UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
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In re: FONTAINEBLEAU LAS VEGAS HOLDINGS, LLC, *et al*., Debtors.	Bankr. Case No. 09-21481-BKC-AJC Chapter 11 (Jointly Administered)
FONTAINEBLEAU LAS VEGAS LLC, Plaintiff, v. BANK OF AMERICA, N.A., *et al*., Defendants.	Adv. Pro. No. 09-01621-ap-AJC

DEFENDANTS' OPPOSITION TO FONTAINEBLEAU'S MOTION FOR EXPEDITED FILING AND CONSIDERATION OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

The Federal Rules of Civil Procedure[1] prohibit granting summary judgment without affording defendants an adequate opportunity to marshal evidence concerning material fact issues. But that is exactly what Fontainebleau seeks here. It has asked this Court to expedite its motion for partial summary judgment even though: (i) Fontainebleau has delayed litigating this matter for months since the alleged breach; (ii) Fontainebleau asserts pre-petition state law contract breach claims, and its claim therefore presents non-core issues that are not properly before the Court; (iii) discovery is necessary concerning critical material fact issues, including whether Fontainebleau defaulted on its various financial obligations and representations, and the parties' intent in drafting the contractual provision on which Fontainebleau relies; and (iv) expediting this case would result in no benefit to the estate because the Credit Agreement at issue is an non-assumable executory contract to lend money and thus, the Lenders[2] cannot be compelled to fund their lending commitments. This request, therefore, should be denied.

First, Fontainebleau's own conduct demonstrates that there is no exigent circumstance that would justify expedited treatment. After filing a nearly identical suit in Nevada, Fontainebleau delayed for nearly seven weeks before belatedly asserting here that one of its six pre-petition state law claims against the Lenders requires urgent resolution, and seeking permission to file a partial summary judgment motion immediately. That unexplained delay alone warrants the motion's denial.

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1 Federal Rule of Bankruptcy Procedure 7056 provides that Federal Rule of Civil Procedure 56 applies in adversary proceedings.

2 The Lenders (also sometimes referred to herein as the "Revolving Lenders") joining in this opposition are Bank of America, N.A., Merrill Lynch Capital Corporation, JPMorgan Chase Bank, N.A., Barclays Bank PLC, Deutsche Bank Trust Company Americas, The Royal Bank of Scotland plc, Sumitomo Mitsui Banking Corporation, HSH Nordbank AG, New York Branch and Bank of Scotland plc.

Second, the motion to expedite should be denied because the Court lacks the authority to adjudicate this dispute. In its belated rush to press its claims against the Lenders, Fontainebleau filed suit in the wrong forum. Because Fontainebleau's claims are based on alleged pre-petition contract breaches, this is a non-core proceeding that belongs in the District Court. The Lenders have filed a motion under 28 U.S.C. § 157(d) and Federal Rule of Bankruptcy Procedure 5011(a) to withdraw the reference of this action from the Bankruptcy Court; therefore, it is premature to consider Fontainebleau's request for expedited treatment of its partial summary judgment motion.[3]

Third, expediting this partial summary judgment motion would prejudice the Lenders by denying them discovery concerning material fact issues. Indeed, this seems to be Fontainebleau's aim. The Lenders have more than a good faith basis to believe that Fontainebleau had already defaulted on the contract at issue by March 2, 2009—the date Fontainebleau alleges that the Lenders breached. Statements by Fontainebleau management, as well as news reports and lawsuits filed against Fontainebleau in the weeks before the bankruptcy filing detailing the hotel project's ballooning costs, support that belief. But extensive fact and expert discovery are still necessary to flesh out and prove Fontainebleau's material contract breaches, which would excuse the Lenders' performance under the Credit Agreement. Fontainebleau's expedition request also ignores the need for discovery regarding the drafting history of the contractual provision on which Fontainebleau relies, which, at worst from the Lenders' perspective, may be ambiguous as to the meaning of the phrase "fully drawn."

[3] This opposition to Fontainebleau's motion for expedited treatment is without prejudice to the Lenders' motion to withdraw the reference, and should not be construed as consent to proceed in bankruptcy court. Furthermore, this opposition addresses only Fontainebleau's motion for expedited treatment; the Lenders respectfully reserve their right to file a full set of papers opposing Fontainebleau's motion for partial summary judgment.

Fourth, in contrast to the substantial prejudice the Lenders would suffer if this motion were expedited, Fontainebleau can point to no prejudice to it or to the estate if the motion were decided in the ordinary course after full discovery. In fact, Fontainebleau would suffer no prejudice at all because expediting the partial summary judgment motion offers no benefit to the estate. The agreement at issue is a non-assumable executory contract to lend money, foreclosing Fontainebleau from obtaining the unfunded loan commitment even if it prevails. Ironically, expedited treatment would only result in needlessly burdening the estate, the Court and the Lenders. Fontainebleau's unseemly rush to deprive the defendants of a fair and orderly trial on the merits should therefore be denied.

