UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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

DECLARATION OF HENRY YU

I, Henry Yu, being duly sworn, hereby declare as follows:

1. I am a Senior Vice President at Bank of America. I am a member of the Special Assets Group that works out large, troubled, corporate debt. I started working at Bank of America in 1976 and joined the Special Assets Group in 1986. My business address is 2 Lois Lane, Lafayette, California 94549. I submit this declaration in Support of Defendants' Opposition to Fontainebleau's Motion for Partial Summary Judgment.

2. All of the facts in this declaration are known to me personally or from my review of relevant Bank of America business records. If called as a witness I could and would testify competently to all facts set forth herein.

3. This declaration sets forth facts regarding the June 6, 2007 Credit Agreement (the "Credit Agreement") among Fontainebleau, Bank of America, N.A. ("Bank of America") and the other defendants, Fontainebleau's March 2, 2009 borrowing request under the Credit Agreement, and information provided to Bank of America by Fontainebleau under that agreement. A Copy of the Credit Agreement and the attendant Disbursement Agreement, without Exhibits, are attached as Exhibits A and B, respectively, to the June 10, 2009 Freeman Affidavit.[1] True and correct copies of Exhibits A and C-1 to the Disbursement Agreement are attached hereto as composite Exhibit 1.

4. Bank of America has served as the Administrative Agent under the Credit Agreement and as the Disbursement Agent under the Disbursement Agreement throughout 2009. It resigned both roles on May 7, 2009. The references to Bank of America below describe actions taken in its role as Administrative Agent, unless otherwise specified.

5. The Credit Agreement provides 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"). Fontainebleau planned to use the Senior Credit Facility to finance, in part, the construction of a 63-story, 3,800-room luxury hotel and casino project—including 1,018 condominium units and 286,500 square feet of retail space—at the Las Vegas Strip's north end (the "Project"). In addition to the Senior Credit Facility, the Project's construction was expected to be financed with funds from the sale of condominium units, equity contributions by Fontainebleau and its affiliates, a $315 million Retail Credit Facility and the public sale of $675 million of 10.25% Second Mortgage Notes (the "Second Mortgage Notes").

[1] The Freeman Affidavit was submitted in support of Plaintiff's motion for partial summary judgment.

6. To obtain a loan under the Credit Agreement, Fontainebleau must submit a "Notice of Borrowing" to Bank of America specifying the amount and type of loan to be borrowed and the requested Borrowing Date. (Credit Agmt. § 2.4(a).) After receiving a Notice of Borrowing, Bank of America notifies each lender under the relevant credit facility, and each lender then transfers to Bank of America funds representing its *pro rata* share of the requested loans (based on the lender's total commitment under the relevant credit facility). (*Id.* § 2.4(b).) Then, upon satisfaction or waiver of the Credit Agreement's conditions, Bank of America transfers the funds to the Bank Proceeds Account. (*See id.* § 2.1(c), 2.4(c).) Under the Disbursement Agreement, Fontainebleau cannot directly access funds in the Bank Proceeds Account. (Disbursement Agmt. § 2.2.2.)

7. To access funds in the Bank Proceeds Account, Fontainebleau must submit an Advance Request to cover Project Expenses. (*Id.* §§ 2; 3.3.4.) Each Advance Request must, among other things, state the amount of funds Fontainebleau is requesting, make certain contractually required certifications and representations, and enclose exhibits providing supporting information regarding the request, the status of the project, and the remaining costs and available funds to complete the project. (*Id.* §§ 3.3, Ex. C-1.)

8. As part of each Advance Request, Fontainebleau is required to submit an "In Balance Report" demonstrating that the "In Balance Test" is satisfied. (*Id.* § 3.3.8.) 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—*i.e.*, that "Available Funds" equal or exceed the "Remaining Costs." (*Id.* Ex. A at 15.) Fontainebleau also must submit a "Remaining Costs Report" providing the amount of "remaining anticipated Project Costs through the Final Completion Date," a breakdown of those remaining costs, a true and

accurate listing of Project Costs previously incurred, and any modifications to the Project budgets. (*Id.* § 4.17.2, Ex. C-1, Appendix VIII.)

