UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 09-MD-02106-CIV-GOLD/MCALILEY
[original SDFL action 09-21879]

IN RE: FONTAINEBLEAU LAS VEGAS CONTRACT LITIGATION **MDL No. 2106** AVENUE CLO FUND, LTD., et al., Plaintiffs, vs. BANK OF AMERICA, N.A., et al., Defendants.	Case No. 09-CV-01047-KJD-PAL

SECOND AMENDED COMPLAINT FOR BREACH OF CONTRACT, BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, AND DECLARATORY RELIEF

JURY TRIAL DEMANDED

This action is brought by the Plaintiffs, each of which is a lender under a June 6, 2007 Credit Agreement (the "Credit Agreement"), by and among, *inter alia*, Fontainebleau Las Vegas, LLC and Fontainebleau Las Vegas II, LLC (together, the "Borrower"), the lenders referred to therein, and Bank of America N.A, in various capacities (in all capacities, "BofA"), against Defendants Bank of America, N.A., Merrill Lynch Capital Corporation, J.P. Morgan Chase Bank, N.A., Barclays Bank PLC, Deutsche Bank Trust Company Americas, The Royal Bank of Scotland PLC, Sumitomo Mitsui Banking Corporation, Bank of Scotland, HSH Nordbank AG, MB Financial Bank, N.A., and Camulos Master Fund, L.P. ("Defendants"), in their capacities as lenders under the Credit Agreement, as well as Bank of America, NA, in its capacities as

Administrative Agent under the Credit Agreement and as Disbursement Agent under the related Master Disbursement Agreement.[1] Plaintiffs allege for their complaint as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action pursuant to 12 U.S.C. § 632 because defendants BofA, JPMorgan Chase Bank, N.A. and MB Financial Bank, N.A. are national banking associations organized under the laws of the United States and the action arises out of transactions involving international or foreign banking or other international or foreign financial operations, within the meaning of 12 U.S.C. § 632.

2. Venue in the United States District Court for the District of Nevada is proper because the Project is located in Nevada and many of the acts and transactions at issue occurred in Nevada.

PARTIES

Plaintiffs

3. Plaintiff Avenue CLO Fund, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

4. Plaintiff Avenue CLO II, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

5. Plaintiff Avenue CLO III, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

6. Plaintiff Avenue CLO IV, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

7. Plaintiff Avenue CLO V, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

[1] Capitalized terms not otherwise defined herein have the meaning used in the Credit Agreement or, if applicable, the Disbursement Agreement.

8. Plaintiff Avenue CLO VI, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

9. Plaintiff Brigade Leveraged Capital Structures Fund, Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

10. Plaintiff Battalion CLO 2007-I Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

11. Plaintiff Canpartners Investments IV, LLC is a limited liability company formed under the laws of California.

12. Plaintiff Canyon Special Opportunities Master Fund (Cayman), Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

13. Plaintiff Canyon Capital CLO 2004 1 Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

14. Plaintiff Canyon Capital CLO 2006 1 Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

15. Plaintiff Canyon Capital CLO 2007 1 Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

16. Plaintiff Caspian Corporate Loan Fund, LLC is a limited liability company formed under the laws of Delaware.

17. Plaintiff Caspian Capital Partners, L.P. is a limited partnership formed under the laws of Delaware.

18. Plaintiff Caspian Select Credit Master Fund, Ltd. is a company with limited liability formed under the laws of the Cayman Islands.

19. Plaintiff Mariner Opportunities Fund, LP is a limited partnership formed under the laws of Delaware.

20. Plaintiff Mariner LDC is company with limited duration formed under the laws of the Cayman Islands.

21. Plaintiff Sands Point Funding Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

22. Plaintiff Copper River CLO Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

23. Plaintiff Kennecott Funding Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

24. Plaintiff NZC Opportunities (Funding) II Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

25. Plaintiff Green Lane CLO Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

26. Plaintiff 1888 Fund, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

27. Plaintiff Orpheus Funding LLC is a limited liability company formed under the laws of Delaware.

28. Plaintiff Orpheus Holdings LLC is a limited liability company formed under the laws of Delaware.

29. Plaintiff LFCQ LLC is a limited liability company formed under the laws of Delaware.

30. Plaintiff Aberdeen Loan Funding, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

31. Plaintiff Armstrong Loan Funding, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

32. Plaintiff Brentwood CLO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

33. Plaintiff Eastland CLO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

34. Plaintiff Emerald Orchard Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

35. Plaintiff Gleneagles CLO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

36. Plaintiff Grayson CLO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

37. Plaintiff Greenbriar CLO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

38. Plaintiff Highland Credit Opportunities CDO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

39. Plaintiff Highland Loan Funding V, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

40. Plaintiff Highland Offshore Partners, L.P. is a limited partnership formed under the laws of Bermuda.

41. Plaintiff Jasper CLO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

42. Plaintiff Liberty CLO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

43. Plaintiff Loan Funding IV LLC is a limited liability company formed under the laws of Delaware.

44. Plaintiff Loan Funding VII LLC is a limited liability company formed under the laws of Delaware.

45. Plaintiff Loan Star State Trust is a trust formed under the laws of the Cayman Islands.

46. Plaintiff Longhorn Credit Funding, LLC is a limited liability company formed under the laws of Delaware.

47. Plaintiff Red River CLO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

48. Plaintiff Rockwall CDO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

49. Plaintiff Rockwall CDO II, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

50. Plaintiff Southfork CLO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

51. Plaintiff Stratford CLO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

52. Plaintiff Westchester CLO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

53. Plaintiff ING Prime Rate Trust is a business trust formed under the laws of Massachusetts.

54. Plaintiff ING Senior Income Fund is a statutory trust formed under the laws of Delaware.

55. Plaintiff ING International (II) - Senior Bank Loans Euro is a SICAV (Société d'Investissement à Capital Variable) formed under the laws of Luxembourg.

56. Plaintiff ING Investment Management CLO I, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

57. Plaintiff ING Investment Management CLO II, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

58. Plaintiff ING Investment Management CLO III, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

59. Plaintiff ING Investment Management CLO IV, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

60. Plaintiff ING Investment Management CLO V, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

61. Plaintiff Carlyle High Yield Partners 2008-1, Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

62. Plaintiff Carlyle High Yield Partners VI, Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

63. Plaintiff Carlyle High Yield Partners VII, Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

64. Plaintiff Carlyle High Yield Partners VIII, Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

65. Plaintiff Carlyle High Yield Partners IX, Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

66. Plaintiff Carlyle High Yield Partners X, Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

67. Plaintiff Carlyle Loan Investment, Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

68. Plaintiff Centurion CDO VI, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

69. Plaintiff Centurion CDO VII, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

70. Plaintiff Centurion CDO 8, Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

71. Plaintiff Centurion CDO 9, Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

72. Plaintiff Cent CDO 10 Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

73. Plaintiff Cent CDO XI Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

74. Plaintiff Cent CDO 12 Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

75. Plaintiff Cent CDO 14 Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

76. Plaintiff Cent CDO 15 Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

77. Plaintiff Venture II CDO 2002, Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

78. Plaintiff Venture III CDO is a company with limited liability incorporated under the laws of the Cayman Islands.

79. Plaintiff Venture IV CDO Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

80. Plaintiff Venture V CDO Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

81. Plaintiff Venture VI CDO Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

82. Plaintiff Venture VII CDO Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

83. Plaintiff Venture VIII CDO Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

84. Plaintiff Venture IX CDO Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

85. Plaintiff Vista Leveraged Income Fund is a company with limited liability incorporated under the laws of the Cayman Islands.

86. Plaintiff Veer Cash Flow, CLO, Limited is a company with limited liability incorporated under the laws of the Cayman Islands.