FACTUAL BACKGROUND

A. The Loans

On June 6, 2007, Fontainebleau and the Lenders, along with other non-party banks, entered into an agreement (the "Credit Agreement") for $1.85 billion in financing through three senior secured credit facilities: (i) a $700 million seven-year maturity term loan, (ii) a $350 million six-year maturity delay draw term loan (the "Delay Draw Loan"), and (iii) an $800 million revolving loan (the "Revolver").[4] Fontainebleau planned to use the proceeds from the senior secured facilities, along with those from a $350 million Retail Credit Facility and $675 million 10.25% Second Mortgage Notes (the "Mortgage Notes"), to fund the construction of the Fontainebleau Las Vegas Resort and Casino (the "Project").[5]

Fontainebleau and the banks also entered into an agreement governing the loaned funds' disbursement to Fontainebleau (the "Disbursement Agreement"). The Credit Agreement and the Disbursement Agreement together governed the Fontainebleau lending relationship and

[4] Am. Compl. ¶ 30.

established a two-step funding process. First, the Credit Agreement required the Lenders, subject to Fontainebleau's satisfaction of the Credit Agreement's terms, to fund loans made pursuant to their commitments into the Bank Proceeds Account.[6] All of the banks that are parties to the Credit Agreement have a ratable security interest in the Bank Proceeds Account funds,[7] and Fontainebleau could not directly access funds in this account.[8] Then, under the Disbursement Agreement, Fontainebleau would draw down funds from this account under monthly Advance Requests to pay Project Expenses if certain conditions were met.[9]

Moreover, the Disbursement Agreement reflects the parties' understanding and intent that Fontainebleau would use the funds from the different facilities in a predetermined sequence, requiring Fontainebleau's monthly Advance Requests be funded by exhausting first the condominium deposit proceeds, then the equity contributions, then funds from the Second Mortgage Notes, followed by funds from the senior secured facilities.[10]

B. The Credit Agreement's Relevant Provisions

Credit Agreement Section 2.1(c) committed the Lenders to make loans to Fontainebleau during the Revolving Commitment Period subject to several terms and conditions, including a requirement that the Total Delay Draw Commitments "*have been* fully drawn" (emphasis added) before the total Revolver and Swing Term loan can exceed $150 million in the aggregate:

> [s]ubject to the terms and conditions [of the Credit Agreement], and in reliance upon the applicable representations and warranties

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5 *Id.* ¶ 27.

6 *See* Credit Agmt., §§ 2.1(c), 2.4(c). (The Credit Agreement is annexed as Freeman Aff. Ex. A.)

7 Disbursement Agmt., § 2.3(d). (The Disbursement Agreement is annexed as Freeman Aff. Ex. B.)

8 *Id.*, § 2.2.2 ("The Project Entities shall not be permitted to make withdrawals from, or otherwise access, any of the Accounts other than the Cash Management Account, the Resort Payment Account and the Retail Payment Account . . . .").

9 *Id.*, § 2.

10 *Id.*, § 2.16.2.

> set forth herein and in the Disbursement Agreement, . . . provided that . . . (iii) unless the Total Delay Draw Commitments have been fully drawn, the aggregate outstanding principal amount of all Revolving Loans and Swing Line Loans shall not exceed $150,000,000.[11]

The "fully drawn" requirement reflected the sequential nature of the funding provided to Fontainebleau. The Revolving Lenders' obligation to make these loans was also subject to the conditions set forth in Section 5.2,[12] including that "Borrowers shall have submitted a Notice of Borrowing specifying the amount and Type of the Loans requested, and the making thereof shall be in compliance with the applicable provisions of Section 2 of this Agreement . . . ."[13]

Credit Agreement Section 6.7 required Fontainebleau to "[p]romptly" give the Lenders notice of, among other things, "the occurrence of any Default or Event of Default … [and] any development or event that has had or could reasonably be expected to have a Material Adverse Effect."[14]

Credit Agreement Section 8 identified the Events of Default, including a materially inaccurate representation or warranty in the loan documents:

> [a]ny representation or warranty made or deemed made by any Loan Party herein or in any other Loan Document or that is contained in any certificate, document or financial or other statement furnished by it at any time under or in connection with this Agreement or any such other Loan Document shall prove to have been inaccurate in any material respect on or as of the date made or deemed made; provided, that the inaccuracy of any representation or warranty contained only in the Disbursement Agreement shall constitute an Event of Default hereunder only to the extent such inaccuracy constitutes a Disbursement Agreement Event of Default . . . .[15]

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[11] Credit Agmt. § 2.1(c).

[12] *Id.*, § 2.1(c) (emphasis in original).

[13] *Id.*, § 5.3.

[14] *Id.*, § 6.7; *see also* Note 23, *infra* (Material Adverse Effect definition).

[15] *Id.*, § 8(b).

It was also an Event of Default to commence a bankruptcy proceeding.[16] Section 8 further provided that upon an Event of Default, a majority of the Revolving Lenders could terminate the Revolver.[17]

C. The Disbursement Agreement's Relevant Provisions

Section 3.3 of the Disbursement Agreement set forth the conditions precedent to disbursing advances to Fontainebleau, including:

- "Representations and Warranties. Each representation and warranty of . . . [e]ach Project Entity set forth in Article 4 . . . shall be true and correct in all material respects as if made on such date."[18]
- "Default. No Default or Event of Default shall have occurred and be continuing."[19]
- "In Balance Requirement. The Project Entities shall have submitted an In Balance Report demonstrating that the In Balance Test is satisfied."[20] The "In Balance Test" requires Fontainebleau to show that it has adequate funds available under its existing sources of financing to complete construction on the Project.[21]

Disbursement Agreement Article 4 requires the "Project Entities" to make a multitude of representations and warranties on each "Advance Date,"[22] including numerous representations going to Fontainebleau's and the Project's financial condition:

- "As of each Advance Date following the Closing Date, there has been no development or event that has or could reasonably be expected to have a Material Adverse Effect[23] since the Closing Date."[24]

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16 *Id.*, § 8(f).

17 *Id.*, § 8.

18 Disbursement Agmt., § 3.3.2.

19 *Id.*, § 3.3.3

20 *Id.*, § 3.3.8.

21 *See id.*, Ex. A at 15 ("'In Balance Test' means that, at the time of calculation and after giving effect to any requested Advance, Available Funds equal or exceed the Remaining Costs. The In Balance Test is 'satisifed' when Available Funds equal or exceed Remaining Costs."). (A true and correct copy is annexed hereto as Ex. A.)