9. In May 2007, the lenders retained Inspection & Valuation International, Inc. ("IVI") as a construction consultant to oversee the Fontainebleau project. IVI has prepared periodic reports with updates regarding, among other things, Fontainebleau's progress in building the project and actual and anticipated future costs. IVI's reports are prepared on the basis of financial information provided by Fontainebleau. IVI also reviews Fontainebleau's Advance Requests. (*See* Disbursement Agmt. § 2.4.4(b).)

10. On January 30, 2009, IVI issued Project Status Report No. 21 ("Report No. 21"). (Declaration of Robert Barone, Ex. 1 (hereinafter, "Barone Ex. 1").) Report No. 21 raised questions regarding the Project's costs, including that "[w]hile the Anticipated Cost Report indicates the Project is expected to stay within budget, IVI is concerned that all the subcontractor claims have not been fully incorporated into the report and potential acceleration impact to meet the schedule has not been included." (Barone Ex. 1 at 7.) IVI also observed that "it appears that the anticipated LEED credits are tracking behind projections, possibly in excess of $15,000,000." (*Id.* at 22.) LEED credits are Nevada state sales tax credits for the purchase of building materials for new construction that satisfy the LEED ("Leadership in Energy and Environmental Design") standards for sustainable construction. Fontainebleau can recover a percentage of its Nevada state sales tax through this program. LEED credit savings were anticipated to decrease Project costs by $50 million. (*See* Disbursement Agmt., Ex. C-1, Appendix VII.) Any LEED credit shortfall would therefore increase the Project's cost.

11. On February 13, 2009, Fontainebleau submitted its February Advance Request. A true and correct copy of the February Advance Request is attached hereto as Exhibit 2. The

February Advance Request's "In Balance Report" represented that Available Funds exceeded Remaining Costs by $115,984,214. (Ex. 2, Appendix X.)

12. Beginning in February 2009, Bank of America became increasingly concerned about the Project's financial condition and projected costs. On February 20, 2009, Bank of America requested additional information from Fontainebleau regarding the Project's costs. Bank of America sought this information because of issues raised by the IVI report and worsening macroeconomic conditions in the country generally, and the Las Vegas market in particular. Bank of America asked Fontainebleau about "whether any additional costs exist that are not included in the budget and the Remaining Cost Report . . . . [and] the impact of any additional costs upon the ability to satisfy the In-Balance Test." It also requested "updated projections reflecting currently anticipated project and interest costs, and updated expectations as to anticipated condominium sales and operating results." A true and correct copy of the February 20, 2009 letter from Maurice Washington to Jim Freeman is attached hereto as Exhibit 3.

13. On February 23, 2009, Fontainebleau responded to Bank of America's letter and represented that "[i]f all of these anticipated costs materialized and there were no offsetting cost savings, the In Balance test would continue to be satisfied." A true and correct copy of the February 23, 2009 letter from Jim Freeman to Maurice Washington is attached hereto as Exhibit 4.

14. That same day, Bank of America sent Fontainebleau a letter requesting a conference call among Fontainebleau and the lenders because the lenders had "questions about the Project." A true and correct copy of the February 23, 2009 letter from Brian Corum to Jim Freeman is attached hereto as Exhibit 5.

15. Fontainebleau responded the next day, refusing to participate "in an open-forum call with lenders . . . where we do not have an opportunity to review questions." A true and correct copy of the February 24, 2009 letter from Jim Freeman to Brian Corum is attached hereto as Exhibit 6. Fontainebleau asserted that the lenders' "proposed call is not required as a condition to the requested Advances and has not been part of the procedure we have followed over the past 20 or so months since our financing closed." (Ex. 6 at 1.)

16. On February 24, 2009, Fontainebleau sent Bank of America a Notice of Borrowing under Credit Agreement Section 2.4, requesting a $68 million Revolver Loan. A true and correct copy of the February 24, 2009 Notice of Borrowing is attached hereto as Exhibit 7.

