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FONTAINEBLEAU LAS VEGAS LLC

13
14 DISTRICT COURT

15 CLARK COUNTY, NEVADA

16 FONTAINEBLEAU LAS VEGAS LLC,)
individually and as successor by)
17 merger to FONTAINEBLEAU LAS)
VEGAS II, LLC,)

18 Plaintiff,

19 v.

20 BANK OF AMERICA, N.A.; MERRILL)
LYNCH CAPITAL CORPORATION;)
21 JPMORGAN CHASE BANK, N.A.;)
22 BARCLAYS BANK PLC; DEUTSCHE)
BANK TRUST COMPANY)
23 AMERICAS; THE ROYAL BANK OF)
SCOTLAND PLC; SUMITOMO)
24 MITSUI BANKING CORPORATION)
NEW YORK; BANK OF SCOTLAND;)
25 HSH NORDBANK AG, NEW YORK)
BRANCH; MB FINANÇIAL BANK,)
N.A.,)

26
27 Defendants.

Case No: A588636
Dept. No: XIII

BUSINESS COURT REQUESTED

AMENDED COMPLAINT

**EXEMPT FROM ARBITRATION:
AMOUNT IN CONTROVERSY
IN EXCESS OF \$40,000;
DECLARATORY JUDGMENT
RELIEF REQUESTED**

28 Plaintiff Fontainebleau Las Vegas, LLC ("Plaintiff" or "Fontainebleau"), as
and for its complaint against defendants Bank of America N.A., Merrill Lynch

1 Capital Corporation, JPMorgan Chase Bank, N.A., Barclays Bank PLC, Deutsche
2 Bank Trust Company Americas, The Royal Bank of Scotland PLC, Sumitomo
3 Mitsui Banking Corporation New York, Bank of Scotland, HSH Nordbank AG,
4 New York Branch, and MB Financial Bank, N.A. (collectively the "Banks" or the
5 "Revolver Banks"), alleges, upon knowledge as to itself and otherwise upon
6 information and belief, as follows:

7 Preliminary Statement

8 1. This case arises from the breach by a group of unscrupulous banks of
9 their clear and unequivocal written promise to Fontainebleau to finance the
10 construction of its multi-billion-dollar casino-resort development project in Las
11 Vegas (the "Project") -- a promise in exchange for which the Banks have already
12 secured for themselves tens of millions of dollars in fees. As a result of that breach
13 -- and absent an order of specific performance by this Court of the Banks'
14 obligations -- the Project, which was nearing completion, is doomed to failure, and
15 thousands of Las Vegas residents will lose their jobs.

16 2. The governing loan agreements provide for \$1.85 billion of bank
17 financing for the Project under two term loan facilities and a revolving loan
18 facility. The banks obligated to provide the term loan financing have substantially
19 complied with their obligations to date, by providing over \$1,000,000,000 in
20 funding. However, the Revolver Banks, which are obligated to provide
21 \$770,000,000 in revolver financing (the "Revolving Loan") have unjustifiably failed
22 and refused to do so.

23 3. On April 20, 2009, the Revolver Banks notified Fontainebleau by letter
24 that they would not honor their commitments under the loan agreement. Instead,
25 they purported to "terminate[]" those commitments, ostensibly based on "one or
26 more" unspecified "Events of Default."

27 4. In fact, there has been no Event of Default, and there is no contractual
28 basis whatsoever for the Revolver Banks' breach of their clear and unambiguous

1 obligations. The purported termination is nothing more than the Banks' baseless
2 attempt to walk away from the Project and abandon their obligations.

3 5. The Banks' brazen breach of contract threatens to cause imminent and
4 irreparable harm to Fontainebleau, including forcing Fontainebleau to stop
5 construction of the Project, which will disrupt Fontainebleau's existing business
6 and contractual relationships and damage the Fontainebleau brand.

7 6. The Banks' breach will also cause enormous harm to the public
8 interest. In addition to the approximately 3,300 construction workers on-site daily
9 (plus the additional 1,700 workers who would be needed to work on the final
10 stages of the Project) and hundreds of others presently employed by the Project,
11 the opening of the Fontainebleau Las Vegas is expected to result in over 6,000 full-
12 time jobs at the facility, and approximately 2,000 additional jobs elsewhere in Las
13 Vegas. All of these sources of employment will vanish as a result of the Banks'
14 breach -- a further blow to a local economy that, in the words of the Las Vegas
15 Sun, is in "freefall" and may be in for its "longest recession since the Great
16 Depression."