22 *Id.*, Art. 4.

- "There is no Default or Event of Default under any of the Financing Agreements."[25]

- "There is no Default or Event of Default hereunder."[26]

- "As of each Advance Date . . . the In Balance Test is satisfied."[27]

- "Each Remaining Cost Report delivered hereunder . . . sets forth:

> (b) In the column N, headed 'Balance to Complete' an aggregate amount equal to the remaining anticipated Project Costs through the Final Completion Date (which amount is accurate as to each time set forth in the column);
>
> (c) In the section headed 'In Balance Test Adjustments' for In Balance calculations: (1) the Unallocated Contingency Balance; . . .
>
> (d) with respect to Project Costs previously incurred, [an amount that] is true and correct in all material respects; [and] . . .
>
> (e) . . . the amount of all reasonably anticipated Project Costs required to achieve Final Completion."[28]

- "As of each Advance Date, the Companies and their respective Subsidiaries are Solvent[29] on a consolidated basis."[30]

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[23] Material Adverse Effect is defined as:

> any event or circumstance which: (a) has a material adverse effect on the business, assets, properties, liabilities (actual or contingent), operations, condition (financial or otherwise) or prospects of . . . the Companies and their Subsidiaries, taken as a whole . . . ; (b) materially and adversely affects the ability of the Companies and their Subsidiaries, taken as a whole, to perform their respective obligations under the Financing Agreements or of the Project Entities to construct the Project; (c) materially and adversely affects the rights of the Secured Parties under their respective Financing Agreements, including the validity, enforceability or priority of the Liens purported to be created under the Security Documents; or (d) materially and adversely affects the ability of the Project Entities to achieve the Opening Date by the Outside Date.

Id., Ex. A at 18.

[24] *Id.*, § 4.7.2.

[25] *Id.*, § 4.9.1.

[26] *Id.*, § 4.9.2.

[27] *Id.*, § 4.14.

[28] *Id.*, § 4.17.2.

Section 7 of the Disbursement Agreement indentifies Events of Default, including when:

> Any representation, warranty or certification confirmed or made by any of the Project Entities in this Agreement on or following the Initial Bank Advance Date (including any Advance Request or other certificate submitted with respect to this Agreement) shall be found to have been incorrect when made or deemed to be made in any material respect.[31]

Fontainebleau made a number of Advance Requests prior to March 2009, including one on February 13, 2009, which contained the representations and warranties described above.

D. The Lenders Reject Fontainebleau's March 2009 Loan Requests

On February 24, 2009, Fontainebleau submitted a Notice of Borrowing for $68 million under the Revolving Loan facility. The Revolving Lenders funded the amount requested.

On March 2, 2009, Fontainebleau submitted another Notice of Borrowing under the Credit Agreement, requesting a Delay Draw Loan for the entire $350 million facility and a $670 million Revolving Loan.[32] Fontainebleau offered no explanation for this sudden need for over $1 billion.

The following day, the Credit Agreement's Administrative Agent notified Fontainebleau that it would not process the Notice of Borrowing because the Notice did not comply with Section 2.1(c)(iii)'s proviso that "unless the Total Delay Draw Commitments have been fully

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[29] The Disbursement Agreement defines "Solvent" to mean:

> as to any Person, that (a) the sum of the assets of such Person, both at fair valuation and at a present fair saleable value, exceeds its liabilities, including its probable liability in respect of contingent liabilities, (b) such Person will have sufficient capital with which to conduct its business as presently conducted and as proposed to be conducted and (c) such Person has not incurred debts, and does not intend to incur debts, beyond its ability to pay such debts as they mature.

Id., Ex. A at 31–32.

[30] *Id.*, § 4.30.

[31] *Id.*, § 7.1.3(c).

[32] Am. Compl. ¶ 41.

drawn, the aggregate outstanding principal amount of all Revolving Loans and Swing Line Loans shall not exceed $150,000,000."[33] The Delay Draw Loan clearly was not "fully drawn"—in fact, it was not "drawn" at all because there had been no previous loans made under it. While Fontainebleau disputed the Lender's interpretation of the Credit Agreement, it later submitted an amended Notice of Borrowing seeking only the $350 million Delay Draw Loan—that request was approved.[34]

E. The Lenders Subsequently Learn Facts Indicating That Fontainebleau Was in Default on March 2, 2009

In the days and weeks following the March Notice of Borrowing, Fontainebleau provided the Lenders with information that not only confirmed that the Project was in serious trouble, but also strongly suggested that Fontainebleau had been in default under the Credit Agreement when it submitted the March Notice of Borrowing. For example, in early March, Fontainebleau began compiling documents and information to support its March Advance Request to draw funds from the Bank Proceeds Account under the Distribution Agreement. As part of this process, the Lenders' construction consultant asked Fontainebleau to provide additional information regarding (i) the schedule for opening certain parts of the hotel, (ii) the change orders and anticipated cost reports, and (iii) the Project's ability to achieve the required LEED credits.[35] The consultant was concerned that Fontainebleau's Anticipated Additional Costs estimates, "which were supposed to be a worst case projection of the potential owner change orders, are actually a summary of the projected costs to date with no projection of future need."[36]

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[33] *Id.* ¶ 42.

[34] *Id.* ¶ 46.

[35] LEED credits are Nevada state sales tax credits for the purchase of building materials for new construction that satisfies the LEED (Leadership in Energy and Environmental Design) standards for sustainable construction. Fontainebleau can recover between 5.75% and 7.75% of its Nevada state sales tax through this program.

[36] Letter from R. Barone (IVI) to D. Kumar (Fontainebleau) (Mar. 5, 2009). (A true and correct copy is annexed hereto as Ex. B.)

