT:** Aware of when?

11:29:50 20 **MR. HENNIGAN:** In June.

11:29:52 21 **THE COURT:** Of when?

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BofA, being aware of misinformation coming from the borrower on subjects like budgeting, is itself a default. BofA not receiving information that it has requested is itself a default.

We have talked about this Lehman Brothers funding issue as though it is okay for a retail lender to make the payment for it, and there is indeed an interpretation of one of the conditions precedent that might make it okay for another retail lender to cover for it, but it is still a default as defined in the agreement for any lender, retail or otherwise, to miss payments.

So, we have got, yes, October and November Fontainebleau funds and therefore doesn't default on those payments, but then defaults on every other payment after that, so we've got mounting numbers of defaults.

Now, I am still sort of marching -- I realize I am being a little discursive, but I am marching through the early

11:31:45 1 days of September.

11:31:46 2 On September 18th, I may be off a day, Standard &
11:31:52 3 Poor's downgrades the Fontainebleau facility to B minus with an
11:32:00 4 indication that further downgrades are probable.

11:32:04 5 What it points to is what BofA also knew, which is that
11:32:11 6 the Las Vegas market for gaming was collapsing; that they could
11:32:16 7 no longer expect repayment to come from cash flow the way they
11:32:20 8 had originally budgeted, and they were concerned about that
11:32:22 9 requiring further degradation; that \$700 million of these loans
11:32:28 10 was going to be repaid from sales of condominiums and that
11:32:32 11 market was drying up and looked like it was going to be bleak
11:32:36 12 going into the future; and oh, by the way, Fontainebleau
11:32:42 13 declared bankruptcy -- I'm sorry -- Lehman Brothers declared
11:32:46 14 bankruptcy and that piece is substantially in jeopardy.

11:32:50 15 There's nothing in the Standard & Poor's downgrade,
11:32:53 16 other than the fact that it downgraded it, that BofA didn't
11:32:58 17 already know.

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11:33:18 23 So the context in which this occurs is a nightmare of
11:33:24 24 negative information, all of which is known to the BofA at the
11:33:28 25 time it is making this decision about is the Fontainebleau

11:33:37 1 bankruptcy an MAE?

11:33:38 2 Is the fact that they have been distorting their
11:33:42 3 budgets itself a default? Isn't the fact that Lehman Brothers
11:33:46 4 missed a payment strong evidence that our fears are going to
11:33:50 5 come to fruition, that indeed we can't count on that piece?

11:33:54 6 Isn't the failure of other banks and their refusal or
11:34:00 7 inability to make payments itself mounting? By the way, what
11:34:04 8 about condominium sales?

11:34:07 9 So it is itself a default if Bank of America has
11:34:11 10 adverse information that, taken as a whole -- I am kind of
11:34:16 11 remembering what it says -- taken as a whole, places in doubt
11:34:19 12 the other information that it has from the lender.

11:34:22 13 **THE COURT:** Let me stop that part of the argument and
11:34:24 14 get a response. It is like a cumulative set of circumstances
11:34:31 15 argument that puts a duty on Bank of America to determine
11:34:38 16 default.

11:34:39 17 What's your response?

11:34:40 18 **MR. CANTOR:** Well, first of all, the Standard & Poor's
11:34:46 19 downgrade that Mr. Hennigan just talked about is evidence of
11:34:49 20 what we were talking about earlier, that all this information
11:34:52 21 was out there in the public.

11:34:54 22 So to the extent that the Standard & Poor's downgrade
11:34:56 23 went through all of these points that Mr. Hennigan considers so
11:34:59 24 significant, they were out there for all the lenders to see.

11:35:04 25 The idea that Bank of America was the one responsible

11:35:10 1 for determining whether there was an MAE or not is just not
11:35:15 2 consistent with the --

11:35:16 3 **THE COURT:** MAE?

11:35:17 4 **MR. CANTOR:** A Material Adverse Event.

11:35:23 5 **THE COURT:** I'm sorry. It is not consistent with what?

11:35:25 6 **MR. CANTOR:** With the contract, Your Honor.

11:35:28 7 What you got in the contract is a condition that says
11:35:32 8 that there shall have been no Material Adverse Event. It is
11:35:38 9 Fontainebleau that is required to rep that all of the conditions
11:35:43 10 precedent are met. It is Fontainebleau that is required to rep
11:35:46 11 that all of its other representations and warranties are met.

11:35:50 12 So Fontainebleau is the one that in the first instance
11:35:57 13 is going to be the one determining whether there has been an MAE
11:36:01 14 or not. Declaring an MAE, okay, under most circumstances, and
11:36:06 15 certainly under these circumstances, is one of the most
11:36:10 16 subjective and speculative determinations that one can make.

11:36:16 17 If a meteor had hit the project, yes, that would have
11:36:19 18 been an MAE, and I don't think anyone could disagree with that.

11:36:23 19 But to determine that a set of economic factors has
11:36:28 20 risen to the level of an MAE is always going to be a subjective
11:36:33 21 determination.

11:36:34 22 You are never going to be able to say that Bank of
11:36:38 23 America had actual knowledge that there was an MAE because there
11:36:42 24 is always going to be some difference of opinion as to whether
11:36:46 25 those facts as they stood at that time constituted an MAE.