17 7. The Revolver Banks' wrongful breach of their obligation to loan
18 Fontainebleau \$770 million is all the more egregious in light of the tens of *billions*
19 of dollars that certain of the Revolver Banks have received from the federal
20 government's Troubled Asset Repurchase Program ("TARP"). Defendant Bank of
21 America, N.A., has to date received a total of \$52.5 billion dollars in federal
22 assistance (including funds received in connection with its acquisition of Merrill
23 Lynch & Co., Inc., the corporate parent of defendant Merrill Lynch Capital
24 Corporation) and JPMorgan Chase has received \$25 billion dollars in federal
25 assistance. These TARP and other funds were provided to the Banks with one
26 purpose: to ensure that these Banks would begin lending again, and would
27 continue to lend, rather than further constricting the flow of credit that is
28 absolutely critical for any economic recovery. But instead of lending -- instead of

1 standing by the contractual commitments to which they already agreed and are
2 legally bound -- the defendant Banks have seized upon a false pretext -- a
3 nonexistent unspecified "Event of Default" -- in a vain attempt to escape their
4 obligations.

5 8. The Revolver Banks' misconduct here was calculated, intentional and
6 malicious. Defendants abandoned their lending commitments solely to try to
7 extricate themselves from a loan they no longer wish to make, notwithstanding
8 that those commitments are clear, unequivocal, and binding, and that Plaintiff and
9 thousands of employees and their families are relying on those commitments to be
10 performed.

11 9. Accordingly, Fontainebleau by this action seeks specific performance
12 of the Revolver Banks' obligations, as well as declaratory relief establishing that
13 the April 20 purported termination of their commitments was improper and that
14 the Revolver Banks are obligated to meet their funding commitments. In addition,
15 although damages alone cannot compensate for the loss of irreplaceable financing
16 for its unique resort, Fontainebleau seeks recovery from the Revolver Banks of all
17 damages resulting from the Banks' bad faith breach of their obligations, including
18 consequential damages arising from the Revolver Banks' bad faith and wrongful
19 conduct, totaling in the billions of dollars.

20 10. Fontainebleau also asserts two additional claims against defendant
21 Deutsche Bank Trust Company Americas ("Deutsche Bank"). Deutsche Bank is a
22 subsidiary of Deutsche Bank, A.G., which shortly over one year ago became the
23 owner and developer, through an affiliate, of another resort-casino under
24 development on the Las Vegas Strip -- the Cosmopolitan Resort and Casino (the
25 "Cosmopolitan") -- that will face stiff competition from the Fontainebleau Las
26 Vegas once it commences operations.

27 11. Deutsche Bank was originally the Cosmpolitan's lender, and acquired
28 the project in mid-2008 in a foreclosure, following the borrower's default, for

1 approximately one billion dollars. To further its own interests as the
2 Cosmopolitan's owner and developer, Deutsche Bank is now seeking to destroy
3 the Fontainebleau in order to minimize competition with the Cosmopolitan
4 project. To that end, Deutsche Bank has sought to persuade other Revolver Banks
5 to breach their commitments and has worked aggressively to discourage other
6 Revolver Banks from working out their differences with Fontainebleau. In so
7 doing, Deutsche Bank has breached the covenant of good faith and fair dealing
8 that is implied by law in every contract that, like the loan agreement here, is
9 governed by New York law.

10 12. Deutsche Bank's misconduct is more than just a breach of its
11 contractual obligations. To serve its own conflicting interest in ensuring the
12 success of Cosmopolitan, Deutsche Bank has induced other Revolver Banks to
13 breach their own commitments -- which, under the loan agreement, are separate
14 and independent obligations. Accordingly, Deutsche Bank is liable for tortious
15 interference with the other Revolver Banks' contractual obligations.

16 PARTIES

17 13. Fontainebleau is a Nevada limited liability company, with its
18 principal place of business at 2827 Paradise Road, Las Vegas, Nevada 89109.
19 Plaintiff is also the successor by merger to Fontainebleau Las Vegas II, LLC, a
20 Florida limited liability company. This action is not removable because there is no
21 complete diversity of citizenship between Fontainebleau and the Defendants. For
22 diversity purposes, Fontainebleau is a citizen of New York, Delaware, North
23 Carolina, Illinois, and numerous other jurisdictions.

24 14. Defendant Bank of America, N.A. ("Bank of America"), is a nationally
25 chartered bank with its main office in Charlotte, North Carolina. Bank of America
26 is committed to fund \$100 million under the Revolving Loan.