87. Plaintiff Genesis CLO 2007-1 Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

88. Plaintiff ARES Enhanced Loan Investment Strategy III, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

89. Plaintiff Primus CLO I, Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

90. Plaintiff Primus CLO II, Ltd. is an exempted company with limited liability incorporated under the laws of the Cayman Islands.

91. Plaintiff Cantor Fitzgerald Securities is a general partnership formed under the laws of New York.

92. Plaintiff Olympic CLO I Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

93. Plaintiff Shasta CLO I Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

94. Plaintiff Whitney CLO I Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

95. Plaintiff San Gabriel CLO I Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

96. Plaintiff Sierra CLO II Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

97. Plaintiff Rosedale CLO, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands, BWI.

98. Plaintiff Rosedale CLO II Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands, BWI.

99. Plaintiff SPCP Group, LLC is a limited liability company formed under the laws of Delaware.

100. Plaintiff Stone Lion Portfolio L.P. is a limited partnership formed under the laws of the Cayman Islands.

101. Plaintiff Venor Capital Master Fund, Ltd. is a company with limited liability incorporated under the laws of the Cayman Islands.

Defendants

102. Defendant BofA is a nationally chartered bank with its main office in Charlotte, North Carolina. Under the Credit Agreement and other Loan Documents, BofA acted in several capacities, including as a Revolving Facility lender, as Issuing Lender, and as Swing Line Lender. In addition, BofA served as Administrative Agent to all of the Lenders under the Credit Agreement and as Disbursement Agent to all of the Lenders under the Disbursement Agreement. BofA agreed to fund $100 million under the Revolving Facility.

103. Defendant Merrill Lynch Capital Corporation is a Delaware corporation with a principal place of business in New York. Merrill Lynch Capital Corporation, which is now indirectly owned by BofA, agreed to fund $100 million under the Revolving Facility.

104. Defendant J.P. Morgan Chase Bank, N.A. is a nationally chartered bank with its headquarters in New York, New York. J.P. Morgan Chase Bank, N.A. agreed to fund $90 million under the Revolving Facility.

105. Defendant Barclays Bank PLC is a public limited company in the United Kingdom with its principal place of business in London, England. Barclays Bank PLC agreed to fund $100 million under the Revolving Facility.

106. Defendant Deutsche Bank Trust Company Americas is a New York State-chartered bank with its principal office in New York, New York. Deutsche Bank Trust Company Americas agreed to fund $80 million under the Revolving Facility.

107. Defendant The Royal Bank of Scotland PLC is a banking association organized under the laws of the United Kingdom with a branch in New York, New York. The Royal Bank of Scotland PLC agreed to fund $90 million under the Revolving Facility.

108. Defendant Sumitomo Mitsui Banking Corporation is a Japanese corporation with offices in New York, New York. Sumitomo Mitsui Banking Corporation agreed to fund $90 million under the Revolving Facility.

109. Defendant Bank of Scotland is chartered under the laws of Scotland, with its principal place of business in Edinburgh, Scotland. Bank of Scotland agreed to fund $72.5 million under the Revolving Facility.

110. Defendant HSH Nordbank AG is a German banking corporation with a branch in New York, New York. HSH Nordbank AG agreed to fund $40 million under the Revolving Facility.

111. Defendant MB Financial Bank, N.A. is a nationally chartered bank with its main office in Chicago, Illinois. MB Financial Bank, N.A. agreed to fund $7.5 million under the Revolving Facility.

112. Defendant Camulos Master Fund, L.P. is a Delaware corporation with its principal place of business in Stamford, Connecticut. Camulos Master Fund LP agreed to fund $20 million under the Revolving Facility.

FACTUAL BACKGROUND

THE FONTAINEBLEAU PROJECT

113. Between March and June 2007, Plaintiffs or their predecessors were approached by a syndicate of investment bankers, led by Banc of America Securities and including other affiliates of the Defendants, to participate in a $1.85 billion bank financing (the "Credit Agreement Facility") for the development and construction of the Fontainebleau Resort and Casino in Las Vegas, Nevada (the "Project"). The Project is designed to be a destination casino-resort on the north end of the Las Vegas Strip, situated on approximately 24.4 acres. The Project consists of a 63-story glass skyscraper featuring over 3,800 guest rooms, suites and

condominium units; a 100-foot high three-level podium complex (the "Podium") housing casino/gaming areas, restaurants and bars, a spa and salon, a live entertainment theater and rooftop pools; a parking garage with space for more than 6,000 vehicles; and a 353,000 square-foot convention center. The Project is also designed to feature retail space (the "Retail Space") of approximately 286,500 square-feet, including retail shops, restaurants, and a nightclub. The Retail Space is being developed by indirect subsidiaries of the Borrower's parent company (the "Retail Borrowers").

114. The total Project costs were to be funded primarily from cash provided by the developers of the Project, the proceeds of the $1.85 billion bank financing, the proceeds of a $675 million 2nd Mortgage Note offering (the "Second Lien Facility"), and proceeds of a $315 million facility (the "Retail Facility") provided to the Retail Borrowers to finance construction of the retail portion of the Project (including $83 million in certain "Shared Costs" for construction improvements to the Podium which was to be owned by Borrower following completion of construction).

THE CREDIT AGREEMENT AND DISBURSEMENT AGREEMENT

115. On June 6, 2007, the Credit Agreement was entered into among numerous lenders, including Plaintiffs and Defendants, and the Borrower. BofA and its counsel served as the principal architects of the Credit Agreement and related Loan Documents, including the Disbursement Agreement. The Credit Agreement included commitments for three kinds of loans: (a) a $700 million initial term loan facility (the "Initial Term Loan Facility"); (b) a $350 million delay draw term facility (the "Delay Draw Facility," and together with the Initial Term Loan Facility, the "Term Loan Facility"); and $800 million revolving loan facility (the "Revolving Facility"). The Initial Term Loan Facility was funded upon the closing of the Credit Agreement in June 2007. The related Second Lien Facility and Retail Facility closed at the same time.

116. Obligations outstanding under the Term Loan Facility and the Revolving Facility are equally and ratably collateralized by mortgages on the real property comprising the Project

and by security interests on all personal property of the Borrower. The personal property security interests as well as statutory and/or common law rights of setoff also extend to deposit accounts, including the Bank Proceeds Account and the Bank Funding Account established pursuant to the terms of a Master Disbursement Agreement (the "Disbursement Agreement"). The Disbursement Agreement governs disbursement of all funds under the Credit Agreement, the Second Lien Facility and the Retail Facility.

117. Plaintiffs are each lenders under the Term Loan Facility. Lenders under the Term Loan Facility are referred to herein as "Term Lenders." Defendants, including BofA, are each lenders under the Revolving Facility. Lenders under the Revolving Facility are referred to herein as "Revolving Lenders." Although certain of the Revolving Lenders are also Term Lenders, BofA is not a Term Lender. In addition to its capacity as a Revolving Lender, BofA also served as Administrative Agent to all of the Lenders under the Credit Agreement, and as Disbursement Agent to all of the Lenders under the Disbursement Agreement.

118. Each of the lenders who agreed to providing financing under the Credit Agreement relied upon the obligation of the other lenders to comply with their funding obligations under the Credit Agreement. The loans available under the Credit Agreement were the principal source of construction financing for the Project and, along with a completion guaranty and the Retail Facility, were intended to be virtually the only source of construction financing remaining after junior sources (equity and second mortgage bonds) were utilized. Because all lenders would suffer if the amount of financing available for construction proved to be insufficient to complete the Project (and, as a result, their collateral value would be destroyed), the Credit Agreement requires that, in the absence of a Stop Funding Notice (described below) or the termination of a Facility by the Required Lenders following an Event of Default, each Lender is required to continue to make Loans into the Bank Proceeds Account.