On March 11, 2009, Fontainebleau submitted a $137,925,649.55 March Advance Request that included various representations that the Disbursement Agreement required, including that the "In Balance Test" was satisfied because Available Funds exceeded Remaining Costs by $42,005,669.[37] On March 20, 2009, the Lenders met with Fontainebleau management in Las Vegas to discuss and tour the Project. During this meeting, the Lenders questioned Fontainebleau about the representations in the March Advance Request. As a result, Fontainebleau submitted two revised March Advance Requests correcting the attached schedules to reflect that, contrary to the lower figures in the previous schedules, changing the Opening Date from October 1 to November 1, 2009 was projected to result in (i) an $88,854,000 construction cost increase, (ii) a $21,747,000 debt service increase, and (iii) a $5 million condo selling cost decrease. Based on these corrected figures, Fontainebleau revised its March 11 representation—it still claimed that the Project was "In Balance," but by only $14,084,701.[38] On March 25, 2009, Fontainebleau received the $137,925,649.55 requested in its March Advance Request to Fontainebleau.[39]

But on April 13, 2009, less than a month later, Fontainebleau notified the Lenders that, contrary to its revised representation a few weeks earlier, Fontainebleau did not expect to satisfy the "In Balance Test:"

> [O]ne or more events, occurrences or circumstances have occurred which reasonably could be expected to cause the In Balance Test to fail to be satisfied or render the Project Entities incapable of, or prevent the Project Entities from (a) achieving the Opening Date on or before the Scheduled Opening Date, or (b) meeting one or more material obligations under the Prime Construction

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[37] March 2009 Advance Request. (A true and correct copy is annexed hereto as Ex. C.)

[38] Second Revised Advance Request, Appendices I & II to the Budget/Schedule Amendment Certificate. (A true and correct copy is annexed hereto as Ex. D.)

[39] Compl. ¶ 47.

> Agreement or the other Material Contracts as and when required thereunder.[40]

On April 14, 2009, Fontainebleau submitted a worksheet to the Lenders' construction consultant reflecting more than $186,932,975 in additional costs that were not included in the March Advance Request documentation.[41] But Fontainebleau offered no explanation of what had occurred in the prior three weeks to alter the "In Balance Test" calculation so dramatically. In fact, it has never done so. Fontainebleau also notified the Lenders that Fontainebleau had learned that (i) the April Retail Loan Advance Request "may not be fully funded" and (ii) "as of today, the Remaining Costs exceed Available Funds."[42]

On April 17, 2009, Fontainebleau representatives met with the Lenders. During this meeting, Fontainebleau confirmed that it was facing a substantial construction deficit and would not be able to complete the project using the funds available under the Credit Agreement—Fontainebleau needed additional new financing. Fontainebleau also told the Lenders that it would likely seek bankruptcy protection to restructure its financial obligations.

Additional facts came to light indicating that the Project was already $130 million over budget well before the March Notice of Borrowing. On May 12, 2009, Fontainebleau was sued for non-payment of services in Nevada federal court by CCCS International, a construction management firm that Fontainebleau had hired in the summer of 2008 to provide cost management and auditing services because the Project was "severely over budget."[43] CCCS alleges in its complaint that when it was hired, Fontainebleau projected that it had made

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[40] Facsimile from J. Freeman to R. Naval (Apr. 13, 2009). (A true and correct copy is annexed hereto as Ex. E.)

[41] E-mail from R. Barone to B. Bolio (Apr. 14, 2009). (A true and correct copy is annexed hereto as Ex. F.)

[42] Facsimile from J. Freeman to R. Naval (Apr. 13, 2009).

[43] The action is styled *CCCS International v. Fontainebleau Las Vegas, LLC, et al.*, No. 2:09-cv-00853-KJD-FAP (D. Nev.).

$130 million in prior overpayments on the Project.[44] By the time Fontainebleau discharged CCCS several months later, the firm had allegedly discovered more than $40 million in overpayments and was "well on its way" to uncovering at least $130 million in overpayments.[45] CCCS also claims that Fontainebleau recognized in the summer of 2008 that it had "significant cost overruns that could potentially jeopardize completion of the Project" and that Fontainebleau did not have "appropriate financing to complete the Project."[46]

Additional facts continued to surface suggesting that Fontainebleau was in default under the Credit Agreement on March 2, 2009. For example, Fontainebleau's Chapter 11 proceeding papers disclose, for the first time, that it has been "intensely focused" on securing additional funding sources for the Project since at least September 15, 2008, when Lehman Brothers Holding, Inc., which was the largest participant in the Project's mortgage loan, filed for bankruptcy protection. Fontainebleau has still not obtained firm commitments for this additional funding.[47]

ARGUMENT

While Federal Rule of Bankruptcy Procedure 9006(c)(1) provides bankruptcy courts with the discretion to shorten time for cause shown,[48] this discretion "should be sparingly invoked,"[49]

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44 CCCS Compl. at ¶ 10. (A true and correct copy is annexed hereto as Ex. G.)

45 *Id*. at ¶ 20.

46 *Id*. at ¶ 49.

47 Decl. of Howard C. Karawan in Support of Debtors' Chapter 11 Petitions and First Day Pleadings, ¶ 24, dated June 10, 2009, *In re Fontainebleau Las Vegas Holdings, LLC*, Bankr. Petition # 09-21481-AJC, Dkt. 5.

48 Fed. R. Bankr. P. 9006(c)(1) ("[W]hen an act is required or allowed to be done at or within a specified time by these rules or by a notice given thereunder or by order of court, the court *for cause shown* may in its discretion with or without motion or notice order the period reduced.") (emphasis added).