27 15. Defendant Merrill Lynch Capital Corporation is a Delaware
28 corporation with a principal place of business in New York. Merrill Lynch Capital

1 Corporation, which is now indirectly owned by Bank of America, is committed to
2 fund \$100 million under the Revolving Loan.

3 16. Defendant JPMorgan Chase Bank, N.A. is a nationally chartered bank
4 with its headquarters in New York, New York. JPMorgan Chase Bank, N.A is
5 committed to fund \$90 million under the Revolving Loan.

6 17. Defendant Barclays Bank PLC is a public limited company in the
7 United Kingdom with its principal place of business in London, England.
8 Barclays Bank PLC is committed to fund \$100 million under the Revolving Loan.

9 18. Defendant Deutsche Bank is a New York State-chartered bank with its
10 principal office in New York, New York. Deutsche Bank is committed to fund \$80
11 million under the Revolving Loan.

12 19. Defendant The Royal Bank of Scotland PLC is a banking association
13 organized under the laws of the United Kingdom with a branch in New York,
14 New York. The Royal Bank of Scotland PLC is committed to fund \$90 million
15 under the Revolving Loan.

16 20. Defendant Sumitomo Mitsui Banking Corporation New York is a
17 Japanese corporation with offices in New York, New York. Sumitomo Mitsui
18 Banking Corporation New York is committed to fund \$90 million under the
19 Revolving Loan.

20 21. Defendant Bank of Scotland is chartered under the laws of Scotland,
21 with its principal place of business in Edinburgh, Scotland. Bank of Scotland is
22 committed to fund \$72.5 million under the Revolving Loan.

23 22. Defendant HSH Nordbank AG, New York Branch is a German
24 banking corporation with a branch in New York, New York. HSH Nordbank AG,
25 New York Branch is committed to fund \$40 million under the Revolving Loan.

26 23. Defendant MB Financial Bank, N.A. is a nationally chartered bank
27 with its main office in Chicago, Illinois. MB Financial Bank, N.A. is committed to
28 fund \$7.5 million under the Revolving Loan.

THE FACTS

A. The Fontainebleau Las Vegas Project

24. The "Fontainebleau" brand is one of the most high-profile names in the lodging industry today, known for combining striking design, contemporary art, music, fashion and technology into a vibrant and unique guest experience. The Project seeks to leverage the name recognition and brand value associated with the Fontainebleau Miami Beach hotel, an iconic property that recently reopened, after a one billion dollar investment, to enormous publicity, rave reviews and receipt of the 2008 Americas Lodging Investment Summit (ALIS) award for Development of the Year. Even under the present economic environment, Fontainebleau Miami Beach is performing at the top of its competitive set.

25. 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 housing casino/gaming areas, restaurants and bars, a spa and salon, a live entertainment theater and a rooftop pool; and a 353,000 square-foot convention center.

26. The Project will also feature high-end 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 Fontainebleau's parent company ("Fontainebleau Retail"), funded by separate loans (the "Retail Financing").

27. Plaintiff broke ground on the Project in January 2007, and today the Project is approximately 70% complete.

B. The Lenders And The Loan Agreements

28. On June 6, 2007, Plaintiff entered into a credit agreement (the "Credit Agreement") with a syndicate of lenders, including Bank of America as

1 administrative agent (the "Administrative Agent") and disbursement agent (the
2 "Disbursement Agent"), whereby the Banks and other lenders agreed to loan \$1.85
3 billion under three senior secured credit facilities (collectively, the "Credit
4 Facilities"). The first was a \$700 million dollar term loan facility with a seven-year
5 maturity (the "Initial Term Loan"). The second was a \$350 million dollar delay
6 draw term loan facility with a seven-year maturity (the "Delay Draw Term Loan").
7 The third, intended to enable Plaintiff to complete construction and open the
8 Project, was the \$800 million Revolving Loan with a six-year maturity. (Two
9 revolver lenders, with total commitments of \$30 million --- one of which is in FDIC
10 receivership --- are not parties to the present action.) Plaintiff also issued \$675
11 million in second-mortgage notes with an eight-year maturity (the "Notes"). As is
12 customary in such financings, and as the Revolver Banks understood,
13 Fontainebleau entered into these loan agreements with the expectation that the
14 revenue generated by the completed Project would permit it to satisfy its
15 repayment obligations.

16 29. Also on June 6, 2007, Fontainebleau, certain of its affiliates, and the
17 Project's lenders, including the Revolver Banks, entered into the disbursement
18 agreement (the "Disbursement Agreement"). The Disbursement Agreement sets
19 forth the order of funding under the Credit Facilities, the Notes, and the Retail
20 Financing, and the related conditions to providing Fontainebleau with advances
21 under the various facilities.