11:36:51 1 Therefore, under the way the contract works, Bank of
11:36:59 2 America was allowed to rely without further investigation on
11:37:04 3 Fontainebleau's representation that, in fact, this amalgam of
11:37:08 4 events was not an MAE.

11:37:11 5 Bank of America was not required, and it would be
11:37:13 6 inconsistent with their role under the contract as it is
11:37:17 7 written, for them to be the one to make that determination and
11:37:21 8 say, yes, there has been an MAE here as a result of all these
11:37:26 9 occurrences.

11:37:27 10 You know who could? The lenders. Again, the lenders
11:37:30 11 never did that.

11:37:33 12 **THE COURT:** How could the lenders do that?

11:37:35 13 **MR. CANTOR:** The lenders, according to Mr. --

11:37:38 14 **THE COURT:** Let me be more specific. What provisions
11:37:44 15 under the Credit Agreement or the Disbursement Agreement are you
11:37:49 16 relying on that would allow the lenders, as compared to the
11:37:54 17 controlling person, to trigger a default notice?

11:38:00 18 **MR. CANTOR:** I don't have the specific number for you.
11:38:02 19 I'll get it for you before we are done here this morning, Your
11:38:05 20 Honor, but the lenders obviously had the right to declare two --

11:38:08 21 **THE COURT:** Well, it is not so obvious to me.

11:38:10 22 **MR. CANTOR:** Well, because what you have got is you
11:38:12 23 have got the provisions that provide that if Bank of America has
11:38:16 24 been notified of an Event of Default, it is required to take
11:38:20 25 certain action.

11:38:20 1 So, therefore that allows the lenders --

11:38:23 2 **THE COURT:** But the only notification provision that I
11:38:28 3 saw, that we discussed, was notification by the controlling
11:38:35 4 person of the Event of Default.

11:38:37 5 Where does it say that any of the lenders, Revolvers,
11:38:44 6 Term Lenders, could trigger --

11:38:48 7 **MR. CANTOR:** In 9.3 of the Credit Agreement, Your
11:38:50 8 Honor, it provides that -- and we have argued the other side of
11:38:56 9 this, but it addresses the same issue -- the agreement provides
11:39:00 10 that the Administrative Agent shall be deemed not to have
11:39:02 11 knowledge of any Default, capital D default, unless and until
11:39:07 12 notice describing such default is given to the Administrative
11:39:10 13 Agent by borrowers, a lender or the Issuing Lender.

11:39:14 14 So that is the provision that allows the lenders to
11:39:18 15 give notice of an Event of Default to Bank of America as
11:39:24 16 Administrative Agent and then Bank of America, as Administrative
11:39:27 17 Agent, would have knowledge of it and would have to act.

11:39:29 18 **THE COURT:** But here's my question. Plaintiffs argue
11:39:34 19 that they are not parties to the Disbursement Agreement.

11:39:37 20 **MR. CANTOR:** But they are parties to the Credit
11:39:40 21 Agreement, Your Honor.

11:39:40 22 **THE COURT:** They are parties to the Credit Agreement,
11:39:42 23 but they are not parties as such to the Disbursement Agreement.

11:39:45 24 **MR. CANTOR:** Right. But the point is the provision I
11:39:48 25 just read to you is from the Credit Agreement.

11:39:51 1 THE COURT: So your point is that where they are
11:39:56 2 parties --

11:39:58 3 MR. CANTOR: Yeah.

11:39:59 4 THE COURT: -- they have an express right to initiate a
11:40:02 5 default process.

11:40:03 6 MR. CANTOR: Right, and the contract defines that if
11:40:08 7 Bank of America knows it, it has to act on it.

11:40:11 8 THE COURT: Let me finish.

11:40:12 9 MR. CANTOR: Sorry.

11:40:13 10 THE COURT: Let me finish. They have an express right
11:40:16 11 to initiate a default process under the Credit Agreement,
11:40:20 12 correct?

11:40:20 13 MR. CANTOR: Yes.

11:40:21 14 THE COURT: And give notice.

11:40:22 15 MR. CANTOR: Right.

11:40:23 16 THE COURT: Now, the money is sitting in the account.

11:40:27 17 MR. CANTOR: Right.

11:40:28 18 THE COURT: Then Bank of America has to deal with the
11:40:35 19 Credit Agreement and Disbursement Agreement.

11:40:36 20 MR. CANTOR: Right.

11:40:37 21 THE COURT: So how does that notice under Credit
11:40:42 22 Agreement then tie into the responsibilities and the protections
11:40:46 23 under the Disbursement Agreement?

11:40:46 24 MR. CANTOR: You go to 2.5.1, Your Honor, and you have
11:40:56 25 the provision that says that if the controlling agent gives

11:41:03 1 notice of an Event of Default or notice of default, the stop
11:41:09 2 funding notice is going to be issued.

11:41:11 3 There is also 9.2.3 of the Disbursement Agreement which
11:41:19 4 provides that if the Disbursement Agent is notified of an Event
11:41:21 5 of Default or a Default has occurred, is continuing, that the
11:41:27 6 Disbursement Agent shall promptly, and in any event within five
11:41:31 7 banking days, provide notices to each of the funding agents of
11:41:37 8 the same.