49 *In re Sandra Cotton, Inc.*, 65 B.R. 153, 156 (W.D.N.Y. 1986); *accord In re Villareal*, 160 B.R. 786, 788 (Bankr. W.D. Tex. 1993) ("[M]otions to expedite should be used sparingly."); *In re Bankwest Boulder Indus. Bank*, 82 B.R. 559, 561 (Bankr. D. Colo. 1988) ("[L]imiting or restricting notice is to be sparingly used.").

and only upon a showing of exigency.[50] In exercising this discretion, "a court must consider, primarily, the potential prejudice to the parties entitled to notice, and weigh that prejudice against the reasons for shortening the period."[51] As discussed below, Fontainebleau's application for expedited treatment should be denied because there is no exigency and the prejudice to the Lenders far outweighs any potential benefit to the estate.

POINT I

FONTAINEBLEAU'S MULTIPLE DELAYS SHOW THAT THERE IS NO EMERGENCY WARRANTING EXPEDITED TREATMENT

Fontainebleau's multiple delays, first in filing suit against the Lenders and then in failing to advance its claims in the Nevada action, belie its assertion that expedited treatment is necessary. The alleged Credit Agreement breach on which Fontainebleau bases its partial summary judgment motion occurred back on March 2, 2009.[52] Fontainebleau then waited more than a month and a half—until April 23—before filing its Nevada suit against the Lenders—an action it concedes was "substantially similar" to this lawsuit.[53] Even after filing the Nevada complaint, Fontainebleau did not seek to expedite its claims. It never sought expedited treatment for any of its claims. To the contrary, it *twice extended* the Lenders' time to respond to the Nevada complaint for a total of 60 days. Thus, when Fontainebleau dismissed the Nevada action on June 9, a month and a half had passed since the Nevada filing—and more than three months

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[50] *See In re Grant Broad. of Phila., Inc.*, 71 B.R. 390, 396 (Bankr. E.D. Pa. 1987) (noting that in considering a motion to shorten time under Rule 9006(c), the "satisfaction of notice requirements [are] very important and not to be compromised in the least unless exigent circumstances justifying an alteration are present"); *Bankwest Boulder*, 82 B.R. at 562 (denying motion for expedited hearing where "[n]o evidence was submitted to the Court, nor was an offer of proof forthcoming, to demonstrate 'exigent circumstances' which would justify" the shortened notice); *Villareal*, 160 B.R. at 787 ("[I]f an expedited hearing is sought, it must appear from the pleadings not only that there is an emergency but also that it is not an emergency of the movant's own making.").

[51] *Grant Broad., Inc.*, 71 B.R. at 397.

[52] Am. Compl. ¶ 75.

since the Lenders' alleged breach—without any responsive pleadings.[54] Fontainebleau's delay in pressing its claims against the Lenders exposes that its newfound exigency plea is mere gamesmanship. Fontainebleau's motion should be denied for that reason alone.[55]

POINT II

FONTAINEBLEAU'S NON-CORE CLAIM SHOULD PROCEED BEFORE THE DISTRICT COURT

Even if Fontainebleau's own conduct did not defeat its request for expedited treatment, such relief would nevertheless be improper because this dispute is in the wrong court. As discussed above, the Lenders have also filed a motion under 28 U.S.C. § 157(d) and Federal Rule of Bankruptcy Procedure 5011(a) to withdraw the reference of this action from the Bankruptcy Court on the grounds that this Adversary Proceeding is a quintessential non-core matter (i) involving a dispute governed by state law, (ii) arising out of an alleged contract breach that (iii) arose pre-petition and (iv) was the subject of a virtually identical state court action that Fontainebleau commenced nearly seven weeks before it filed its Chapter 11 case. The question of whether this action is a "core" proceeding properly before this Court should be resolved before Fontainebleau's request for expedited treatment is entertained.

While this action's outcome could conceivably affect the Debtors' estate, that alone does not render the action a core proceeding.[56] (*See* Motion to Withdraw Reference filed

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[53] Fontainebleau Br. at 29. In fact, the two actions are identical as to parties, allegations and claims, with the exception of the Amended Complaint's newly added claim under 11 U.S.C. § 542.

[54] *See* Docket for *Fontainebleau Las Vegas LLC v. Bank of Am. N.A.*, 2:09-cv-00860-RLH-GWF (D. Nev.). (A true and correct copy is annexed hereto as Ex. H.)

[55] *Villareal*, 160 B.R. at 787 (denying motion for expedited hearing under Rule 9006(c) because debtors were not entitled to an expedited hearing "when the cause for expedited hearing is one of the movant's own making"); *In re Fort Wayne Assocs., L.P.*, Case No. 97-10378, 1998 Bankr. LEXIS 1695, at **3-4 (Bankr. N.D. Ind. Dec. 16, 1998) (denying debtor's motion for an expedited emergency hearing because the "emergency [was] one of the debtor's own making").

contemporaneously herewith.) In fact, Fontainebleau's complaint asserts classic non-core causes of action that a bankruptcy court may not decide without the parties' unanimous consent—pre-petition contract breach claims under New York state law, not bankruptcy law.[57] Thus, it would be premature to consider Fontainebleau's request for expedited treatment of its partial summary judgment motion.