17. On March 2, 2009, Fontainebleau sent Bank of America a Notice of Borrowing, under Credit Agreement Section 2.4, requesting a $350 million Delay Draw Loan and a $670 million Revolver Loan. A true and correct copy of the March 2, 2009 Notice of Borrowing is attached hereto as Exhibit 8. On March 3, 2009, Fontainebleau sent Bank of America a Notice of Borrowing correcting a scrivener's error in the March Notice and reducing its Revolving Loan request to $656,522,698. A true and correct copy of the March 3, 2009 Notice of Borrowing is attached hereto as Exhibit 9. Prior to submitting this billion-dollar request, Fontainebleau had borrowed only $68 million under the Revolver (all of it in February 2009) and had not borrowed any Delay Draw Loan funds.[2]

18. On March 3, 2009, IVI issued Project Status Report No. 22 ("Report No. 22"). (*See* Declaration of Robert Barone, Ex. 2 (hereinafter, "Barone Ex. 2").) Report No. 22 states that "[t]he Anticipated [Contingency] Summary anticipates a balance contingency of $15,545,478; however, IVI is concerned that the anticipated balance may drop substantially in

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[2] Fontainebleau had also requested and received "letters of credit in the aggregate face amount of approximately $13 million" under the Revolver. Under Credit Agreement Section 2.1(c)(1), the outstanding letter of credit obligations reduced the available Revolver funds dollar for dollar. (Credit Agmt. § 2.1.)

order to meet the aggressive schedule. The concern specifically, is that all of the subcontractors have not fully disclosed the potential costs to meet the schedule." (Barone Ex. 2 at 23.) The contingency is unallocated funds included in the budget—initially $111,039,860 and then reduced as the Project is completed—to cover Project changes and cost increases without increasing the overall Project cost or budget. The balance contingency reflects the amount of funds remaining in the contingency after all anticipated Fontainebleau change orders are funded. Decreases in the balance contingency may be caused by increases in Project costs and reflect an increased likelihood that the Project will exceed its budget. IVI also expressed concern that (i) "[w]hile the Anticipated Cost Report indicates the Project is expected to stay within budget, IVI is concerned that all the subcontractor claims have not been fully incorporated into the report and potential acceleration impact to meet the schedule has not been included;" (ii) "the LEED credits are tracking behind projections and the Developer has begun a detailed audit" whose "findings will be presented at the April 2009 quarterly meeting;" and (iii) "it appears that the work in the podium may need to be accelerated to meet the aggressive target for that part of the Project." (*Id.* at 7.) Along with the tower and garage, the podium is one of the Project's three main sections.

19. On March 3, 2009, Bank of America declined to process Fontainebleau's March 2 Notice of Borrowing because it "d[id] not comply with the provisions of Section 2.1(c) of the Credit Agreement which states that: '(iii) unless the Total Delay Draw Commitments have been fully drawn, the aggregate outstanding principal amount of all Revolving Loans . . . shall not exceed $150,000,000.'" A true and correct copy of the March 3, 2009 letter from Ronaldo Naval to Jim Freeman is attached hereto as Exhibit 10. Mr. Freeman's reply to Ronaldo Naval is attached hereto as Exhibit 11.

20. On March 4, 2009, IVI supplemented Report No. 22 by providing Bank of America with information from IVI's March 1 and 2, 2009 Project site visit. A true and correct copy of the March 4, 2009 letter from Paul Bonvicino to Brandon Bolio is attached hereto as Exhibit 12. IVI reported that Fontainebleau had "acknowledged . . . a [LEED credit] short-fall of $3,000,000 to $5,000,000[,] . . . . [but] IVI still believes that the credits are tracking behind projections in excess of $15,000,000." (Ex. 12 at 2.)

21. On March 4, 2009, Bank of America sent Fontainebleau a letter requesting that "members of the Fontainebleau senior management team" meet with it and the lenders who were members of a newly-formed ad hoc steering committee on March 9 or 10, 2009, to discuss the Project's status and Fontainebleau's financial condition.[3] A true and correct copy of the March 4, 2009 letter from Henry Yu to Jim Freeman is attached hereto as Exhibit 13.