11:41:37 9 So the bottom line is, Your Honor, one way or another
11:41:39 10 if the lenders, which they clearly had the right to do, gave
11:41:42 11 Bank of America a formal notice of an Event of Default, Bank of
11:41:46 12 America, both in its Disbursement Agent and Bank Agent capacity
11:41:53 13 had obligations to act.

11:41:58 14 **THE COURT:** Okay. So let me get back to 9.2.3 for a
11:42:04 15 moment.

11:42:06 16 **MR. CANTOR:** Okay.

11:42:07 17 **THE COURT:** If the Disbursement Agent is notified that
11:42:11 18 an Event of Default -- which is capitalized, so that means that
11:42:15 19 is a defined term?

11:42:16 20 **MR. CANTOR:** Right.

11:42:17 21 **THE COURT:** -- or a default has occurred and is
11:42:20 22 continuing. So, how do I read that in terms of the Disbursement
11:42:27 23 Agreement?

11:42:30 24 Is that notification only by the controlling person?

11:42:34 25 **MR. CANTOR:** No, I don't believe so, Your Honor.

11:42:36 1 **THE COURT:** Or if you read the two agreements together
11:42:39 2 the way we started our discussion, is that notification by
11:42:42 3 lenders, other lenders?

11:42:44 4 **MR. CANTOR:** I would read that -- I mean, it just says
11:42:46 5 if the Disbursement Agent is notified, Your Honor. I don't see
11:42:49 6 how I can credibly argue to you that that notice has to come
11:42:52 7 from --

11:42:53 8 **THE COURT:** So let me ask from the plaintiffs' side:
11:42:58 9 In reading that, do I not go back to the Credit Agreement itself
11:43:05 10 where there are provisions for Term Lenders, among others, to
11:43:08 11 give formal notice of default to Bank of America and then that
11:43:16 12 would be sufficient under 9.2.3 to trigger those provisions?

11:43:22 13 **MR. HENNIGAN:** Your Honor, the Default that was
11:43:23 14 referred to in the Credit Agreement where lenders have the
11:43:27 15 opportunity to give notice is a capital D default under the
11:43:30 16 Credit Agreement.

11:43:31 17 We are not talking about any of these things being
11:43:33 18 defaults under the Credit Agreement. These are defaults of
11:43:36 19 conditions or failures of conditions under the Disbursement
11:43:40 20 Agreement.

11:43:44 21 So we don't -- you kind of fall into the capital D
11:43:50 22 default hole in the Credit Agreement and come back over here to
11:43:55 23 the Disbursement Agreement and say, you know, this is a question
11:43:59 24 of knowledge and information that is flowing toward BofA from
11:44:03 25 whatever source.

11:44:04 1 **THE COURT:** You are saying that once the Term Lenders
11:44:10 2 put their money up, that there was no right on the part of the
11:44:14 3 Term Lenders to notify Bank of America that, in the opinion of
11:44:21 4 the Term Lenders, there was a formal Default and to say to Bank
11:44:28 5 of America, "Don't disburse"?

11:44:33 6 **MR. HENNIGAN:** I am going to say two things. There is
11:44:34 7 a defined term called "Required Lenders." You will recall we
11:44:37 8 talked about earlier today the fact that BofA considered at one
11:44:41 9 point going and getting consents from the lenders for the
11:44:47 10 Fontainebleau disbursement.

11:44:49 11 If there is -- that protocol does give the required
11:44:54 12 lenders, if that procedure is invoked by Bank of America, gives
11:44:58 13 the required -- the quote-unquote Required Lenders authority to
11:45:03 14 take action. That was never invoked so that sort of issue of
11:45:10 15 lender democracy never happened.

11:45:12 16 So, what we're dealing with in September is almost all
11:45:17 17 of \$700 million sitting in a bank proceeds account subject to
11:45:24 18 the diligence of our Disbursement Agent making sure that at each
11:45:29 19 level of disbursement the right conditions have been satisfied.

11:45:32 20 **THE COURT:** Okay. So let me turn back to Bank of
11:45:34 21 America on this.

11:45:36 22 The position is that Bank of America can't rely on that
11:45:43 23 argument because the default at issue would have to be a Default
11:45:49 24 under the Credit Agreement, which means that the Term Lender
11:45:53 25 wouldn't have had to fund into the account that was subject to

11:45:58 1 the Disbursement Agreement.

11:46:01 2 **MR. CANTOR:** Everything that they are talking about
11:46:02 3 here, Your Honor, is an Event of Default, both under the
11:46:06 4 Disbursement Agreement and under the Credit Agreement.

11:46:09 5 If there are events of default -- nothing in either
11:46:13 6 9.2.3 or 2.5.1 in any way says that only certain events of
11:46:25 7 default give rise to a stop funding notice.

11:46:28 8 Indeed, it is completely inconsistent with what their
11:46:31 9 practical business position has been all along, which is that
11:46:34 10 they wanted to make sure that the money that they had funded
11:46:37 11 into the bank proceeds account didn't find its way into the
11:46:40 12 project.