POINT III

FONTAINEBLEAU'S CONTRACT BREACH CLAIM REQUIRES EXTENSIVE DISCOVERY

Contrary to Fontainebleau's repeated assertions, the Amended Complaint's First Claim for Relief (the partial summary judgment motion's subject) raises numerous genuine issues of material fact about which Defendants must be given an adequate opportunity to conduct discovery. Although Rule 56(a) allows a party to move for summary judgment at any time more than 20 days after the commencement of an action (a time period Fontainebleau seeks to erase), the Supreme Court has made it clear that the standards governing summary judgment motion oppositions must be applied *after* adequate discovery has been allowed.[58]

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[56] *See Barnett v. Stern*, 909 F.2d 973, 981 (7th Cir. 1990) ("If the proceeding does not invoke substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy it is not a core proceeding; it may be *related* to the bankruptcy because of its potential effect, but under section 157(c)(1) it is an 'otherwise related' or non-core proceeding." (emphasis in original)); *Official Comm. Of Unsecured Creditors Of Wickes Inc.*, No. 06 C 0869, 2006 WL 1457786, at *4 (N.D. Ill. May 23, 2006) ("An action may be related to an underlying bankruptcy case if its resolution has a direct and substantial impact on the asset pool available for distribution to the estate, however, any such relationship does not necessarily make the proceeding core." (internal quotation marks omitted)).

[57] *In re G.A.D., Inc.*, 340 F.3d 331, 336 (6th Cir. 2003) ("The significance of whether a proceeding is core or non-core is that the bankruptcy judge may hear non-core proceedings related to bankruptcy cases but cannot enter judgments and orders without consent of all parties to the proceeding."); *Barnett*, 909 F.2d at 979 (noting that while "[t]he bankruptcy courts also may hear noncore proceeding that are related to a case under title 11," it "cannot determine such a related proceeding unless all parties consent." (internal quotation marks and citations omitted)).

[58] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242, 257 (1986) (non-movant must proffer evidence to defeat properly-supported motion "so long as the [non-movant] has had a full opportunity to conduct discovery."); *see also* Fed. R. Civ. P. 56(f).

Fontainebleau's contract breach claim stems from the parties' differing interpretations of the term "fully drawn" in Credit Agreement Section 2.1(c)(iii). But Fontainebleau's interpretation, which treats the word "drawn" as synonymous with "requested," is illogical and contrary to the parties' intent. As discussed above, the Disbursement Agreement and the other documents concerning the Project's financing, make clear that the parties intended the various funding sources to be used sequentially, with one facility being exhausted (*i.e.*, fully drawn) before Fontainebleau could access the next facility in the sequence. Fontainebleau's interpretation would undermine the parties' intended sequential financing by permitting Fontainebleau to access the entire Revolving Loan simply by simultaneously submitting a request for the entire Delay Draw Loan—just as it tried to do here.

But even if "fully drawn" could be read to mean simply "requested," Fontainebleau's interpretation would still be unreasonable on its face because it takes "fully drawn" out of context. Credit Agreement Section 2.1(c)(iii) requires that "unless the Total Delay Draw [Term Loan] Commitments *have been* fully drawn, the aggregate outstanding principal amount of all Revolving Loans . . . shall not exceed $150,000,000." Credit Agreement 2.1(c)(iii)(emphasis added). This makes clear that the full drawing of the Delay Draw Loan is a precondition that must be satisfied *before* Fontainebleau can request Revolver Loans in excess of $150 million (again, reflecting the sequential nature of the Fontainebleau financing). Had the parties intended to adopt Fontainebleau's interpretation, the Credit Agreement would have required that the Delay Draw Term Commitments "have been or are being fully drawn," which would permit Fontainebleau to simultaneously request the remainder of the Delay Draw Loan and Revolver funds exceeding $150 million.

Moreover, even if Fontainebleau's interpretation were reasonable, that would merely show that the parties have differing reasonable interpretations. This would not entitle Fontainebleau to partial summary judgment, but would—at most—render Section 2.1(c)(iii) ambiguous.[59] Where a contract provision is ambiguous, "the parties have a right to present extrinsic evidence of their intent at the time of contracting" and summary judgment is inappropriate before the parties have had an opportunity to take discovery regarding the parties' intent.[60]

And regardless of how the Court construes Section 2.1(c)(iii), extensive discovery would still be necessary to resolve Fontainebleau's partial summary judgment motion. To prevail on its contract breach claim, Fontainebleau must prove that it had fulfilled its own contractual obligations as of March 2—the date the Lenders allegedly breached the Credit Agreement. If Fontainebleau materially breached the Credit Agreement on or before March 2, the Lenders' performance would be excused and Fontainebleau's contract breach claim would fail.[61]

The Lenders believe that Fontainebleau (i) was in default under the Credit Agreement when it submitted the March Notice of Borrowing, (ii) made a number of contractually required representations and warranties prior to March 2 that were materially inaccurate when made and

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[59] *See Chimart Assocs. v. Paul*, 489 N.E.2d 231, 233 (N.Y. 1986) (a provision is ambiguous if "the agreement on its face is reasonably susceptible of more than one interpretation"). Credit Agreement Section 10.11 provides that New York law applies to Fontainebleau's contract breach claim.

[60] *See Schering Corp. v. Home Ins. Co.*, 712 F.2d 4, 9–10 (2d Cir. 1983) (reversing summary judgment because district court did not permit non-moving party to conduct discovery into the parties' intent); *Manchester Techs., Inc. v. Didata (N.Y.) Inc.*, 303 A.D.2d 726, 726 (N.Y. App. Div. 2003) ("The stipulation which is the subject of this action is ambiguous and subject to different interpretations. Since the defendant's motion was made before discovery was completed, the Supreme Court properly denied its motion for summary judgment with leave to renew upon the completion of discovery.").