22. On March 5, 2009, IVI wrote to Fontainebleau requesting (i) "to see the finalized schedule" for opening the podium portion of the Project, (ii) information regarding change orders and anticipated cost reports, and (iii) expedition of Fontainebleau's LEED Credit audit. (*See* Declaration of Robert Barone, Ex. 3.). IVI also noted that "[b]ased upon [its] review of the Turnberry West Construction Requisition for the month of February 2009 (received last week) and the Anticipated Costs for Fontainebleau dated January 2009 . . . there appears to be a delay in the execution of Owner Change Orders, which seems to have gotten larger recently," and asked Fontainebleau to "update the [Anticipated Cost Report] to show the potential exposures to [Fontainebleau] and a better indication of the current contingency." (Barone Ex. 3 at 2.)

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[3] The ad hoc steering committee was comprised of Bank of America, JPMorgan Chase Bank, Barclays Capital, Deutsche Bank, The Royal Bank of Scotland, Sumitomo Mitsui Banking Corporation, Bank of Scotland, and Highland Capital. These lenders represent over half the Credit Agreement lenders by commitment size. (*See* Ex. 13.)

23. On March 6, 2009, I emailed Fontainebleau CFO Jim Freeman asking to meet with him and to take a tour of the Project site. I also called and, not reaching him, left a voicemail restating that request.

24. Fontainebleau never responded to my request. Instead Jim Freeman sent me a letter on March 6 saying that "[w]e are deeply troubled by your letter of March 4, 2009, which purports to be in response to ours of March 3 . . . Again, when funding is provided consistent with your obligations pursuant to Section 2.1 of the Credit Agreement, the Company will be happy to meet with representatives of all constituents of the Senior Lenders ... " A true and correct copy of the letter is attached hereto as Exhibit 14.

25. On March 9, 2009, Fontainebleau submitted a revised Notice of Borrowing requesting only a $350,000,000 Delay Draw Loan. A true and correct copy of the March 9, 2009 Notice of Borrowing and its cover letter are attached hereto as Exhibit 15. Bank of America processed, and the Delay Draw Lenders funded, this Notice of Borrowing.

26. On March 10, 2009, Bank of America requested that under Section 9.2.1 of the Disbursement Agreement and Section 6.6 of the Credit Agreement, Fontainebleau "attend a bank meeting in Las Vegas on Tuesday, March 17." A true and correct copy of the March 10, 2009 letter from Henry Yu to Jim Freeman is attached hereto as Exhibit 16. Bank of America's letter also pointed out that Fontainebleau had failed to return Bank of America's telephone calls and had "refused to conduct a meeting or conference call with Bank of America or the other Lenders . . . in spite of [Bank of America's] continued requests." (Ex. 16 at 2.)

27. On March 11, 2009, Fontainebleau submitted its March Advance Request. A true and correct copy of the March Advance Request is attached hereto as Exhibit 17. The March

Advance Request's "In Balance" Report represented that Available Funds exceeded Remaining Costs by $42,005,669. (Ex. 17, Appendix X.)

28. On March 11, 2009, Fontainebleau sent Bank of America a proposed "pre-negotiation agreement." A true and correct copy of the March 11, 2009 e-mail from Whitney Thier to Henry Yu with the annexed pre-negotiation agreement is attached hereto as Exhibit 18. Fontainebleau indicated that only parties executing this agreement would be invited to the meeting. The proposed agreement provided for a "Standstill Period" during which Bank of America and the lenders would "temporarily forbear [sic] from exercising [their] default-related rights and remedies" under the Credit Agreement and Fontainebleau would "temporarily forbear [sic] from initiating any formal legal proceeding in respect of any claims, actions, causes of action and suits against any [lender] arising out of or in connection with the Loan Documents." (Ex. 18, proposed Pre-Negotiation Agreement § 1.)

29. Bank of America reviewed the Pre-negotiation Agreement with the steering committee. The committee agreed that lenders should not have to sign any such agreement to meet with Fontainebleau. I informed Fontainebleau of that decision.

30. On March 16, 2009, Fontainebleau wrote to the lenders, proposing that a meeting be held on March 20, 2009. Fontainebleau also stated that it "disagree[s] with any contention that the requested meeting is a pre-condition to the funding demanded by our Notices of Borrowing or our right to draw upon such funds." The letter did not mention the Pre-negotiation Agreement. A true and correct copy of the March 16, 2009 letter from Jim Freeman to Henry Yu is attached hereto as Exhibit 19.