11:46:40 13 So the idea that it is their position that they didn't
11:46:43 14 have the right somehow to stop that by issuing a notice of an
11:46:47 15 Event of Default or a Notice of Default, all of these things
11:46:51 16 that they are claiming, all of these things that they had equal
11:46:55 17 knowledge with Bank of America, are all things that are defaults
11:47:02 18 under all of the loan documents, both the Credit Agreement and
11:47:07 19 the Disbursement Agreement.

11:47:08 20 **THE COURT:** Let me do this. Let me give you a few more
11:47:13 21 minutes to complete your argument on the plaintiffs' side
11:47:16 22 because there is another issue I have to discuss before we
11:47:19 23 adjourn.

11:47:21 24 Any other points you want me to note that address
11:47:27 25 issues that were raised here during oral argument or from the

11:47:32 1 papers?

11:47:35 2 **MR. HENNIGAN:** Yes, Your Honor. Thank you.

11:47:39 3 I've got a short list but I want to get to it. I want
11:47:44 4 to read for you -- I realize that there is a lot of information
11:47:48 5 here. It is hard to keep it all straight. I want to read to
11:47:50 6 you the condition for disbursement that is 3.3.21.

11:47:57 7 **THE COURT:** Now we are in the Disbursement Agreement.

11:47:59 8 **MR. HENNIGAN:** The Disbursement Agreement.

11:48:01 9 **THE COURT:** 3.3.21. Let me just catch up with you.

11:48:08 10 Okay. The adverse information?

11:48:10 11 **MR. HENNIGAN:** Yes.

11:48:11 12 **THE COURT:** Yeah, I've read that.

11:48:12 13 **MR. HENNIGAN:** Okay.

11:48:14 14 Basically, you know, nobody could be certifying to BofA
11:48:22 15 that this condition was complied with because it has to do with
11:48:27 16 BofA subjectively being unaware of information or other matter
11:48:32 17 affecting the project or transactions in an adverse manner
11:48:37 18 inconsistent with the other information. You know what it says.

11:48:41 19 We've heard BofA now repeatedly say they were entitled
11:48:46 20 to rely upon the representations of the borrower. You don't
11:48:54 21 have any credible information in front of you in which they
11:48:57 22 attempt to say that, in fact, they did rely.

11:49:01 23 It would have been easy enough to say it. They have
11:49:03 24 never said it. They have never said that they relied upon a
11:49:07 25 representation from the borrower that they didn't have adverse

11:49:11 1 information, that no Material Adverse Effect had occurred, that
11:49:14 2 Lehman Brothers had funded.

11:49:18 3 **THE COURT:** Okay. Quick response on that?

11:49:21 4 **MR. CANTOR:** Your Honor, the bottom line is that the
11:49:24 5 contract as written allows us to rely on all of the
11:49:29 6 representations and warranties that are made.

11:49:33 7 **THE COURT:** Right. But how do I reconcile the language
11:49:36 8 in 3.3.21 with Bank Agent with the other language?

11:49:45 9 **MR. CANTOR:** First of all, again, you are talking there
11:49:47 10 about the Bank Agent, so again you have got this dichotomy
11:49:52 11 between the two roles of Bank of America.

11:49:56 12 But the bottom line is under the contract, this is a
11:50:01 13 contract set up by sophisticated parties that is specifically
11:50:04 14 intended to limit the liability of the Disbursement Agent. No
11:50:08 15 one is hiding behind that fact.

11:50:10 16 This contract was designed to limit the liability of
11:50:12 17 the Disbursement Agent.

11:50:14 18 **THE COURT:** Let me interrupt. This is where it gets
11:50:17 19 confusing.

11:50:18 20 **MR. CANTOR:** Yeah.

11:50:20 21 **THE COURT:** If Bank of America was to be sued as Bank
11:50:24 22 Agent for violation of 3.3.21, would it have to be sued under
11:50:32 23 the Credit Agreement where it was the Bank Agent?

11:50:41 24 **MR. CANTOR:** I --

11:50:42 25 **THE COURT:** Where was Bank of America a Bank Agent?

11:50:45 1 Wasn't it under the Credit Agreement?

11:50:47 2 **MR. CANTOR:** No. Actually, I believe that
11:50:49 3 technically -- and I realize how complicated and sometimes
11:50:53 4 counterintuitive this seems -- Bank of America was actually the
11:50:55 5 Administrative Agent under the Credit Agreement. It was the
11:50:59 6 Bank Agent under the Disbursement Agreement.

11:51:03 7 **THE COURT:** I'm sorry. Bank of America was the
11:51:12 8 Disbursement Agent under the Disbursement Agreement.

11:51:15 9 **MR. CANTOR:** Yes.

11:51:17 10 **THE COURT:** Was it not the Bank Agent under the Credit
11:51:21 11 Agreement?

11:51:21 12 **MR. CANTOR:** "Bank Agent," Your Honor, is a defined
11:51:24 13 term that is used only in the Disbursement Agreement. The term
11:51:28 14 that is used to describe Bank of America in the Credit Agreement
11:51:32 15 is the Administrative Agent.

11:51:33 16 **THE COURT:** Okay. This is where we started.

11:51:39 17 **MR. CANTOR:** Right.