119. Consistent with that agreement among the Lenders, the Credit Agreement and other Loan Documents create a two-step mechanism for the Borrower to obtain loan proceeds under the Term Loan Facility and the Revolving Facility prior to the Opening Date of the

Project. Under the first step, the Borrowers must submit to the Administrative Agent a notice of borrowing (the "Notice of Borrowing") specifying the requested loans and designated borrowing date. The Credit Agreement requires that the Administrative Agent promptly notify each lender of a Notice of Borrowing. Once notified, each lender is contractually required to make its pro-rata share of the requested loans available to the Administrative Agent prior to 10:00 AM on the designated borrowing date, subject only to identified conditions precedent. Although Revolving Loans made after construction is completed (referred to in the Credit Agreement as "Direct Loans") are expressly subject to conditions precedent in Section 5.3 of the Credit Agreement (including the requirement that each representation and warranty under the Loan Documents be true and correct and the absence of a Default or Event of Default), Revolving Loans made during construction (referred to as "Disbursement Agreement Loans") and Delay Draw Term Loans are expressly conditioned "**only**" upon the conditions precedent in Section 5.2 of the Credit Agreement (which, unlike Section 5.3, does not include the requirement that each representation and warranty under the Loan Documents be true and correct, nor the absence of a Default or Event of Default). The proceeds of Delay Draw Term Loans and Revolving Loans are, under the first step, deposited into the Bank Proceeds Account.[2]

120. Under the second step, in order to access those funds from the Bank Proceeds Account to pay for the cost of the Project, the Borrowers must submit an advance request (typically monthly) pursuant to the Disbursement Agreement (the "Advance Request"). The Disbursement Agreement establishes: (a) the conditions precedent, which are set forth in Section 3.3 of the Disbursement Agreement, to be satisfied prior to approval of the Advance Request by the Disbursement Agent; (b) the relative sequencing of disbursements from the proceeds of

[2] With respect to the $700 million Initial Term Facility, the funds were deposited into the Bank Proceeds Account on the Closing Date (June 6, 2007), and thus, were made subject to different conditions precedent that those applicable to the Delay Draw Term Loans and Revolving Term Loans.

various facilities and debt instruments; and (c) the obligations of the various agents to make disbursements to the Borrowers of loan proceeds from the Bank Proceeds Account.

121. The Term Lenders are intended third-party beneficiaries of the Disbursement Agreement, which, in pertinent part, governs the disbursement of the funds loaned by the Term Lenders. The Disbursement Agreement expressly provides that BofA is granted security interests in the Bank Proceeds Account, for the benefit of the lenders. (Disbursement Agreement, § 2.3). The Disbursement Agreement states that the provisions of Article 9 (which governs the duties and obligations of BofA as Disbursement Agent) are for the benefit of the Lenders (which includes the Plaintiffs), and that BofA is responsible and liable to the Term Lenders as a consequence of its performance under the Disbursement Agreement. (Disbursement Agreement, § 9.10).

122. As Disbursement Agent and Administrative Agent, BofA assumed responsibility for the proper administration of the construction loans and disbursement of funds to be used by the Borrower to construct the Project. BofA agreed to exercise commercially reasonable efforts and utilize commercially prudent practices in the performance of its duties. Disbursement Agreement, § 9.1. BofA's duties included ensuring that funds were disbursed to the Bank Funding Account only if all of the conditions precedent to disbursement of funds under Section 3 of the Disbursement Agreement were satisfied, including that, as of the Advance Date: (a) each representation and warranty of each Project Entity in Article 4 was true and correct as if made on such date; (b) there was no Default or Event of Default under any of the Financing Agreements; (c) the In Balance Test was satisfied; (d) there had been no development or event since the Closing Date that could reasonably be expected to have a Material Adverse Effect on the Project; and (e) the Retail Agent and Retail Lenders under the Retail Facility had made all Advances required of them under the Advance Request. (Disbursement Agreement, §§ 3.3.2, 3.3.3, 3.3.8, 3.3.11, 3.3.23).

123. If all of the applicable conditions precedent for the advance of funds were satisfied, the Disbursement Agreement provided for the Disbursement Agent and the Borrower

to execute an Advance Confirmation Notice and, with respect to the use of funds in the Bank Proceeds Account advanced by the Term Lenders, to deliver the notice to BofA as Administrative Agent. Upon receipt of such notice, BofA would make the advances contemplated under the Advance Confirmation Notice. (Disbursement Agreement, § 2.4.6).

124. If not all of the conditions precedent to an Advance were satisfied, or if the Administrative Agent notified the Disbursement Agent that a Default or Event of Default had occurred, then the Disbursement Agent was required to provide notice (a "Stop Funding Notice") to the Borrowers and each Funding Agent, including the Administrative Agent. (Disbursement Agreement, § 2.5.1). If a Stop Funding Notice were issued, no disbursements could be made, and the funds would remain safely in the Bank Proceeds Account until all of the conditions precedent were satisfied, including the absence of any Default or Event of Default. In addition, the lenders have no obligation to fund until the circumstances associated with the Stop Funding Notice have been resolved. (Credit Agreement § 2.4(e)).

125. Under Section 9.2.3 of the Disbursement Agreement, "if the Disbursement Agent is notified that an Event of Default or a Default has occurred and is continuing, the Disbursement Agent shall promptly and in any event within five Business Days provide notice to each of the Funding Agents of the same and otherwise shall exercise such of the rights and powers vested in it by this Agreement and the documents constituting or executed in connection with this Agreement, and use the same degree of care and skill in their exercise, as a prudent person would exercise or use under the circumstances in the reasonable administration of its own affairs." As noted above, among the powers and duties vested in BofA under the Disbursement Agreement upon receiving notice of a Default or Event of Default was the power and duty to issue a Stop Funding Notice.

LEHMAN'S FAILURE TO FUND UNDER THE RETAIL FACILITY

126. As evidenced by the terms of the Disbursement Agreement, the three "Financing Agreements" covered by that agreement – the Credit Agreement, the Second Mortgage Indenture, and the Retail Facility Agreement – are closely interrelated, and the proceeds

available under each facility were integral to the construction, completion and ultimate success of the Project.

127. As a result of the syndication of the Retail Facility, Lehman Brothers Holdings, Inc. ("Lehman"), which served as Retail Agent, was the largest Retail Lender, responsible for $215 million, or 68.25%, of the Retail Facility. As of the Closing Date, $125.4 million of the Retail Facility was advanced, leaving $189.6 million to be advanced. Much of that sum was earmarked to pay Shared Costs to complete the Podium and to complete the Retail component of the Project. Thus, the successful completion of the overall Project depended heavily on the proceeds to be made available pursuant to Lehman's commitment under the Retail Facility.