22 30. The \$700 million Initial Term Loan was funded in full upon execution
23 of the Credit Agreement. To date, \$336.7 million of the \$350 million Delay Draw
24 Term Loan has been funded.

25 31. The credit facilities provide two related mechanisms for funding the
26 Project. First, the submission of a notice of borrowing ("Notice of Borrowing")
27 obligates the Banks to transfer the requested funds into an account (the "Bank
28 Proceeds Account") that is subject to the Disbursement Agreement. Second,

1 Fontainebleau must submit an advance request ("Advance Request"), typically
2 monthly, to secure disbursements from the Bank Proceeds Account that it can then
3 use to pay the costs of the Project.

4 32. As consideration for their promise to provide Fontainebleau with
5 financing when called upon to do so, the Revolver Banks were paid tens of million
6 of dollars in fees at the June 2007 closing. In particular, defendants Bank of
7 America, Merrill Lynch, Deutsche Bank, and Barclays PLC served as co-lead
8 arrangers and joint underwriters with respect to the Credit Facilities, and were
9 compensated accordingly.

10 33. In addition to these fees, several of the Revolver Banks have also been
11 the beneficiaries of billions of dollars in federal TARP funds that are intended, as
12 then-Treasury Secretary Paulson has explained, to induce banks to "deploy, not
13 hoard, their capital. And we expect them to do so". For example, defendant
14 Bank of America has received \$52.5 billion dollars in government assistance to
15 date, JPMorgan Chase \$25 billion, and MB Financial Bank N.A. \$196 million. But
16 instead of deploying their capital, the Revolver Banks have reneged on their
17 existing commitments to Fontainebleau.

18 **1. The Credit Agreement**

19 34. Under the Credit Agreement, the Revolver Banks are obligated to
20 disburse loan proceeds into the Bank Proceeds Account upon receiving from
21 Fontainebleau a Notice of Borrowing specifying the amount of the Revolving Loan
22 requested.

23 35. The Credit Agreement also sets forth the only conditions to the
24 Revolver Banks' funding obligation in response to a Notice of Borrowing. Section
25 2.1(c) of the Credit Agreement provides that "[t]he making of Revolving Loans
26 which are Disbursement Agreement Loans to the Bank Proceeds Account shall be
27 subject **only** to the fulfillment of the applicable conditions set forth in Section 5.2
28" (Emphasis in original.)

1 36. Under Section 5.2 of the Credit Agreement, the only pertinent
2 conditions to the Revolver Banks' obligations to fund the Revolving Loans are:

3 (a) Notice of Borrowing. Borrowers shall have submitted a Notice of
4 Borrowing specifying the amount and Type of the Loans requested,
5 and the making thereof shall be in compliance with the applicable
6 provisions of Section 2 of this Agreement.

7 ...

8 (c) Drawdown Frequency. Except for Loans made pursuant to
9 Section 3 with respect to Reimbursement Obligations, Loans made
10 pursuant to this Section shall be made no more frequently than once
11 every calendar month unless the Administrative Agent otherwise
12 consents in its sole discretion.

13 No representations, warranties, or certifications are required, and the lack of an
14 Event of Default as defined in Section Eight of the Credit Agreement is not a
15 condition precedent. In any event, no such Event of Default has occurred here.

16 **2. The Disbursement Agreement**

17 37. The Disbursement Agreement sets forth Fontainebleau's material
18 obligations to develop, construct and complete the Project, and Fontainebleau
19 Retail's obligation to develop, construct and complete the Project's retail
20 component. The Disbursement Agreement also establishes the conditions to, and
21 the relative sequencing of, disbursements from the proceeds of, among other
22 things, the Revolving Loan, the Retail Financing and the Notes. The
23 Disbursement Agreement also establishes the obligations of the various agents to
24 make disbursements to Fontainebleau of loan proceeds from the Bank Proceeds
25 Account.

26 **C. Defendants' Breaches Under the Loan Agreements**

27 38. The Revolver Banks have repeatedly breached their obligations under
28 the Credit Agreement.

1 **1. Refusal To Honor The March 2009 Notice of Borrowing**

2 39. On March 2, 2009, Fontainebleau submitted a Notice of Borrowing for
3 all of the funds remaining in the senior credit facilities, comprising \$350 million
4 under the Delay Draw Term Loan and \$670 million under the Revolving Loan (the
5 "March 2 Notice"). Under the Credit Agreement, funding under the March 2
6 Notice was required by the next day, March 3, 2009.