11:51:39 18 **THE COURT:** Is Bank of America being sued as
11:51:44 19 Disbursement Agent or Bank Agent?

11:51:47 20 **MR. CANTOR:** Disbursement Agent, Your Honor. So Bank
11:51:50 21 of America, as Disbursement Agent, is relying on all of the
11:51:54 22 certifications by Fontainebleau that all of the conditions
11:51:57 23 precedent are satisfied.

11:52:00 24 9.2.5, Your Honor, which you talked about a little bit
11:52:05 25 earlier --

11:52:06 1 THE COURT: So where does 3.3.21 come in?

11:52:13 2 MR. CANTOR: I'm not sure I am following your question,
11:52:15 3 Your Honor.

11:52:15 4 THE COURT: Okay. How do I read this paragraph in
11:52:22 5 terms of Article 9?

11:52:25 6 MR. CANTOR: In terms of Article 9, Your Honor, you
11:52:26 7 have got both 9.3.2, which allows us to rely without
11:52:31 8 investigation on the certification from Fontainebleau that every
11:52:35 9 single one of the conditions precedent, regardless of who, if
11:52:39 10 you will, is the action person under that condition precedent,
11:52:44 11 Fontainebleau certifies that every single one of those
11:52:46 12 conditions precedent is satisfied as of the disbursement date
11:52:53 13 and Bank of America, as Disbursement Agent, is entitled to rely
11:52:57 14 on that certification without further investigation.

11:53:00 15 9.2.5, which is entitled no imputed knowledge,
11:53:06 16 specifically provides that the Disbursement Agent shall not be
11:53:09 17 deemed to have knowledge of any fact known to it in any capacity
11:53:13 18 other than the capacity of Disbursement Agent or by reason of
11:53:16 19 the fact that the Disbursement Agent --

11:53:18 20 THE COURT: But --

11:53:18 21 MR. CANTOR: I need to finish this, I apologize.
11:53:21 22 -- is also a funding agent.

11:53:22 23 THE COURT: Pardon me. Pardon me. Pardon me. Bank
11:53:26 24 Agent is a defined term in the Disbursement Agreement that says
11:53:31 25 the Bank Agent is Bank of America in its capacity as

11:53:34 1 Administrative Agent under the Credit Agreement.

11:53:36 2 **MR. CANTOR:** Yes, Your Honor.

11:53:37 3 **THE COURT:** So my question is: If there is a violation
11:53:40 4 of 3.3.21 as to Bank of America as Bank Agent, wouldn't it have
11:53:50 5 to be a suit under the Credit Agreement against Bank of America?

11:53:54 6 **MR. CANTOR:** If that is how the claim was going to be
11:53:58 7 phrased, yes, I would say you're right, Your Honor, but to be
11:54:01 8 fair, that is not how the claim is phrased.

11:54:04 9 The claim is that Bank of America, as Disbursement
11:54:05 10 Agent, shouldn't have allowed the funding to go forward because,
11:54:09 11 among other things, this condition precedent was not satisfied.

11:54:12 12 The problem is that they can't establish that this
11:54:15 13 condition precedent was not satisfied or that Bank of America
11:54:18 14 was not entitled to rely on the certification by Fontainebleau
11:54:23 15 that it was satisfied.

11:54:26 16 **THE COURT:** All right. I know there is so much more
11:54:28 17 that both parties have, but we have been at it for almost three
11:54:32 18 hours, so let me get to one other issue which is important that
11:54:38 19 we discuss and, that is, I had entered back in January 2010,
11:54:49 20 which seems like a long time ago, MDL order number 3 which set
11:54:56 21 dates, among other thing, for a pretrial conference in January
11:55:00 22 2012. That seemed like a very long time back in 2010.

11:55:06 23 But let's talk about the posture of the case and my
11:55:16 24 role as an MDL Judge and what my options are here depending on
11:55:22 25 what I do on these motions.

11:55:24 1 Right now there is before the Eleventh Circuit -- and I
11:55:28 2 think the briefing is done. I don't know if the Eleventh
11:55:31 3 Circuit has set oral argument yet.

11:55:33 4 **MR. CANTOR:** There has been no argument date yet, Your
11:55:35 5 Honor.

11:55:35 6 **THE COURT:** But the briefing has been done before the
11:55:38 7 Eleventh Circuit on the fully funded questions, right?

11:55:42 8 **MR. CANTOR:** Yes.

11:55:43 9 **THE COURT:** Okay. The only case that I actually had
11:55:48 10 was the one that Fontainebleau brought --

11:55:51 11 **MR. CANTOR:** Right.

11:55:52 12 **THE COURT:** -- which deals with the fully funded
11:55:55 13 aspect, although Term Lenders raise this in this suit.

11:56:00 14 So let's assume for the sake of just a discussion that
11:56:11 15 the Eleventh Circuit affirms on fully funded. My case
11:56:18 16 disappears in terms of what I have in this district. That
11:56:24 17 leaves, if there is a trial on what we are discussing today, the
11:56:31 18 cases in Las Vegas and New York, right?