128. In September 2008, Lehman filed for bankruptcy protection. According to a proof of claim filed by the Retail Borrower in Lehman's bankruptcy case, beginning in September 2008 and on four occasions thereafter, Lehman failed to honor "its obligation to fund a total of $14,259,409.74 under the Retail Facility," and thereby defaulted in its lending obligations under the Retail Facility Agreement (the "Lehman Defaults"). Those defaults prevented satisfaction of numerous conditions precedent to the approval of Advance Requests, including the following:

- Section 3.3.23 of the Disbursement Agreement requires that "[i]n the case of each Advance from the Bank Proceeds Account made concurrently with or after Exhaustion of the Second Mortgage Proceeds Account, the Retail Agent and the Retail Lenders shall, on the date specified in the relevant Advance Request, make any Advances required of them pursuant to that Advance Request."
    - Lehman, as Retail Agent and as a Retail Lender, did not make the Advances required of it pursuant to at least five Advance Requests between September 2008 and March 2009.
- Section 3.3.3 of the Disbursement Agreement provides that "[n]o Default or Event of Default shall have occurred and be continuing." A "Default" or "Event of Default" under the Credit Agreement constitutes a "Default" or "Event of

Default" under the Disbursement Agreement. (Disbursement Agreement, Ex. A). Under Section 8(j) of the Credit Agreement, the breach by "any Person" of a "Material Agreement" constitutes an Event of Default (and, prior to the expiration of any notice or other grace period, a Default) if such breach could reasonably be expected to result in a Material Adverse Effect. Schedule 4.24 of the Credit Agreement lists, as Material Agreements, "[t]he 'Financing Agreements' as defined in the Disbursement Agreement." Credit Agreement, Schedule 4.24. That definition of "Financing Agreements" includes the "Facility Agreements," which in turn includes the "Retail Facility Agreement." As stated above, the failure of the Project Entities to receive material amounts of funding and the resulting uncertainty over receiving the balance of Lehman's commitment threatened completion of the Project.

    - Accordingly, Lehman's breach of the Retail Facility was a Default, based upon Section 8(j) of the Credit Agreement.

- Section 3.3.2 requires that each representation and warranty by each Project Entity in Article 4 be true and correct as if made on such date. One such representation is that "[t]here is no default or event of default under any of the Financing Agreements." (Disbursement Agreement, at § 4.9.1).

    - That representation was not true and correct when made on or after September 2008, based upon the Lehman Defaults under the Retail Facility (one of the Financing Agreements).

- Section 3.3.11 requires that, prior to any disbursement, there has been no change in the economics or feasibility of constructing and/or operating the Project, or in the financing condition, business or property of the Borrowers, any of which could reasonably be expected to have a Material Adverse Effect.

    - Lehman's bankruptcy filing, and the uncertainty that Lehman would fulfill its loan commitment or that any other lender would assume Lehman's

commitment under the Retail Facility, threatened the successful completion of the Project and thus could reasonably be expected to have a Material Adverse Effect.

129. BofA, as Disbursement Agent, received notice of the Lehman Defaults from one or more of the Term Lenders. In September and October 2008, at least one of the Term Lenders wrote to BofA and expressed the position that Lehman's failure to comply with its funding obligations under the Retail Facility meant that certain of the conditions precedent to disbursement of funds under Section 3.3 of the Disbursement Agreement were not satisfied. In response, BofA refused to do anything, instead asserting that its function as Disbursement Agent was purely administrative in nature.

130. BofA refused to address the Lehman Defaults in large part because it wished to preserve its ongoing business relationship with the Borrower and its principal indirect owners, including Jeffrey Soffer. For example, BofA was the agent and a lender under a loan facility used to renovate the Fontainebleau Hotel in Miami, which was indirectly owned by the Borrower's indirect parent. BofA also made loans to Turnberry Associates (of which Soffer is a principal) or its affiliates. The close relationship between BofA on the one hand, and the Borrower and related parties on the other, was further evidenced by the fact that the Borrower's chief financial officer, prior to taking that position, worked for eight years at Banc of America Securities (which served as an co-lead arranger and joint underwriter of the Credit Agreement).

131. BofA's refusal to address the Lehman Defaults continued even after Moodys Investment Service announced on November 6, 2008 that it had downgraded the Credit Agreement Facility to B3 from B1. In that announcement, Moodys expressed its opinion that the outlook was "negative" in recognition of the challenges faced by the Borrowers' parent in resolving the potential funding shortfall related to the Lehman Default.

132. In wrongful and willful derogation of its duties and responsibilities as Disbursement Agent and Administrative Agent, BofA approved Advance Requests and issued Advance Confirmation Notices after, and despite notice of, the Lehman Defaults. Likewise,

BofA, as Administrative Agent, made Advances to the Borrowers pursuant to the Advance Requests. In total, those Advances (excluding debt service paid to the Lenders) exceeded $680 million, the last made on or about March 25, 2009 (the "March 25 Advance"). Each approval and/or Advance by BofA following the date it received notice of the Lehman Defaults was improper and constituted bad faith, gross negligence and/or willful misconduct on the part of BofA.

DEFAULT BY FIRST NATIONAL BANK

OF NEVADA UNDER CREDIT AGREEMENT

133. On July 25, 2008, First National Bank of Nevada, was closed by the Office of the Comptroller of the Currency. The Federal Deposit Insurance Company ("FDIC") subsequently was appointed as receiver. First National Bank of Nevada had made a commitment of $1,666,666 under the Term Loan Facility and a commitment of $10,000,000 under the Revolving Facility. According to the Borrower, FDIC has repudiated the commitments of First National Bank of Nevada under the Credit Agreement. As a result, beginning in January 2009, the Borrower's calculation of Available Funds under the In Balance Test was therefore reduced by the amount of the total commitment by First National Bank of Nevada ($11,666,666).

134. The FDIC's repudiation of First National Bank of Nevada's commitment constituted, as a matter of law, a breach of that bank's obligation under the Credit Agreement. Such a breach by a party to a Material Agreement (which the Credit Agreement was) was a Default, based upon Section 8(j) of the Credit Agreement. It also prevented the Borrower from satisfying Section 3.3.2 of the Disbursement Agreement, which conditioned any disbursement upon the truth of the Borrower's representations and warranties under Article 4, in particular the representation and warranty pursuant to Section 4.9.1 that there existed no defaults or events of default under any of the Financing Documents.

135. Notwithstanding the fact that the conditions precedent for disbursement under Section 3.3 of the Disbursement Agreement by virtue of the Default resulting from the FDIC's repudiation of the Credit Agreement were not satisfied, BofA wrongfully and willfully continued

to issue Advance Confirmation Notices, and failed to issue a Stop Funding Notice. Instead, the amounts requested by the Borrower continued to be disbursed by BofA.

BofA'S CHANGE OF APPROACH AS DISBURSEMENT AGENT

136. As a result of BofA's acquisition of Merrill Lynch that closed in December 2008, BofA effectively (through its indirect ownership of Merrill Lynch) doubled its level of commitment as a Revolving Lender, and became responsible for $200 million – or 25% – of the total original Revolving Loan commitment.

137. Prior to February 2009, the Borrowers did not request any advances under the Revolving Facility (other than for letters of credit), and instead used proceeds of the Initial Term Loan Facility, the Second Lien Facility and other proceeds to pay Project Costs. As explained above, during that period of time, BofA willfully and wrongfully disregarded its obligations as Disbursement Agent and Administrative Agent, taking the position that its role was purely administrative in nature. That passive approach changed dramatically after February 13, 2009, when the Borrower submitted an Advance Request that included the first request for an Advance under the Revolving Facility, in the amount of $68 million.

138. As a Revolving Lender, BofA was required to finance a portion of that Advance Request, and thus for the first time faced the prospect of sharing loan exposure with the Term Lenders if the Project failed. In response to the Advance Request in February 2009, BofA wrote a detailed letter to the Borrower on Friday, February 20, 2009. BofA began the letter by insisting upon "strict compliance" with the deadline of the 11th day of the month to submit Advance Requests established under Section 2.4.1 of the Disbursement Agreement, despite the fact that three of the previous four Advance Requests, each of which had been accepted, were submitted late, including as recently as October 16, 2008 and November 17, 2008. Commenting on the submission of the Advance Request "at a time of continued deterioration of both the national economy and the Las Vegas marketplace," BofA also raised numerous questions. Among those questions was a request to "comment on the status of the Retail Facility, and the commitments of the Retail Lenders to fund under the Retail Facility, in particular, whether you anticipate that

Lehman Brothers Holdings, Inc. will fund its share of requested loans, and whether the other Lenders under the Retail Facility intend to cover any shortfalls." With the Borrower insisting upon disbursement of funds no later than February 25, 2009, BofA demanded that the Borrower supply detailed written responses to the questions by no later than Monday, February 23, 2009 – the very next business day.