7 40. Instead, the next day, Bank of America, as Administrative Agent,
8 notified Fontainebleau by letter (the "March 2 Bank Letter") that it would not
9 process the March 2 Notice, purportedly because it did not comply with Section
10 2.1(c) (iii) of the Credit Agreement, which provides that "unless the Total Delay
11 Draw Commitments have been fully drawn, the aggregate outstanding principal
12 amount of all Revolving Loans and Swing Line Loans shall not exceed
13 \$150,000,000."

14 41. That same day, Fontainebleau advised Bank of America by letter that
15 the March 2 Bank Letter was in error and urged Bank of America to reconsider
16 (the "March 3 Letter"). Plaintiff also submitted an amended Notice of Borrowing
17 to correct a scrivener's error, clarifying that the amount sought under the
18 Revolving Loan was actually \$656.52 million (the "March 3 Notice"). As the March
19 3 Letter correctly explained, the Credit Agreement only limits the amount of the
20 Revolving Loan that can be outstanding unless the Term Loan has been fully
21 drawn; it does not prohibit a Notice of Borrowing that -- like the March 2 Notice --
22 in fact does fully draw down the Term Loan such that the Notice can also draw
23 upon more than \$150,000,000 under the Revolving Commitments. By fully
24 drawing the Term Loan, the Notice of Borrowing itself removed the limitation on
25 the amount of the Revolving Loan that may be drawn.

26 42. On March 4, 2009, Bank of America again wrote to Fontainebleau
27 stating that it had formed an ad hoc steering committee (the "Steering
28 Committee") with other lenders (purportedly constituting a majority in interest of

1 the lenders under the Credit Agreement) and that this unspecified self-selected
2 group of lenders "unanimously" concurred that the March 2 Notice did not
3 conform to the Credit Agreement requirements.

4 43. Fontainebleau responded in a March 6, 2009 letter (the "March 6
5 Letter"), again pointing out that the interpretation of the Credit Agreement
6 advanced by Bank of America was incorrect. Certain other lenders under the
7 Credit Agreement advised Fontainebleau that they also disagreed with the
8 Steering Committee's interpretation.

9 44. In light of the ongoing need to pay for the costs of the Project,
10 Fontainebleau submitted an amended Notice of Borrowing on March 9, 2009 (the
11 "March 9 Notice"), drawing only the \$350 million remaining under the Term Loan.
12 Fontainebleau specifically reserved its right to contest the Administrative Agent's
13 decision to deny, and the Revolver Banks' refusal to provide, funding under the
14 Revolving Loan.

15 45. Section 1.1 of the Credit Agreement defines a "Lender Default" as "the
16 failure or refusal (which has not been retracted in writing) of a Lender to make
17 available (i) its portion of any Loan required to be made by such Lender
18 hereunder..."

19 46. The Revolver Banks' failure and refusal to fund the Revolving Loan in
20 response to the March 2 Notice and March 3 Notice is a Lender Default under the
21 express terms of the Credit Agreement.

22 2. Improper "Termination" Of The Revolving Loan Commitments

23 47. At or about the time that Bank of America informed Fontainebleau
24 that various lenders had formed the Steering Committee, certain of the Revolver
25 Banks determined that they would not honor their commitments to Fontainebleau,
26 and began to seek a pretext on which to renege. On March 6, 2009, Bank of
27 America sent Fontainebleau, on behalf of the Steering Committee, a letter
28 purporting to raise certain questions and seek information about the Project, and

1 proposing a meeting and tour of the Project. In response, on March 16, 2009,
2 Fontainebleau advised Bank of America that it would host such a meeting, but
3 that neither holding such a meeting nor providing such information was a
4 condition precedent to the Banks' compliance with the Notice of Borrowing, and
5 that accordingly the Revolver Banks were still in default with respect to the March
6 2 and March 3 Notices.

7 48. A meeting was held at the Project site on March 20, 2009, attended by
8 certain Revolver Banks and other lenders. At the meeting, Fontainebleau
9 provided the lenders with a presentation about the Project, additional
10 information, and a site tour.

11 49. On March 25, 2009, Fontainebleau finalized the documentation in
12 support of its March Advance Request. Bank of America, as Disbursement Agent,
13 authorized the release of \$138 million from the Bank Proceeds Account.