11:56:34 19 **MR. CANTOR:** Well, I think -- and these guys will have
11:56:37 20 to tell you -- I think the New York case no longer exists
11:56:41 21 because -- and you signed some orders to this effect -- but
11:56:44 22 effectively all of the Term Lenders that were plaintiffs in the
11:56:48 23 New York case had sold their interests to Term Lenders who are
11:56:51 24 plaintiffs in the Nevada case and I think -- it has never been
11:56:56 25 actually dismissed, I don't think.

11:56:59 1 MR. DILLMAN: Actually, it has.

11:57:00 2 MR. CANTOR: Has it been dismissed?

11:57:02 3 MR. DILLMAN: I believe so.

11:57:02 4 THE COURT: Well, let's assume it has. That leaves the
11:57:05 5 Las Vegas case --

11:57:06 6 MR. CANTOR: Right.

11:57:07 7 THE COURT: -- right? So, if there is a trial on the
11:57:15 8 issues, it is going to be in Las Vegas because, as an MDL Judge,
11:57:22 9 I have to send this bank to the federal court there.

11:57:29 10 MR. CANTOR: I think as a practical matter -- and I am
11:57:31 11 sure my worthy adversary will chime in momentarily -- that is
11:57:38 12 correct. I believe that it is permissible for Your Honor, if
11:57:40 13 the parties agreed, for Your Honor to keep it here.

11:57:44 14 But I don't think -- I think that is a moot point.

11:57:47 15 THE COURT: Under the MDL statute and all and
11:57:51 16 interpretation, I, as the MDL Judge, have to stop my work and
11:57:58 17 send it back to the original court once I complete this phase of
11:58:06 18 it.

11:58:06 19 Now, whether the parties can convince the Court in Las
11:58:13 20 Vegas that I ought to try this thing and transfer it back to me
11:58:16 21 for some reason, whether I accept it, because I don't have a
11:58:19 22 case here, is a whole other issue.

11:58:23 23 MR. CANTOR: Right.

11:58:23 24 THE COURT: But it appears to me that my obligation, if
11:58:29 25 I determine that there are material issues of fact and a trial

11:58:34 1 is necessary -- and, by the way, it has to be a nonjury trial
11:58:40 2 according to the papers, right?

11:58:42 3 **MR. HENNIGAN:** Correct, Your Honor.

11:58:43 4 **THE COURT:** That goes back to Las Vegas.

11:58:47 5 So then I have to say, Well, wait a minute. Don't I
11:58:52 6 have to wait to see what the Eleventh Circuit does on the fully
11:58:57 7 funded questions to see whether I have a case that goes forward
11:59:03 8 with Fontainebleau because if I do have that case and all these
11:59:09 9 other matters are related, then, you know, should I, you know,
11:59:16 10 integrate everything if the parties want that?

11:59:18 11 **MR. CANTOR:** Well, I think so, Your Honor, because
11:59:20 12 if -- and obviously, you know, we hope and believe that it won't
11:59:24 13 happen, but if the fully funded case were to come back as to
11:59:29 14 both entities, there is going to be further discovery on that
11:59:32 15 issue.

11:59:33 16 **THE COURT:** Right. The Term Lenders have an issue in
11:59:38 17 that and Fontainebleau has an issue in that, in the fully funded
11:59:43 18 side.

11:59:43 19 **MR. CANTOR:** Right.

11:59:44 20 **THE COURT:** Okay. So then I still have a case to which
11:59:51 21 all of these issues then also relate, plus there are going to be
11:59:57 22 all kinds of other claims, I assume, against Fontainebleau based
12:00:01 23 on the discovery that has come out here.

12:00:05 24 **MR. CANTOR:** I will let them speak. There are
12:00:07 25 litigations pending against Fontainebleau that these folks have

12:00:11 1 filed. There is still stuff going on in the bankruptcy, Your
12:00:14 2 Honor, litigations relating to lien priority and things like
12:00:18 3 that.

12:00:19 4 **THE COURT:** Well, I haven't begun to --

12:00:21 5 **MR. CANTOR:** The trustee actually has filed its own
12:00:24 6 fraud claim against Fontainebleau and the Soffer entities in
12:00:29 7 bankruptcy court here.

12:00:32 8 **THE COURT:** Okay. So the bottom line is that in terms
12:00:36 9 of the MDL order that I have issued, should I not hold anything
12:00:43 10 in abeyance, at least at the moment, until I determine the
12:00:50 11 issues on this case that are before me and hear further from the
12:00:55 12 Eleventh Circuit because I can't take you to trial in any event?

12:01:00 13 **MR. CANTOR:** I would say, Your Honor, that certainly,
12:01:02 14 at a minimum, it makes sense for us to wait until you rule on
12:01:05 15 these motions.

12:01:07 16 **THE COURT:** Why should I require everybody to file here
12:01:13 17 a pretrial stipulation which will take you a lot of time when
12:01:17 18 you don't know all the issues that would be going to trial?

12:01:24 19 **MR. HENNIGAN:** Your Honor, first of all, I need two
12:01:27 20 more minutes on the substance of this argument.

12:01:31 21 **THE COURT:** Let me get my answer first.

12:01:34 22 **MR. HENNIGAN:** The answer is I don't know. Certainly I
12:01:38 23 think Your Honor needs to decide these motions. Whether there
12:01:42 24 is a sufficient overlap with the Eleventh Circuit case and this
12:01:46 25 one, I think there's not.