[61] *See LTT Int'l Inc. v. MCI Telecomm. Inc.*, 69 F. Supp. 2d 510, 512, 516 (S.D.N.Y. 1999) (Under New York law, the party seeking to recover for breach of contract has "the burden of proving . . . due performance."); *Hermandad Y Associados, Inc. v. Movimiento Misonero Mundial, Inc.*, No. 100211/06, 2009 WL 765036, at *3 (N.Y. Sup. Ct. Mar. 6, 2009) ("[U]nless a plaintiff has performed the contract pursuant to its terms, the plaintiff has not established all of the required elements for sustaining a breach of contract claim, even if the other elements are satisfied.").

did not reveal Fontainebleau's financial distress, and (iii) was aware of its default on or before March 2, 2009, but that it failed to notify the Lenders, as the Credit Agreement requires. For example, Credit Agreement Section 6.7 requires Fontainebleau "promptly" to notify the defendants of any event of default or any event which could have a material adverse effect on Fontainebleau's business or its ability to perform under the Credit Agreement. Under Section 8(b), materially inaccurate representations or warranties in any document relating to the Credit Agreement are also events of default. Fontainebleau repeatedly made contractually-required representations that it was, among other things, solvent, and that its remaining construction costs did not exceed its available remaining financing. But as discussed above (*supra* at 10–12), Fontainebleau management has submitted documents and made statements to the Lenders that call those representations into question.

Moreover, developments in recent weeks indicate that Fontainebleau had been serious financial distress over the past year. For example, in March 2009, *Moody's Investor Service* reported that Fontainebleau would not be able to sell enough condominiums to reduce its construction debt before the Project opened, as originally projected. Moody's anticipated that due to adverse market conditions, Fontainebleau's construction debt would be "materially higher than originally projected" and its earnings would be "substantially below initial expectations." Moody's warned that Fontainebleau could default on its debt obligations if the Las Vegas market does not significantly improve.[62] Moody's also anticipated that Fontainebleau's construction debt would be materially higher than projected because of adverse market conditions.[63] Further, on May 12, 2009, construction cost auditor CCCS filed suit against Fontainebleau, alleging that

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[62] Amanda Finnegan, *Moody's: Fontainebleau Could Default on Debt*, LAS VEGAS SUN, Mar. 4, 2009, *available at* http://www.lasvegassun.com/news/2009/mar/04/moodys-fontainebleau-could-default-debt (last visited June 14, 2009). (A true and correct copy is annexed hereto as Ex. I.)

[63] *Id.*

it was fired after its investigation uncovered "known and intentional overpayments" by Fontainebleau to certain subcontractors and suppliers.[64] Through its work for Fontainebleau, CCCS allegedly uncovered evidence of Fontainebleau's gross mismanagement that resulted in $130 million in excessive costs.[65] And on June 8, 2009, the *Las Vegas Sun* reported that Fontainebleau's financing estimates put "the project . . . over its most recently revised budget by an estimated $375 million."[66]

These facts and allegations underscore the Lenders' need for discovery, both document requests and depositions, regarding the following topics, among others, to defend against the contract breach and turnover claims in Fontainebleau's partial summary judgment motion:

- Negotiations over the Credit Agreement and ancillary loan documents such as the Disbursement Agreement to ascertain the parties' contractual intent.
- Fontainebleau's communications with the Lenders to determine whether its course of conduct comports with its Credit Agreement interpretation.
- Fontainebleau's internal forecasts for the project's construction costs and timetable.
- All Fontainebleau financial records.
- The construction project's rate of completion.
- Fontainebleau's inability to manage costs on the hotel project and improper payments to contractors.
- Fontainebleau's internal financial projections for the project's post-construction performance.
- The backup documents for Fontainebleau's disclosures and representations to the defendants.

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64 CCCS Compl. ¶ 63.

65 *Id.* at ¶ 10.

66 Liz Benston, *Outlook for Fontainebleau slides from bad to worse*, LAS VEGAS SUN, June 8, 2009, *available at* http://www.lasvegassun.com/news/2009/jun/08/fontainebleaus-outlook-slides-bad-worse (last visited June 14, 2009). (A true and correct copy is annexed hereto as Ex. J.)

- Communications between Fontainebleau and third-parties (including its affiliates, auditors and investors) regarding its financial conditions.

- Expert analysis of Fontainebleau's financial condition in 2007 and 2008 when it made representations concerning its financial health to the defendants.

- Analysis of Fontainebleau's construction cost and timing projections by industry experts.

Fontainebleau's motion simply ignores that these fact-intensive issues must be developed through discovery before there can be a full and fair adjudication of its claims.[67]

Fontainebleau's partial summary judgment motion, which seeks a ruling on its deficient contract breach claim before the Lenders have an opportunity to conduct discovery or even file a responsive pleading, is therefore premature.[68] Allowing Fontainebleau to proceed with its motion before any discovery has been taken would prejudice the defendants by denying them the factual record needed to address Fontainebleau's allegations and uncover evidence showing Fontainebleau's own case-dispositive contract breaches. Fontainebleau's request to expedite should be denied for this reason, as well.[69]

POINT IV

THE CREDIT AGREEMENT IS A NON-ASSUMABLE EXECUTORY CONTRACT TO LEND MONEY

In any event, Fontainebleau is wrong that expediting its partial summary judgment motion is necessary to increase the value of the estate[70] because the Credit Agreement is a non-

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[67] Because, as noted above, this opposition addresses only Fontainebleau's motion for expedited treatment, not the partial summary judgment motion, the Lenders have not submitted an affidavit under Fed. R. Civ. P. 56(f).

[68] *See Shelton v. Tr. of Columbia Univ.*, No. 04 Civ. 6714 (AKH), 2004 WL 2979781, at *1 (S.D.N.Y. Dec. 17, 2004) (holding that summary judgment "motion is premature before defendants have had an opportunity to answer and before discovery").

[69] If Fontainebleau files its motion, the defendants will be entitled to take discovery under Fed. R. Civ. P. 56(f). Fontainebleau's statement that it will oppose any such effort (Fontainebleau Br. at 19, n.10) further underscores that its objective in seeking expedition is denying the defendants an opportunity to defend themselves.