31. On March 16, 2009, Bank of America accepted Fontainebleau's proposed meeting date and stated that its "position is that a meeting between the Lenders and the Company is both

required by the terms of the Credit Agreement and the other Loan Documents, and desirable." A true and correct copy of the March 16, 2009 letter from Henry Yu to Jim Freeman is attached hereto as Exhibit 20.

32. On March 20, 2009, Fontainebleau met with the lenders in Las Vegas and presented an update on the Project's status. A true and correct copy of the Fontainebleau Lender Update, as of March 20, 2009, is attached hereto as Exhibit 21. Fontainebleau's Update represented that with construction 75.6% completed, the Project had $1,011,749,043 in remaining costs and that Available Funds exceeded those costs by $42,005,669. (*See* Ex. 21 at 25-26.) During the meeting Fontainebleau refused to answer questions about the future operating prospects of the project on the grounds that the Pre-negotiation Agreement was not executed.

33. On March 24, 2009, Fontainebleau revised its Advance Request and supporting documentation. A true and correct copy of the revised March Advance Request is attached hereto as Exhibit 22. The revisions projected additional costs associated with Fontainebleau's decision to delay the Project's Scheduled Opening Date from October 1, 2009 to November 1, 2009, including: (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. (Ex. 22, Budget/Schedule Amendment Certificate at 1, Appendices I & II to Budget/Schedule Amendment.) In addition, the revised "In Balance" Report now represented that Available Funds exceeded Remaining Costs by only $13,785,184. (*Id.*, Appendix X.)

34. On March 25, 2009, Fontainebleau submitted a second revision to the supporting documentation for its March 2009 Advance Request. A true and correct copy of these revisions to the March 2009 Advance Request is attached hereto as Exhibit 23. The revised Advance

Request's "In Balance" Report represented that Available Funds exceeded Remaining Costs by $14,084,701. (Ex. 23, Appendix X.) Included in Available Funds was Z Capital Finance LLC's commitment of $11,666,667. To this day Z Capital has not funded this amount. If this amount is excluded from the calculation, Available Funds exceeded Remaining Costs by only $2,418,034.

35. Despite having requested (and been refused) a $656 million Revolver loan in early March, Fontainebleau did not submit a monthly Notice of Borrowing for a Revolver loan on April 1, its next opportunity to do so. In fact, Fontainebleau did not submit another Notice of Borrowing until after the Revolver was terminated. In addition, Fontainebleau did not submit an April Advance Request.

36. On April 13, 2009, Fontainebleau notified Bank of America that it did not expect to be able to satisfy the "In Balance" test. A true and correct copy of the April 13, 2009 notice is attached hereto as Exhibit 24. Fontainebleau stated that it had "learned that (i) the April Advance request under the Retail Loan may not be fully funded, and (ii) the Remaining Costs may exceed the Available Funds." (Ex. 24 at 2.)

37. On April 14, 2009, Fontainebleau provided IVI with a worksheet containing a "Preliminary Analysis" of "Anticipated Costs as of April 14, 2009." A true and correct copy of the April 14, 2009 e-mail from Robert Barone to Brandon Bolio attaching the worksheet is attached hereto as Exhibit 25. This worksheet reflected $186,932,975 in additional costs that were not included in the March 2009 Advance Request. IVI requested Fontainebleau provide this information after receiving Fontainebleau's April 13, 2009 notice (*see* Ex. 24) reflecting "significant extra construction costs . . . which were not disclosed previously to [IVI]." (*See* Ex. 25, April 14, 2009 e-mail from Robert Barone to Deven Kumar.)

38. On April 17, 2009, Fontainebleau and the Lenders met to discuss the Project. At this meeting, Fontainebleau revealed the existence of a "Base Plan" and an "Enhanced Plan." The "Enhanced Plan" included restaurants, retail, nightclubs, and pool deck gaming and bar area, not included in the "Base Plan." Fontainebleau revealed that the "Base Plan" had a $180 million construction deficit—*i.e.*, the Project was "Out of Balance" by $180 million. Fontainebleau also estimated that to complete the "Enhanced Plan" would require an additional $203 million over the cost of completing the Base Plan—a total shortfall of $383 million. Fontainebleau also proposed further delaying the Project's opening from November 2009 until February 2010. During this meeting, Fontainebleau also disclosed that it faced a risk of insolvency. It made a proposal to restructure its finances—a plan that included extinguishing the Second Mortgage Notes and converting a substantial portion of the senior secured credit facilities to equity.