14 50. Shortly thereafter, in early April, Fontainebleau began gathering the
15 relevant data to be submitted in connection with its April Advance Request. As
16 part of this process, Fontainebleau determined that, under the definitions and
17 criteria in the Credit Agreement and Disbursement Agreement, the remaining
18 costs to complete the Project (the "Remaining Costs") appeared to exceed the
19 available loan funds ("Available Funds"), and as a result the Project at that time
20 likely could not satisfy the test that remaining costs and available funds be in
21 balance (the "In Balance Test"), as required under the Disbursement Agreement.

22 51. On April 13, 2009, Fontainebleau provided its lenders with notice,
23 pursuant to the Disbursement Agreement and other loan documents (the "April 13
24 Notice") that as of that date, it did not believe that the Project satisfied the In
25 Balance Test. The April 13 Notice made no reference whatsoever to the March
26 Advance Request. Under the Disbursement Agreement, failure to satisfy the In
27 Balance Test is not an Event of Default, and does not preclude the submission and
28 funding of a Notice of Borrowing; at most, it only delays the ability to draw funds

1 from the Bank Proceeds Account, pursuant to an Advance Request, to pay the
2 costs of the Project.

3 52. Following the April 13 Notice, Fontainebleau and its lenders
4 (including the Revolver Banks) held a meeting on Friday, April 17, in New York,
5 to discuss the status of the Project and plans for its completion. On Monday, April
6 20, as a follow-up to that meeting, the Steering Committee's counsel sent a letter
7 on behalf of "a number of Steering Committee institutions," including certain
8 Revolver Banks, to Fontainebleau's counsel (the "April 20 Letter"). The April 20
9 Letter requested additional information based on the April 17 meeting, including
10 "[a]n assessment of the March In Balance Test" -- an implicit concession that these
11 lenders did not believe they had sufficient information to determine whether the
12 In Balance Test had been satisfied as of March.

13 53. Only hours later, and before any response by Fontainebleau, the
14 Revolver Banks sent Fontainebleau a letter (the "Termination Letter") asserting
15 that "one or more Events of Default have occurred" under the Credit Agreement,
16 but utterly failing to identify any particular Event of Default. The Termination
17 Letter also contended that the Total Revolving Commitments -- i.e., the \$800
18 million Revolving Loan commitments (less the \$10 million that is the subject of an
19 FDIC receivership, and which is not at issue here) -- were "terminated effective
20 immediately."

21 54. The next day, April 21, 2009, Fontainebleau's counsel advised the
22 Revolver Banks' counsel by letter that there had been no Event of Default under
23 the Credit Agreement, that the Termination Letter was ineffective and a nullity,
24 and that unless the Revolver Banks withdrew the Termination Letter immediately,
25 Fontainebleau would pursue all available remedies.

26 **3. Refusal To Honor The April 21, 2009 Notice of Borrowing**

27 55. Also on April 21, 2009, Fontainebleau provided Bank of America, as
28 Administrative Agent, with a Notice of Borrowing (the "April 21 Notice") that

1 complied with all applicable conditions under the Credit Agreement, seeking \$710
2 million in Revolving Loans. The amount of the Notice of Borrowing -- \$710
3 million -- reflects certain adjustments to the full \$790 million in Revolver Loan
4 commitments (net of the \$10 million commitment in FDIC receivership) that do
5 not alter or diminish Fontainebleau's right to those total commitments. Under the
6 Credit Agreement, the April 21 Notice was required to be funded by 12:00 noon
7 on April 23, 2009.

8 56. The Revolver Banks have once again breached their obligations under
9 the Credit Agreement by failing to honor the April 21 Notice.

10 **D. The Revolver Banks' Breaches Will Cause Irreparable Harm**
11 **To Plaintiff And The Las Vegas Economy.**

12 57. The Revolver Banks' breach of their obligations will cause extensive
13 and irreparable harm to Plaintiff.

14 58. The Project is roughly 70% complete, and significant work remains to
15 be performed. The Project has now been deprived of access to at least \$710 million
16 in financing that is crucial to completion. Without these funds -- which cannot be
17 replaced in today's economic environment -- the Project cannot be finished and
18 will never open. Construction will cease, contractor liens will accrue, and
19 revenues from the Project will never be realized.

20 59. A collapse of the Project -- caused by the Revolver Banks' failure to
21 fund -- would trigger similar consequences with respect to the Fontainebleau
22 Retail development.