139. On February 23, 2009, the Borrower sent a response to BofA. In that letter, the Borrower sidestepped BofA's request for comment on whether it anticipated that Lehman would fund its share of the Retail Facility, or on whether the other Retail Lenders intended to cover any shortfalls. But the Borrower did not (nor could it) deny that Lehman was in default of its obligations.

140. Notwithstanding the unanswered questions, and the fact that numerous conditions to approval of the Advance Request were not satisfied, BofA did not issue a Stop Funding Notice. Instead, it approved the Advance Request and issued an Advance Confirmation Notice. The amounts requested by the Borrower accordingly were disbursed.

THE MARCH 2 AND MARCH 3 NOTICES OF BORROWING

141. On March 2, 2009, the Borrowers issued a notice of borrowing to borrow the entire amount of $350 million available under the Delay Draw Facility and to borrow $670 million available under the Revolving Facility (the "March 2 Notice"). The next day, the Borrowers issued another notice of borrowing to correct a "scrivener's error" made in calculating the amount sought under the Revolving Facility (the "March 3 Notice"), reducing the requested amount to approximately $656 million. Both notices caused the Delay Draw Facility to be fully drawn.

142. As described above, the lenders under the Credit Agreement expressly agreed among themselves and with the Borrower that the Revolving Loans (those that were Disbursement Agreement Loans) and Delay Draw Loans are not, at the time of the borrowing request, conditioned on the absence of any Defaults or Events of Default (as that term is defined in the Credit Agreement), nor conditioned on the truth and correctness of the representations and

warranties in the Loan Documents. Rather, the Delay Draw Facility lenders and the Revolving Facility lenders could refuse to fund their obligations only if their commitments were validly terminated by the Required Lenders of a loan facility in accordance with section 8 of the Credit Agreement following an Event of Default, or pursuant to Section 2.4 of the Credit Agreement, if BofA as Disbursement Agent issued a Stop Funding Notice to the Administrative Agent.

143. As of March 2 and March 3, the Revolving Lenders had not terminated their commitment, and BofA had not issued a Stop Funding Notice. Accordingly, because the Delay Draw Facility was fully drawn, the Revolving Lenders were obligated to fund their commitment. Although BofA submitted the March 2 Notice and the March 3 Notice to the Lenders, it stated that the notices did not comply with the terms of the Credit Agreement. BofA advised the lenders that an *ad hoc* steering committee formed by BofA supported BofA's position.

144. In its correspondence to the Borrowers, BofA took the position that the March 2 Notice and the March 3 Notice did not comply with the Credit Agreement because they contained simultaneous requests for borrowing under both the Delay Draw Facility and the Revolving Facility. A simultaneous request for loans under the two facilities, however, is not prohibited under and is consistent with the Credit Agreement.

145. The pretext for BofA's position was Section 2.1(c)(iii) of the Credit Agreement, which provides that no more than $150 million of Revolving Loans can be outstanding unless the Delay Draw Facility has been "fully drawn." BofA asserted that "fully drawn" meant "fully funded" rather than "fully requested." According to BofA, borrowing under the Revolving Facility is limited to $150 million unless and until each of the Term Lenders fully funded its commitment under the Delay Draw Facility.

146. Significantly, the interpretation of Section 2.1(c)(iii) put forward by BofA in early March 2009 was completely at odds with BofA's historical approval of each prior Advance Request. As noted above, a condition precedent to BofA's approval of any Advance Request is the satisfaction of the "In Balance Test," a critical calculation that demonstrates whether the remaining available financing is sufficient to cover the remaining anticipated costs required to

complete the Project. The In Balance Test is satisfied when "Available Funds" exceed "Required Costs." (Disbursement Agreement, Ex. A). One component of "Available Funds" is "Bank Revolving Availability," defined to mean "***as of each date of determination***, the aggregate principal amount ***available to be drawn on that date*** under the Bank Revolving Facility." (Disbursement Agreement, Ex. A) (emphasis added).

147. Each of the prior Advance Requests approved by BofA was supported by an In Balance Report that included "Bank Revolving Availability" equal to the full amount of the Revolving Facility – $800 million (reduced to $790 million in January 2009 after First National Bank of Nevada went into receivership) – despite the fact that, at such time, the Delay Draw Facility was not fully funded. Had the full amount of the Revolving Facility not been included in each of the prior In Balance Report calculations, the resulting calculations would have demonstrated that the Project was at all times enormously out of balance. As a result, BofA would have been prevented from making any of the prior Advance Requests, and the Project never could have been constructed.

148. In order to allow the full amount of the Revolving Facility to be included in the In Balance calculation, however, BofA had to conclude that the entire Revolving Facility was "available to be drawn on th[e] date" of the In Balance Test determination. BofA could not reach this conclusion unless it interpreted "drawn" to mean "requested." "Drawn" could not mean "funded" because, by virtue of the fact that the Borrower had never previously requested the full amount of the Revolving Facility (an obvious condition precedent to its funding), that amount was never available to be funded as of the date of any Advance Request. On the other hand, because the Revolving Facility at all times remained unfunded, the entire amount was always available to be requested. Thus, the term "drawn," as used in the definition of Bank Revolving Availability, and as applied by BofA when it approved all prior Advance Requests, can only mean "requested."

149. Similarly, only if BofA understood the term "drawn," as used under Section 2.1(c)(iii) in referring to the Delay Draw Facility, to mean "requested" rather than "funded,"

would it have been justified in concluding (as it repeatedly did) that the full amount of the Revolving Facility was "available to be drawn" as of the date of each Advance Request. If BofA understood "drawn" as used in Section 2.1(c)(iii) to mean "funded" rather than "requested," then the Bank Revolving Availability – the amount "available to be drawn on th[e] date" of each In Balance Test – could not have exceeded $150 million unless and until the Delay Draw Loans were fully funded. Until that occurred (which it never did), the In Balance Test would never be satisfied, and there would never be disbursements to fund construction of the Project. That was not the intent of the parties who drafted the Credit Agreement and other Loan Documents.

150. Notwithstanding the fact that satisfaction of the In Balance Test is a condition precedent to any Advance (past, present or future) under the Disbursement Agreement, BofA did not issue a Stop Funding Notice on March 3 or at any time thereafter. Under BofA's new, after-the-fact position that "drawn" means "funded," however, the Borrower had never satisfied the In Balance Test and all prior disbursements were improper. BofA was therefore obligated to (but did not) issue a Stop Funding Notice.

151. Faced with BofA's refusal to process the March 2 Notice and the March 3 Notice, the Borrower issued a revised Borrowing Notice on March 9, 2009, directed solely to the Delay Draw Facility lenders for the full amount of their $350 million commitment (a figure that included the $1,666,666 portion committed by First National Bank of Nevada). That Borrowing Notice was attached to a letter from the Borrower to BofA in which the Borrower asserted that the Lenders were, by their actions or inactions in response to the March 2 Notice and March 3 Notice, in default of the Loan Documents. The Borrower also reiterated its concern that BofA was acting in its own self-interest and against the interest of the Borrower and several of the other lenders.