39. Fontainebleau's statement that the project could not be finished without eliminating the $675 million Second Mortgage Notes and converting a substantial portion of the senior credit facilities into equity suggested that Fontainebleau was already insolvent insofar as the Project's liabilities exceeded its assets and Fontainebleau could not satisfy its debt obligations when they became due. This also suggested that a Material Adverse Effect had occurred.

40. During the April 17, 2009 meeting, one of the lenders asked Mr. Freeman why Fontainebleau had not made an April Advance Request. He responded that Fontainebleau could not make the contractually required representations consistent with the terms and provisions of the Credit Agreement and Distribution Agreement. Under the Distribution Agreement, Fontainebleau is required to make representations concerning its financial conditions as of the time it submits Advance Requests, including that: the "In Balance Test" is satisfied; no Material

Adverse Effect[4] has occurred since the Closing Date; there has been no Event of Default under either the Disbursement Agreement or any other financing agreement; and that Fontainebleau and its respective subsidiaries are solvent. (*See* Disbursement Agmt., Art. 4.) During this meeting, when asked exactly when Fontainebleau had retained Kasowitz, Benson, Torres & Friedman LLP as counsel, Marc Kasowitz of the law firm responded that his firm was retained in February.

41. On April 20, 2009, a majority of the Revolver Lenders instructed Bank of America to notify Fontainebleau that the Revolving Lenders "have determined that one or more Events of Default have occurred and are continuing and that they have requested that the Administrative Agent notify you that the Total Revolving Commitments have been terminated." A true and correct copy of the April 20, 2009 letter from Ronaldo Naval to Jim Freeman is attached hereto as Exhibit 26.

42. On April 23, 2009, based upon the new information received from Fontainebleau, IVI issued Project Status Report No. 23 ("Report No. 23"), reporting significant cost increases for the Project. A true and correct copy of Report No. 23 is attached hereto as Exhibit 27. Report No. 23 states that (i) "the Developer increased the direct cost budget by $50,000,000 to account for additional construction costs;" (ii) "the Prime Contract Control Budget was increased

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[4] 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.

Disbursement Agmt., Ex. A at 18.

$64,854,542 from $1,986,150,792 to $2,051,005,334;" and (iii) "the Contingency was reduced by $38,854,000, resulting in a current direct cost contingency of $37,994,445." (Ex. 27 at 7.) IVI also stated that it "believes the current contingency budget will be depleted." (*Id.* at 23.) IVI also requested that "[w]hile the [Anticipated Cost Report] has been submitted by the Developer as a true representation of known costs, IVI is still concerned that all the subcontractor claims have not been fully incorporated into the report." (*Id.* at 7.) In addition, Report No. 23 also stated that "the anticipated LEED credits are tracking behind projections" and that "the Developer has acknowledged a +/- $6,000,000 lower target; however, IVI is still concerned it may be more." (*Id.* at 22.)

43. On April 28, 2009, Fontainebleau held a meeting with several lenders in New York. Fontainebleau further discussed a plan to restructure the Project's finances. During that meeting, Fontainebleau revealed that it would cost $1.504 billion to complete and open the Project. This amount far exceeded the amount that the Lenders would have had on deposit in the Bank Proceeds Account as of April 20, 2009, even if the Revolver Lenders had ignored Section 2.1(c)(iii) of the Credit Agreement and funded the March 3, 2009 Notice of Borrowing. Under Section 2.1(b)(iii) of the Credit Agreement, which states " the proceeds of each Delayed Draw Term Loan will be applied <u>first</u> to repay in full any then outstanding Revolving Loans and Swing Line Loans (but without reducing the Total Revolving Commitments), and <u>second</u>, to the extent of any excess, be credited to the Bank Proceeds Account …," all of the funds from the Delay Draw Term Loan would have gone towards paying down the Revolver indebtedness first. In addition, Fontainebleau and its advisors asserted that the maximum amount of debt that can be serviced by the project is $1.4 billion. Therefore, consistent with the presentation on April 17, 2009, the company insisted that the $675 million of Second Mortgage Notes had to be

extinguished and a substantial portion of the senior secured credit facilities had to be converted to equity. This again confirms that the Project had been insolvent well before Fontainebleau filed for bankruptcy protection on June 9, 2009.