12:01:50 1 I think once we're done with these motions, this case
12:01:52 2 ought to be liberated to go to Vegas for its trial and I think
12:01:59 3 at that point the case that is pending before Your Honor will
12:02:03 4 probably be a stand-alone version here.

12:02:07 5 But, honestly, I hadn't really thought it through.

12:02:13 6 **THE COURT:** All right.

12:02:13 7 **MR. CANTOR:** Your Honor, I don't understand how that
12:02:14 8 could be. Essentially, they filed a complaint with multiple
12:02:19 9 counts. We won on the fully drawn counts. Over our objection,
12:02:24 10 that went up to the Eleventh Circuit. It is still part of this
12:02:27 11 case.

12:02:27 12 **THE COURT:** I think I heard --

12:02:30 13 **MR. HENNIGAN:** That's right.

12:02:30 14 **THE COURT:** You have got two minutes.

12:02:32 15 **MR. HENNIGAN:** I forgot. That's true.

12:02:34 16 **THE COURT:** Use them wisely.

12:02:39 17 **MR. HENNIGAN:** I will talk fast.

12:02:41 18 First of all, Your Honor before the break suggested
12:02:44 19 that, you know, why would they pull the plug, quote-unquote, for
12:02:48 20 a two-and-a-half million shortfall. Pulling the plug was not
12:02:52 21 one of their options.

12:02:54 22 What they needed to do was to issue a stop funding
12:02:57 23 order, perhaps call the lenders together to discuss it and have
12:03:02 24 lender clarification on some of these issues, but stop funding
12:03:06 25 doesn't mean stop the project. It means that once the

12:03:10 1 conditions can be resolved, they can be resolved and move
12:03:15 2 forward largely consensually.

12:03:17 3 My second point was on the --

12:03:19 4 **THE COURT:** Well, what do you mean? In reality, if you
12:03:22 5 are not paying the contractors, the project stops.

12:03:24 6 **MR. HENNIGAN:** You stop paying the contractors at that
12:03:28 7 moment and certainly the project in terms of a funding sense
12:03:31 8 stops at that moment until these issues can be resolved and
12:03:34 9 perhaps consensually.

12:03:37 10 **THE COURT:** Are you trying to tell me that if a stop
12:03:40 11 order was issued, that this project wouldn't have imploded at
12:03:47 12 that point?

12:03:47 13 **MR. HENNIGAN:** I think without any doubt this project
12:03:50 14 was doomed at that moment, Your Honor. Just as a technical
12:03:54 15 matter --

12:03:55 16 **THE COURT:** That is not my question.

12:03:57 17 Are you trying to tell me that if a stop funding order
12:04:01 18 was issued, the project would not have imploded at that point
12:04:06 19 because of the contractors not getting paid and all the rest of
12:04:10 20 this thing given the Lehman bankruptcy and all the other --

12:04:13 21 **MR. HENNIGAN:** I am saying not at that moment. I
12:04:16 22 believe that had the democracy protocols taken effect, it would
12:04:21 23 have ultimately -- look, make no mistake about it. I think had
12:04:25 24 the right thing been done in September, this project would have
12:04:28 25 ended on that date. The \$700 million would still be in the bank

12:04:33 1 account and people would have been much better off than they
12:04:39 2 ultimately became.

12:04:41 3 Now, the last point -- I am trying to speak quickly --
12:04:44 4 on the cases with respect to gross negligence, it occurred to me
12:04:47 5 reviewing them on the way here that we need to put them into
12:04:50 6 three categories in the group contract cases that have gross
12:04:56 7 negligent provisions.

12:04:57 8 Category Number 1 are contracts for the provision of
12:05:01 9 goods and services. Those contracts can be intentionally
12:05:06 10 breached as long as there is payment of direct damages. Those
12:05:09 11 are what I call the efficient breach cases. That is, for
12:05:14 12 example, Global Crossing.

12:05:20 13 In the case of contracts that provide for protection of
12:05:23 14 property, which is banks with conditions on funding and alarm
12:05:28 15 companies that, under certain conditions, are required to take
12:05:31 16 action to protect properties, in those cases where the
12:05:35 17 conditions have occurred that require affirmative action, the
12:05:39 18 courts have routinely held that gross negligence is a triable
12:05:44 19 fact.

12:05:45 20 In the one case that we cited, which is DRS, when the
12:05:50 21 bank has actively participated in the loss of property, it was
12:05:55 22 held to be gross negligence as a matter of law.

12:06:04 23 **MR. CANTOR:** For the most part it is in our papers.
12:06:07 24 Your Honor, at this point I am not going to belabor why DRS is
12:06:12 25 completely factually inapposite here. I think the showing in

12:06:16 1 our paper on gross negligence is sufficient.

12:06:18 2 THE COURT: Thank you for your participation this
12:06:20 3 morning. I found it very helpful to discuss these issues with
12:06:25 4 you and hear your input.

12:06:27 5 MR. HENNIGAN: I always enjoy being here, Your Honor.

12:06:28 6 MR. CANTOR: Thank you, Your Honor.

12:06:32 7 [The proceedings conclude at 12:06 p.m., 11/18/11.]