[70] Fontainebleau Br. at 28.

assumable, executory contract under which the Lenders' performance has been excused.[71] Thus, even if Fontainebleau could establish that the Lenders breached the Credit Agreement, their unfunded loan commitment would not become part of the bankruptcy estate.[72] Accordingly, rushing to decide the partial summary judgment motion would not aid the estate.

The Bankruptcy Code prohibits Fontainebleau from assuming the Credit Agreement because it is an executory contract to lend money: *i.e.*, Fontainebleau and the Lenders owe each other performance under the loan documents, and "the failure of either party to perform would give rise to a material breach."[73] Bankruptcy Code Section 365(c)(2) prevents Fontainebleau from "assum[ing] or assign[ing] any executory contract . . . to make a loan" and from forcing the Lenders to advance funds post-petition.[74] As the Third Circuit made clear two decades ago, the

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[71] *In re Cont'l Experts Enters., Inc.*, 26 B.R. 308, 309 (Bankr. S.D. Fla. 1982) ("Defendants' obligation to complete funding as contemplated by the note and mortgage is, of course, an executory contract. Because of the foregoing prohibition [in Section 365(c)(2)] the debtor cannot assume that contract and, therefore, there is no continuing obligation on the defendants' part to complete the funding.").

[72] *In re Quad Cities Constr.*, Inc., 254 B.R. 459, 470 (Bankr. D. Idaho 2000) ("The ban of §365(c)(2) on assumption of such [executory] financial accomodation contracts is absolute . . . . Even if Plaintiff can leap the hurdles imposed by Idaho law, it at best achieves the right to seek specific performance of an alleged financial accommodation contract. That performance, however, as a matter of bankruptcy law, is unavailable to Plaintiff as debtor in possession.").

[73] *See In re Cardinal Indus., Inc.*, 146 B.R. 720, 729 (Bankr. S.D. Ohio 1992); *see also In re Sun City Inv., Inc.*, 89 B.R. 245, 247 (Bankr. M.D. Fla. 1988) ("Although there is no precise definition of what contracts are executory, it generally includes contracts on which performance remains due to some extent on both sides."); *see also In re Metro Affiliates, Inc.*, Bankruptcy No. 02-42560 (PCB), Adversary No. 03-6364, 2008 WL 656788, at *6 (Bankr. S.D.N.Y. Mar. 6, 2008) ("[A]ny pre-petition agreement for a loan . . . that is unperformed on the petition date must per se be executory. Any other interpretation of Code § 365(c)(2) would be inconsistent with the purpose of this subsection that is to prevent lenders from being required to make involuntary post-petition loans.").

[74] 11 U.S.C. § 365(c)(2) (2008); *see also In re Wills Travel Serv., Inc.*, 72 B.R. 380, 382 (Bankr. M.D. Fla. 1987) ("A plain reading of this Section [362(c)(2)] indicates that executory contracts to make a loan or extend other debt financing or financial accommodations are not assumable."); H.R. Rep. No. 595, 95th Cong., 2d Sess. 348, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6304 (1978) (explaining that "[t]he purpose of [§ 365(c)(2)], at least in part, is to prevent the trustee from requiring new advances of money or other property. The Section permits the trustee to continue to use and pay for property already advanced, but is not designed to permit the trustee to demand new loans.").

Bankruptcy Code "provides explicitly that there is no way that a debtor can assume [a financing] agreement and thus compel its lender to continue to advance it funds during reorganization."[75]

The Lenders cannot be compelled to fund their Credit Agreement commitments for another, independent reason: both Section 365(e)(2)(B) and Credit Agreement Section 8 permit the Lenders to terminate the Credit Agreement upon Fontainebleau's bankruptcy filing.[76] Thus, there can be no obligation for the Lenders to fund under the Credit Agreement where Fontainebleau's bankruptcy estate cannot assume the agreement, cannot compel the Lenders to fund under the Bankruptcy Code, and Fontainebleau has defaulted under the Credit Agreement (and therefore excused any future performance by the Lenders) by becoming insolvent. Consequently, expediting Fontainebleau's partial summary judgment motion would not benefit the estate. The Court should therefore defer the motion's resolution until after the Lenders have had an adequate opportunity to take discovery and the motion can be taken up in the ordinary course.

CONCLUSION

Fontainebleau's request for expedited summary judgment should be denied because Fontainebleau's delay in moving this action forward to date demonstrates that there is no real urgency to their claims. Expedition is also unnecessary because this action was filed in the wrong forum. Based solely on alleged pre-petition contract breaches, the suit should have been filed in the District Court.

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[75] *In re Watts*, 876 F.2d 1090, 1095 (3d Cir. 1989) (internal quotation marks omitted) (bracketed language in original).

[76] *See In re Taylor*, 263 B.R. 139, 148 (N.D. Ala. 2001) (noting that "[c]ourts have held that § 365(e)(2)(B) allows for the termination of a contract to make a loan after the commencement of a bankruptcy case."); *see also In re Watts*, 876 F.2d at 1095-96 (holding that "commitments to plaintiffs are executory contracts to make a loan or extend other debt financing and thus are terminable by [defendant] under Section 365(e)(2)(B).") (internal quotation marks omitted).

Fontainebleau's application seeks to deprive the Lenders of an adequate opportunity to conduct the discovery that is clearly necessary to resolve Fontainebleau's motion. Moreover, this prejudice to the Lenders is not offset by any benefit to the estate; even if Fontainebleau somehow prevailed on its partial summary judgment motion, its victory could not increase the estate's value because its claim rests on a non-assumable agreement to loan money. Accordingly, Fontainebleau's request to expedite its partial summary judgment motion should be denied.

Dated: June 16, 2009
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