44. On or about May 12, 2009, I learned that Fontainebleau had been sued by CCCS International, one of Fontainebleau's consultants for the Project. A true and correct copy of CCCS' complaint is attached hereto as Exhibit 28. CCCS alleges that it had been hired by Fontainebleau during the summer of 2008 because "[a]ccording to Fontainebleau, the Project was severely over budget and Fontainebleau was in need of a contraction manager able to provide cost management and auditing services to recover prior unnecessary overpayments" to contractors and suppliers. (Ex. 28 at ¶ 9.) CCCS also claimed that at the time of its termination, it had already "discovered over $40 million in prior overpayments, and was well on its way to uncovering upwards of $130 million" in overpayments. (*Id.* at ¶ 27.) CCCS further alleged that "Fontainebleau failed to adequately design, supervise, coordinate, plan and schedule all the work performed at the Project, which resulted in significant delays, disruptions, alterations and hardship on many of the subcontractors, consultants and employees who worked on the Project, including CCCS." (*Id.* at ¶ 18.) CCCS' allegations suggested to me that the Project was over budget for more than one year, thereby casting doubt on the accuracy of Fontainebleau's prior cost disclosures and financial forecasts under the Credit and Disbursement Agreements.

45. On May 15 2009, IVI issued a Cost-to-Complete Review (the "CTC Review") analyzing the costs of completing the Project. (*See* Declaration of Robert Barone, Ex. 6 (hereinafter "Barone Ex. 6").) The CTC Review states that "[d]uring March 2009, the Developer increased the direct cost budget by $50,000,000," and that "[w]hile the information submitted by the Developer at that time was accepted as a true representation of known costs, IVI was still

concerned that all the subcontractor claims have not been fully incorporated into the disclosed costs." (Barone Ex. 6 at 6.) IVI reports that Fontainebleau's anticipated cost report "includes $298,053,918 in Pending Owner Changes," and that "[i]t is clear from the number and scope of pending items, the claims were made by the subcontractors some time ago, possibly as far back as a year, and were never included on prior [anticipated cost reports] submitted to IVI." (*Id.* at 20.) In addition, the CTC Review also stated that "the anticipated LEED credits are tracking behind projections and we believe that there will be a shortfall of ±$10,000,000." (*Id.* at 22.) IVI also reported that certain shortfalls in the Project budget "are expected to erode the Developer's Unallocated Contingency budget to insufficient levels." (*Id.*)

46. Bank of America retained Cushman & Wakefield to conduct an appraisal of the Fontainebleau Project. On May 21, 2009, Cushman & Wakefield issued an appraisal report. A true and correct copy of the appraisal report is attached hereto as Exhibit 29. Cushman & Wakefield concluded that the Project's market value upon completion in May 1, 2010 would be $1,764,000,000. (Ex. 29 at 200.) Given that Fontainebleau asserts that $1.5 billion is needed from this point forward to complete and open the project, and that most of that amount has to be debt on top of the existing $1 billion of outstanding term loans and $675 million of Second Mortgage Notes, it is clear that the project at completion will have liabilities far exceeding its assets unless the existing debt is compromised.

47. Based upon the foregoing, it is my belief, although it was not my belief at the time, that as of March 2, 2009, Fontainebleau was in default under the Credit and Disbursement Agreements because, among other things, Fontainebleau was insolvent, and the Project had suffered a Material Adverse Effect. I also believe that Fontainebleau's financial disclosures before and as of that date were materially inaccurate because they failed to accurately present Fontainebleau's financial condition, including the fact that remaining construction costs exceeded available funds. In addition, Fontainebleau failed to provide prompt notice of the occurrence of events of default, as required by the Credit Agreement and Distribution Agreement. I believe that these facts will be substantiated by discovery of Fontainebleau, its affiliates and certain third parties such as its accountants, financial advisors and contractors.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

EXECUTED, this 1st day of July, 2009 at Lafayette, California.

Henry Yu