23 60. Furthermore, the goal of the development of the Project was to build
24 a unique destination casino-resort which would translate the successful
25 Fontainebleau image, brand and reputation earned in Miami to the Las Vegas
26 Strip. The Project thus was intended to expand further the Fontainebleau brand
27 and generate new business opportunities. The Revolver Banks' breach of their
28

1 commitments and resulting failure of the Project will substantially tarnish
2 Fontainebleau's business, brand image, and reputation.

3 61. The Revolver Banks' breach of their obligations will also cause
4 extensive and irreparable harm to Clark County and the Las Vegas economy.
5 Currently, southern Nevada faces one of the most significant economic challenges
6 in its modern history. Unemployment has spiked to more than 10 percent and the
7 annual job loss rate is 4.8 percent and climbing. Southern Nevada's hotels and
8 casino-hotels directly employed an average of 176,100 workers in 2008 but as of
9 January 2009 this number fell to 164,700 -- a loss of 11,400 jobs. It is undeniable
10 that the interest of the public is best served by the completion of the Project. If the
11 Revolver Banks' breach forces the Project to shut down, there would be a
12 profound impact on the community and the already reeling Las Vegas economy.

13 62. At the upcoming peak of its construction cycle, the Project is expected
14 to employ more than 5,000 workers and generate nearly \$41 million dollars per
15 month in wages and benefits to southern Nevada households. Under the current
16 plans, the finished Project will employ over 6,000 people directly and an
17 additional 2,000 indirect regional jobs. Moreover, the Project would result in
18 substantial public revenues, including property tax payments of \$1.1 million per
19 acre per year and \$73 million dollars in tax and fee payments annually.

20 63. The failure of the Revolver Banks to honor their financial
21 commitments to the Project places the completion of this hotel and casino in
22 serious jeopardy. Should the Project fail, the aforementioned benefits would not
23 be realized, thousands of jobs would be lost, millions of dollars in tax revenue
24 would evaporate, and Clark County would likely sink further into economic
25 recession.

26 **E. Plaintiff Has No Adequate Remedy At Law**

27 64. Specific performance of the Revolver Banks' obligations is required,
28 and entirely appropriate, because Plaintiff lacks an adequate remedy at law.

65. Damages would not be an adequate remedy at law because alternative financing cannot be obtained. The terms of the Revolving Loan negotiated in June 2007 cannot be replicated in today's financial markets, and \$770 million in comparable revolver financing for a Las Vegas construction project cannot be obtained.

66. Specific performance is also appropriate because the Project concerns real property. No other parcel of land, and no other development, could possibly substitute for the Fontainebleau Las Vegas. If the Revolver Banks' breaches cause Fontainebleau to lose the Project, that loss cannot adequately be remedied in damages.

67. The harm to Fontainebleau is also irreparable because the Banks' wrongdoing threatens to damage Fontainebleau's reputation and brand image. These highly valuable assets are being and will be harmed by the Revolver Banks' spurious claim that an Event of Default has occurred; that reputational and business harm cannot be undone.

FIRST CAUSE OF ACTION

(Breach of the Credit Agreement -- Against All Revolver Banks
Failure to Fund the Revolving Loans in March 2009)

68. Fontainebleau realleges and incorporates each and every allegation contained in paragraphs 1 through 67 hereof.

69. The Credit Agreement is a valid and binding contract, pursuant to which the Revolver Banks agreed to fund \$800 million in Revolving Loans.

70. The March 2 Notice, as amended by the March 3 Notice (together, the "March Notice of Borrowing") submitted by Fontainebleau complied with all applicable conditions under the Credit Agreement. At the time of the March Notice of Borrowing, Fontainebleau had performed all obligations required of it to be performed.

1 71. Pursuant to the terms of the Credit Agreement, the Revolver Banks
2 were, and continue to be, obligated to honor the March Notice of Borrowing.

3 72. The Revolver Banks' failure to honor the March Notice of Borrowing
4 constitutes a material breach of their obligations under the Credit Agreement.

5 73. By refusing to comply with their obligations under the Credit
6 Agreement, the Revolver Banks have also breached the covenant of good faith and
7 fair dealing implied in every contract that, like this one, is governed by New York
8 law.

9 74. There is a real and substantial controversy between Fontainebleau, on
10 the one hand, and the Revolver Banks, on the other hand. Expeditionary resolution
11 of this controversy is both necessary and appropriate.

12 75. Fontainebleau has no adequate remedy at law for the Revolver Banks'
13 breaches, and will be irreparably harmed thereby.

14 76. Accordingly, Fontainebleau is entitled to a decree of specific
15 performance compelling the Banks to provide the Revolving Loans in accordance
16 with the March Notice of Borrowing.