152. Under section 2.1(b)(iii) of the Credit Agreement, any proceeds of the Delay Draw Facility must be used first to repay any "then outstanding" Revolving Loans. At the time of the March 9 Borrowing Notice, $68 million had been advanced by the Revolving Lenders in February 2009. Thus, as a Revolving Lender, BofA stood to benefit by failing to issue a Stop

Funding Notice prior to March 9, 2009, because such notice would have suspended any Delay Draw Loans otherwise to be used to repay BofA's 25% share of the $68 million of then "outstanding" Revolving Loans.

153. Acting at all times in bad faith and with gross negligence and willful misconduct, BofA processed the March 9 Notice and sent it to all Delay Draw Facility lenders. BofA advised the Lenders that the revised Borrowing Notice complied with the Credit Agreement and that the Delay Draw Lenders were required to fund. In the absence of any Stop Funding Notice that would have suspended their obligation to fund, the Delay Draw Term Lenders could not rely on the failure to fund by the Revolving Lenders, or by any individual Delay Draw Term Lenders or upon the Lehman default. That is because, under Section 2.23(g) of the Credit Agreement, "the obligations of the Lenders to make Term Loans and Revolving Loans . . . are several and not joint. The failure of any Lender to make any Loan . . . shall not relieve any other Lender of its corresponding obligation to do so . . . ." Thus, the Delay Draw Term Lenders were left with no choice but to fund, or else face a claim for breach of contract.

154. Accordingly, on or about March 10, 2009 or thereafter, Plaintiffs complied with their Delay Draw Facility commitments and honored their obligations to fund the Delay Draw Facility. BofA used a portion of those funds to immediately repay itself and the other Revolving Lenders the then-outstanding balance of the $68 million under the Revolving Facility, thereby unjustly enriching BofA and the other Defendants, to the detriment of the Plaintiffs.

155. On March 16, 2009, the Borrower sent another letter to BofA in which it stated its continued belief that the lenders who had not funded were in default of their funding obligations. Shortly thereafter, on March 19, 2009, certain Term Lenders wrote to BofA to demand that the Revolving Lenders, including BofA, honor the March 2 and 3 Notice of Borrowing. They explained why BofA's newly-minted interpretation of "fully drawn" was wrong. They also noted the conflict of interest that BofA had as a result of its Revolving Commitment exposure. The Term Lenders demanded that BofA either correct its conduct or resign. At that time, BofA refused to do either.

THE MARCH 25 ADVANCE

156. On March 11, 2009, the Borrowers sent BofA the March 25 Advance Request, requesting disbursement in the amount of $138 million (of which about $4 million was for debt service under the Credit Agreement). In response, BofA sent correspondence in which it once again reserved the right to demand "strict conformity" with the Disbursement Agreement, and expressed to the Borrower the need to conclude "our review of the substance of those documents." Because BofA used the proceeds of the Delay Draw Loans to repay to itself and the other Revolving Lenders the full amount of the then-outstanding $68 million in Revolving Loans, none of the funds to be disbursed under the March 25 Advance Request included funds to be loaned by the Revolving Lenders. Without its own money on the line, BofA reverted to the laissez-faire approach that it had employed before February 2009, prior to the Borrowers' first request for Revolving Loans.

157. As of no later than March 23, 2009, BofA was on notice, from the Borrower and otherwise, that certain of the Delay Draw Lenders had not funded their portion of the commitment under the Delay Draw Facility in response to the March 9 Notice. Section 1.1 of the Credit Agreement defines a "Lender Default" as "the failure or refusal (which has not been retracted in writing) of a Lender to make available (i) its portion of any Loan required to be made by such Lender hereunder . . . ." As of March 25, the amount of the unfunded commitment totaled about $23.3 million (of which $1.67 million was attributable to First National Bank of Nevada).[3] That unfunded commitment precluded BofA from disbursing any funds pursuant to the March 25 Advance Request for a number of independent reasons.

158. First, because the Credit Agreement, along with the Retail Facility, is one of the Material Agreements on Schedule 4.24, the failure of any Delay Draw Lender to fund its commitment was a Default by virtue of Section 8(j) of the Credit Agreement. (The same was, of

[3] A portion of that amount was subsequently funded, thereby curing any breach with respect to those Term Lenders.

course, true of the failure of the Revolving Lenders to fund on March 3). That meant that at least one of the conditions precedent for disbursement of funds, Section 3.3.3 of the Disbursement Agreement, clearly had not been satisfied.

159. Second, the Borrower could not, based on the failure as of March 25 to fund the $23,333,333 in Term Loans, represent and warrant to be true and correct that no default existed under the Financing Agreements (here, the Credit Agreement), as required under Section 4.9.1 of the Disbursement Agreement. (The same is true based on the failure of the Revolving Lenders to fund). Thus, the Borrower could not satisfy the conditions under Section 3.3.2 of the Disbursement Agreement.

160. Third, under the new interpretation of Section 2.1(c)(iii) of the Credit Agreement adopted by BofA and the other Revolving Lenders, the Revolving Lenders claimed to be relieved of any obligation to fund more than $150 million of their $800 million commitment until the Delay Draw Facility was fully "funded." The position of BofA and the other Revolving Lenders that no more than $150 million of the Revolving Facility was available to fund the Project if any Delay Draw Lender failed to fund its commitment, and the Revolving Lenders' ongoing refusal to fund, clearly constituted a change in the economics or feasibility of constructing the Project that could reasonably be expected to have a Material Adverse Effect, thereby precluding satisfaction of Section 3.3.11 of the Credit Agreement.

161. Fourth, the Borrower could not satisfy the In Balance Test. On March 23, 2009, the Borrowers advised BofA that it would be submitting a calculation of the In Balance Test reflecting a razor-thin cushion of only $13.8 million. That cushion included Available Funds with two components that are, as explained below, incompatible: (a) $750 million in "Bank Revolving Availability"; and (b) $21,666,666 under "Delay Draw Term Loan Availability," which represented the unfunded portion of the Delay Draw Loans (excluding First National Bank of Nevada's portion). Depending on whether "fully drawn" was interpreted to mean "fully funded" or "fully requested," either the $750 million or the $21,666,666 could be included as Available Funds – ***but not both***. If "fully drawn" meant "fully funded," then the "Bank

Revolving Availability" under the In Balance Test could not exceed $150 million unless and until the Delay Draw Facility was in fact fully funded, thereby causing the In Balance Test to fail by a spectacular margin. If, on the other hand, "fully drawn" meant "fully requested," then the $21,666,666 in Term Loans that were requested but not funded would be excluded. That is because "Delay Draw Term Loan Availability" is defined to mean, "as of each date of determination, the ***then undrawn*** portion of the Delay Draw Term Loans." (Disbursement Agreement, Ex. A)(emphasis added). If "drawn" meant "requested," then the "undrawn portion of the Delay Draw Term Loans" was zero as of March 25, 2009. Either way, the Borrower could not satisfy the In Balance Test, a condition to disbursement under Section 3.3.8 of the Disbursement Agreement.

162. In short, there was a myriad of facts – all known to BofA, and none requiring any investigation, additional facts, or exercise of discretion by BofA – that precluded satisfaction of the conditions precedent necessary for BofA to approve the March 25 Advance Request and disburse the proceeds that had been advanced by the Term Lenders. Yet BofA knowingly and intentionally chose to disregard those facts and to shirk its obligations as Disbursement Agent.