8 CERTIFICATE

9 I hereby certify that the foregoing is an accurate transcription of the
10 proceedings in the above-entitled matter.

11
12 11.19.11

DATE



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ELEVENTH CIRCUIT TRANSCRIPT INFORMATION FORM

PART I. TRANSCRIPT ORDER INFORMATION

Appellant to complete and file with the District Court Clerk within 14 days of the filing of the notice of appeal in all cases, including those in which there was no hearing or for which no transcript is ordered.

Short Case Style: Avenue CLO Fund, Ltd., et al. vs Bank of America, N.A.

District Court No.: 09-cv-23835; 09-md-02106 Date Notice of Appeal Filed: 3/22/12 Court of Appeals No.: _____
(If Available)

CHOOSE ONE: No hearing No transcript is required for appeal purposes All necessary transcript(s) on file
 I AM ORDERING A TRANSCRIPT OF THE FOLLOWING PROCEEDINGS:

Check appropriate box(es) and provide all information requested:

	HEARING DATE(S)	JUDGE/MAGISTRATE	COURT REPORTER NAME(S)
<input type="checkbox"/> Pre-Trial Proceedings	<u>11/18/2011</u>	<u>Hon. Alan S. Gold</u>	<u>Joseph A. Millikan</u>
<input type="checkbox"/> Trial			
<input type="checkbox"/> Sentence			
<input type="checkbox"/> Other			

METHOD OF PAYMENT:

- I CERTIFY THAT I HAVE CONTACTED THE COURT REPORTER(S) AND HAVE MADE SATISFACTORY ARRANGEMENTS WITH THE COURT REPORTER(S) FOR PAYING THE COST OF THE TRANSCRIPT.
- CRIMINAL JUSTICE ACT. Attached for submission to District Judge/Magistrate is my completed CJA Form 24 requesting authorization for government payment of transcript. [A transcript of the following proceedings will be provided ONLY IF SPECIFICALLY AUTHORIZED in Item 13 on CJA Form 24: Voir Dire; Opening and Closing Statements of Prosecution and Defense; Prosecution Rebuttal; Jury Instructions.]

Ordering Counsel/Party: Lorenz Pruss
 Name of Firm: Dimond Kaplan & Rothstein, P.A.
 Street Address/P.O. Box: 2665 South Bayshore Drive
 City/State/Zip Code: Miami, Florida 33133 Phone No. : (305) 374-1920

I certify that I have completed and filed PART I with the District Court Clerk, sent a copy to the appropriate Court Reporter(s) if ordering a transcript, mailed a filed copy to the Court of Appeals Clerk, and served all parties.

DATE: March 28, 2012 SIGNED: s/Lorenz Pruss Attorney for: Plaintiffs/Appellants

PART II. COURT REPORTER ACKNOWLEDGMENT

Court Reporter to complete and file with the District Court Clerk within 14 days of receipt. The Court Reporter shall send a copy to the Court of Appeals Clerk and to all parties.

Date Transcript Order received: 03.29.12
 Satisfactory arrangements for paying the cost of the transcript were completed on: 03.29.12
 Satisfactory arrangements for paying the cost of the transcript have not been made.
 No. of hearing days: One Estimated no. of transcript pages: 80 Estimated filing date: 04.29.12
 DATE: 03.29.12 SIGNED: Joseph A. Millikan Phone No. : 305.523.5588

NOTE: The transcript is due to be filed within 10 days of the date satisfactory arrangements for paying the cost of the transcript were completed unless the Court Reporter obtains an extension of time to file the transcript.

PART III. NOTIFICATION THAT TRANSCRIPT HAS BEEN FILED IN DISTRICT COURT

Court Reporter to complete and file with the District Court Clerk on date of filing transcript in District Court. The Court Reporter shall send a copy to the Court of Appeals Clerk on the same date.

This is to certify that the transcript has been completed and filed with the district court on (date): 04.02.12

Actual No. of Volumes and Hearing Dates: 11/18/2011, one volume

Date: 04.02.12 Signature of Court Reporter: /s/ Joseph A. Millikan

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **ELEVENTH CIRCUIT TRANSCRIPT INFORMATION FORM** 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: March 28, 2012

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**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

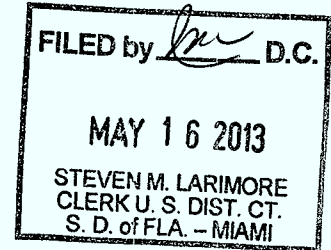
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May 08, 2013

Steven M. Larimore
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810



Appeal Number: **10-14925-AA ; 11-10468 -AA ; 11-10740 -AA**
Case Style: Soneet Kaplila, Trustee v. Bank of America, N.A., et al
District Court Docket No: 1:09-cv-21879-ASG
Secondary Case Number: 1:09-md-02106-ASG

The following record materials in the referenced case are returned herewith:

Six Volumes Record-on-Appeal.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Will Miller
Phone #: (404) 335-6115

(3) Vols. of Pleadings (copies)
(3) Vols. of Transcripts (copies)
(2) Decision Folders (copies)
(2) Boxes containing DE# 152 (Exhibits)

REC-3 Ltr Returning Record to DC