163. Instead, in a March 23 letter to Fontainebleau lenders posted on Intralinks, BofA flip-flopped yet again and took an entirely new position: "since the Borrower had requested all of the Delay Draw Term Loans and ***almost*** all of the loans had funded," the Borrowers could now request Revolving Loans in excess of $150 million. Under BofA's new position, "fully drawn" now meant "almost fully funded." Because "almost all" of the Delay Draw Term Loans had funded, BofA opined the entire amount of the Revolving Loan Facility could be used to calculate "Bank Revolving Availability." The letter read in pertinent part:

> Bank of America's position is that since the Borrower has requested all of the Delay Draw Term Loans**, and almost all of the loans have funded** (whether or not the outstanding $21,666,667 is ultimately received), Section 2.1 (c)(iii) ***now*** permits the Borrower to request Revolving Loans **which result in the aggregate amount outstanding under the Revolving Commitments being in excess of $150,000,000**. As a result, we would permit the relevant portion of the Revolving Commitment to be reflected in Available Funds. (Emphasis added)

164. Notably, in its third interpretive iteration, BofA proposed to redefine "fully drawn" to mean "almost fully funded" even though few, if any, of the other Revolving Lenders had indicated that they agreed with BofA's position, let alone unconditionally waived any argument that they were not required to fund the full amount of their commitment because of the failure of certain Delay Draw Term Lenders to fund. The March 23 letter itself recognizes the "divergence of opinions" as of that date among the Revolving Lenders. Indeed, within a week of the disbursement under the March 25 Advance Request, BofA negotiated an Interim Agreement with the Borrower, dated April 1, 2009 and circulated to Term Lenders on April 3, 2009, under which any consent of the Revolving Lenders to treat the Delay Draw Term Loans as "fully drawn" was conditioned upon the Borrowers' agreement to limit any requests under the Revolving Loans in April and May 2009 to the amount of the Advance Requests plus $5 million for each month. Under the Interim Agreement, "Bank Revolving Availability" on the dates of those Advance Requests would have been capped at an amount far less than the total amount of the Commitment.

165. By virtue of the inability of the Borrowers to satisfy numerous conditions under Section 3.3 of the Disbursement Agreement, BofA was not authorized to approve the March 25 Advance Request nor issue an Advance Confirmation Notice, and was instead obligated to issue a Stop Funding Notice. In breach of its duties as Disbursement Agent, BofA issued the Advance Confirmation Notice and, as Administrative Agent, disbursed $134 million in proceeds that had been advanced by the Term Lenders, including Plaintiffs.

EVENTS SUBSEQUENT TO THE MARCH 25 ADVANCE

166. On or about April 13, 2009, shortly after Plaintiffs' funding of the Delay Draw Facility and the release of approximately $134 million of those funds from the Bank Proceeds Account, the Borrowers advised BofA and the Lenders that it could not meet the In Balance Test, based upon a substantial increase in the figure they used to calculate Required Costs.

167. On April 20, 2009, BofA, in its capacity as Administrative Agent, sent a letter to the Borrower, the Lenders and other parties, in which BofA advised that "the Required Facility

Lenders under the Revolving Credit Facility have determined that one or more Events of Default have occurred and are continuing . . . ." BofA did not, in that letter or in response to a letter sent by certain Term Lenders the following day, identify those Events of Default that had been determined to have occurred. To the extent any Events of Default (or Defaults) had in fact occurred and were continuing on that date, any such Events of Default (or Defaults) were known or should have been known to BofA long before March 2009, and BofA breached its duties as Disbursement Agent and Administrative Agent by failing to communicate them to the Term Lenders, failing to issue a Stop Funding Notice, or failing to take any other required action.

168. Pursuant to Section 8 of the Credit Agreement, BofA provided notice that the Revolving Facility commitment was "terminated effectively immediately." Notably, BofA did not purport to make its termination retroactive to a date prior to the March 2 Notice and March 3 Notice, reflecting BofA's understanding that such retroactive termination was not a remedy available under the Credit Agreement or applicable law.

169. On April 21, 2009, the Borrower submitted a Notice of Borrowing (the "April 21 Notice") to BofA, drawing $710 million under the Revolving Facility. In a separate letter sent that same day by Borrower's counsel to BofA, the Borrower disputed the existence of any Events of Default under the Credit Agreement. If the Borrower were able to demonstrate that no Events of Default under the Credit Agreement had occurred or were continuing as of April 20, 2009, then Defendants were not authorized to terminate the commitment, and were obligated to fund $710 million in response to the April 21 Notice. Defendants did not provide such funding.

170. BofA's failure to issue a Stop Funding Notice and its approval of the prior Advance Requests was in bad faith and constituted gross negligence and willful misconduct. BofA promoted its own self-interest, to the detriment of the Term Lenders, by: 1) causing the Revolving Lenders to refuse to fund their Revolving Loans, thereby reducing the collateral available to the Term Lenders; 2) causing the Delay Draw Lenders to fund their Loans, thereby enabling the repayment of $68 million in Revolving Loans and increasing the collateral available to the Revolving Lenders on account of their existing claims arising from previously issued

letters of credit under the Revolving Facility; and 3) causing disbursements to be made from the Bank Proceeds Account to allow for construction to continue on the Project. All of those events dramatically improved the negotiating leverage of BofA and other Revolving Lenders and reduced the negotiating leverage of the Term Lenders, thereby positioning BofA to seek concessions from both the Borrower and the Term Lenders in exchange for providing the funds that already had been committed. Indeed, BofA applied that leverage to negotiate a term sheet with the Borrower, circulated to the Term Lenders in mid-May 2009, under which the Revolving Lenders would have obtained numerous concessions adverse to the interests of the Term Lenders. That proposal failed only because certain of the Revolving Lenders other than BofA were unwilling to advance funds even on those concessionary terms.

171. On or about May 6, 2009, after having succeeded in maximizing its leverage against the Term Lenders, BofA notified the lenders of its resignation as Disbursement Agent and Administrative Agent.

172. As a consequence of Defendants' wrongful and willful refusal to fund and their termination of the Revolving Facility commitments, the Project has been derailed and the value of the collateral securing Plaintiffs' loans has been substantially diminished. Moreover, BofA's failure to perform its obligations as Disbursement Agent and Administrative Agent not only reduced the amount and value of the collateral securing Plaintiffs' loans, but also required Plaintiffs to advance Delay Draw Loans that, but for BofA's failure to satisfy its duties, would have been suspended and ultimately terminated. Accordingly, Plaintiffs have suffered substantial damages in an amount based upon their *pro rata* share of the funds wrongfully disbursed from the Bank Proceeds Account and their *pro rata* share of the Delay Draw Loans for which they seek compensation.

COUNT I
Breach of the Disbursement Agreement Against BofA

173. Plaintiffs reallege and incorporate each and every allegation set forth in paragraphs 1 through 172 herein.

174. The Disbursement Agreement is a valid and binding contract, pursuant to which BofA agreed to act as Bank Agent and Disbursement Agent. The Disbursement Agreement was intended to directly benefit Plaintiffs.

175. Pursuant to the terms of the Disbursement Agreement, BofA had a duty to exercise commercially reasonable efforts and use commercially prudent practices in performing its obligations under the Disbursement Agreement, including its duty to fund Advance Requests if, but only if, all conditions precedent to such funding were met and its corresponding duty to issue Stop Funding Notices if all such conditions were not met or if there existed any Defaults or Events of Default.

176. Beginning with Advance Requests made in September 2008, and continuing through the March 25 Advance Request, BofA materially breached its duties under the Disbursement Agreement by improperly approving Advance Requests that failed to meet one or more of the conditions precedent under Section 3.3 of the Disbursement Agreement, improperly issuing Advance Confirmation Notices, improperly failing to issue Stop Funding Notices as a result of the failure of conditions precedent to these Advance Requests and Defaults, and improperly disbursing funds from the Bank Proceeds Account pursuant to such deficient Advance Requests.

177. In breaching its duties under the Disbursement Agreement as set forth herein, BofA's actions constituted bad faith, gross negligence and willful misconduct, and favored its own interests over those of the Term Lenders.

178. Plaintiffs have suffered injury as a result of those breaches because, as a result of BofA's approval of the Advance Requests and failure to issue Stop Funding Notices, the amount and value of Plaintiffs' collateral has been and continues to be diminished, and Plaintiffs have been required to fund the Delay Draw Loans. BofA's liability to Plaintiffs is not limited under Section 9.10 of the Disbursement Agreement by virtue of the fact that: (a) the limitation of liability does not apply to claims asserted by Plaintiffs; (b) the limitation of liability does not

apply to the conduct of BofA for which BofA is liable; and (c) BofA's bad faith, gross negligence and willful misconduct are not subject to any limitation on liability.

COUNT II
Breach of the Credit Agreement Against All Defendants

179. Plaintiffs reallege and incorporate each and every allegation set forth in paragraphs 1 through 172 herein.

180. The Credit Agreement is a valid and binding contract, pursuant to which the Defendants agreed to fund $790 million under the Revolving Facility.

181. The March 2 Notice and March 3 Notice complied with all applicable conditions under the Credit Agreement. Plaintiffs have performed all obligations required of them under the Credit Agreement.

182. The Revolving Loan Lenders had an obligation, not just to the Borrowers, but also to their co-lenders, to fund in response to the Notices of Borrowing.

183. Pursuant to the terms of the Credit Agreement, the Defendants were, and continue to be, obligated to honor the Notices of Borrowing.

184. In the alternative, in the event that it is judicially determined that, prior to April 21, 2009, no Events of Default under the Credit Agreement occurred that would authorize termination of the Revolving Facility commitment, then Defendants also were required to fund the sum of $710 million under the April 21 Notice.

185. The Defendants' failure to honor the Notices of Borrowing constitutes a material breach of their obligations under the Credit Agreement.

186. By repudiating their obligations to fund under the Revolving Facility, the Defendants have breached the Credit Agreement.

187. Plaintiffs, as parties to the Credit Agreement, are entitled to seek damages against Defendants for their breach of the Credit Agreement.

188. Plaintiffs have suffered injury as a result of the breach because, as a result of the Defendants' refusal to honor their obligation to fund the Revolving Facility, the amount and value of Plaintiffs' collateral has been and continues to be diminished.

COUNT III
For Breach of the Implied Covenant of Good Faith and Fair Dealing Against BofA

189. Plaintiffs reallege and incorporate each and every allegation set forth in paragraphs 1 through 172 herein.

190. The Disbursement Agreement contained an implied covenant of good faith which prohibited BofA, in its capacities as Administrative Agent and Disbursement Agent, from preferring its own interests and the interests of the Revolving Lenders over the interests of the Term Lenders.

191. Defendants owed the implied covenant of good faith to Plaintiffs, who are intended third-party beneficiaries under the Disbursement Agreement.

192. BofA breached the implied covenant of good faith by: (a) preferring its own interests and the interests of the Revolving Lenders (including BofA) over the interests of Term Lenders when it improperly approved Advance Requests, issued Advance Confirmation Notices, failed to issue Stop Funding Notices, and caused the disbursement of funds from the Bank Proceeds Account; and (b) failing to communicate information to the Term Lenders regarding Events of Default that were known of should have been known to BofA.

193. Plaintiffs have suffered injury as a result of BofA's breach of the implied covenant of good faith. BofA's liability to Plaintiffs is not limited under Section 9.10 of the Disbursement Agreement by virtue of the fact that: (a) the limitation of liability does not apply to claims asserted by Plaintiffs; (b) the limitation of liability does not apply to the conduct of BofA for which BofA is liable; and (c) BofA's bad faith, gross negligence and willful misconduct are not subject to any limitation on liability.

COUNT IV
Breach of the Implied Covenant of
Good Faith and Fair Dealing Against All Defendants

194. Plaintiffs reallege and incorporate each and every allegation set forth in paragraphs 1 through 172 herein.

195. The Credit Agreement is a valid and binding contract, pursuant to which the Defendants agreed to fund $790 million under the Revolving Facility.

196. The Credit Agreement contains an implied covenant of good faith and fair dealing. The covenant is intended to prevent parties to a contract from destroying or injuring the right of other parties to enjoy the fruits of the contract.

197. Defendants owed Plaintiffs a duty of good faith and fair dealing as parties to the same Credit Agreement.

198. BofA as Administrative Agent and the other Defendants breached the implied covenant by adopting a contrived construction of the Credit Agreement in order to justify their refusal to fund the March 2 Notice and the March 3 Notice.

199. Plaintiffs have performed all obligations required of them under the Credit Agreement.

200. Plaintiffs have suffered injury as a result of the breach of the covenant because, as a result of the Defendants' refusal to honor their obligation to fund under the Revolving Facility, the amount and value of Plaintiffs' collateral has been and continues to be diminished. Furthermore, Plaintiffs have been prevented from receiving the benefits of their bargain under the contract because their ability to obtain repayment on their loans has been endangered.

COUNT V
For Declaratory Relief Against BofA

201. Plaintiffs reallege and incorporate each and every allegation set forth in paragraphs 1 through 172 herein.

202. A dispute has arisen between Plaintiffs and BofA regarding BofA's obligations to Plaintiffs as intended third-party beneficiaries under the Disbursement Agreement. Plaintiffs

contend that BofA has breached that agreement by approving the Advance Requests and by failing to issue a Stop Funding Notice. Plaintiffs are informed and believe and thereon allege that BofA contends that it has acted in good faith and in compliance with its obligations under the Disbursement Agreement.

203. A judicial determination is therefore necessary to resolve this dispute and ascertain the respective rights of the parties with regard to the actions and agreements referenced in this complaint.

COUNT VI
For Declaratory Relief Against All Defendants

204. Plaintiffs reallege and incorporate each and every allegation set forth in paragraphs 1 through 172 herein.

205. A dispute has arisen between Plaintiffs and Defendants regarding their respective rights and obligations under the Credit Agreement. Plaintiffs contend that Defendants have breached this agreement by failing to fund and by terminating their loan commitments under the Revolving Facility. Plaintiffs are informed and believe and thereon allege that Defendants contend that they have acted in good faith and in compliance of their obligations under the Credit Agreement.

206. A judicial determination is therefore necessary to resolve this dispute and ascertain the respective rights of the parties with regard to the actions and agreements referenced in this complaint.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against the Defendants, and each of them,

(a) For compensatory damages in an amount subject to proof at trial.

(b) For a declaration that BofA has breached its contractual duties under the Disbursement Agreement as set forth above entitling Plaintiffs to damages in an amount subject to proof at trial.

(c) For a declaration that Defendants have breached their contractual duties under the Credit Agreement as set forth above entitling Plaintiffs to damages in an amount subject to proof at trial.

(d) For a declaration that Plaintiffs are excused from performance of any obligations owing to Defendants under the Credit Agreement.

(e) For a declaration that any claims asserted by Defendants against the Borrower should be disallowed pursuant to 11 U.S.C. § 502(b).

(e) For an award of the costs of suit including attorneys' fees to the extent available.

(f) For any further relief as this Court deems just and proper.

JURY DEMAND

Plaintiffs demand a trial by jury for all issues so triable.

DATED: January 15, 2010

Respectfully submitted,

/s/ David A. Rothstein
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