17 77. While damages would not adequately compensate Plaintiff for the
18 harm caused by the Revolver Banks' breaches, Plaintiff also is entitled to damages
19 in an amount to be proven at trial.

20 **SECOND CAUSE OF ACTION**

21 **(Breach of the Credit Agreement -- Against All Revolver Banks**
22 **Improper Termination of Commitments)**

23 78. Fontainebleau realleges and incorporates each and every allegation
24 contained in paragraphs 1 through 77 hereof.

25 79. The Credit Agreement is a valid and binding contract, pursuant to
26 which the Revolver Banks and other revolver lenders agreed to fund \$800 million
27 in Revolving Loans.

1 80. In the Termination Letter, the Revolver Banks have taken the position
2 that as of April 20, 2009, one or more Events of Default have occurred. The
3 Revolver Banks failed to identify any such Event of Default.

4 81. No Event of Default under the Credit Agreement has occurred, and
5 the Termination Letter is ineffective and a nullity. By repudiating their
6 obligations, the Revolver Banks have breached the Credit Agreement.

7 82. There is thus a real and substantial controversy between
8 Fontainebleau, on the one hand, and the Revolver Banks, on the other hand, as to
9 the validity of the Termination Letter. Expeditious resolution of this controversy
10 is both necessary and appropriate.

11 83. Accordingly, Fontainebleau is entitled to a judgment declaring that as
12 of April 21, 2009, (i) no Event of Default had occurred under the Credit
13 Agreement; (ii) the Credit Agreement was in full force and effect, including with
14 respect to the Revolver Banks, and (iii) the Termination Letter was ineffective and
15 a nullity.

16 84. Fontainebleau has no adequate remedy at law for the Revolver Banks'
17 breaches, and will be irreparably harmed thereby.

18 85. Accordingly, Fontainebleau is entitled to a decree of specific
19 performance compelling the Banks to continue to comply with their obligations
20 under the Credit Agreement.

21 86. While damages would not adequately compensate Fontainebleau for
22 the harm caused by the Revolver Banks' breaches, Fontainebleau also is entitled to
23 damages in an amount to be proven at trial.

24 **THIRD CAUSE OF ACTION**

25 **(Breach of the Credit Agreement -- Against All Revolver Banks** 26 **Failure to Fund the Revolving Loans in April 2009)**

27 87. Fontainebleau realleges and incorporates each and every allegation
28 contained in paragraphs 1 through 86 hereof.

1 88. The Credit Agreement is a valid and binding contract, pursuant to
2 which the Revolver Banks and other revolver lenders agreed to fund \$800 million
3 in Revolving Loans.

4 89. The April 21 Notice of Borrowing submitted by Fontainebleau
5 complied with all applicable conditions under the Credit Agreement. At the time
6 of the April 21 Notice, Fontainebleau had performed all obligations required of it
7 to be performed.

8 90. Pursuant to the terms of the Credit Agreement, the Revolver Banks
9 were, and continue to be, obligated to honor the April 21 Notice.

10 91. The Revolver Banks' failure to honor the April 21 Notice constitutes a
11 material breach of their obligations under the Credit Agreement.

12 92. By refusing to comply with their obligations under the Credit
13 Agreement, the Revolver Banks have also breached the covenant of good faith and
14 fair dealing implied in every contract that, like this one, is governed by New York
15 law.

16 93. There is a real and substantial controversy between Fontainebleau, on
17 the one hand, and the Revolver Banks, on the other hand. Expeditious resolution
18 of this controversy is both necessary and appropriate.

19 94. Fontainebleau has no adequate remedy at law for the Revolver Banks'
20 breaches, and will be irreparably harmed thereby.

21 95. Accordingly, Fontainebleau is entitled to a decree of specific
22 performance compelling the Banks to provide the Revolving Loans in accordance
23 with the April 21 Notice.

24 96. While damages would not adequately compensate Fontainebleau for
25 the harm caused by the Revolver Banks' breaches, Fontainebleau also is entitled to
26 damages in an amount to be proven at trial.

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FOURTH CAUSE OF ACTION

(Equitable Estoppel -- Against All Revolver Banks)

97. Fontainebleau realleges and incorporates each and every allegation contained in paragraphs 1 through 96 hereof.

98. The Revolver Banks led Fontainebleau to believe that they would comply with their obligations to provide the Revolving Loans by, among other things, continuing to engage in dialogue as to the status of the project, requesting information from Fontainebleau, attending meetings with Fontainebleau, and otherwise acting as if they still intended to perform under the Credit Agreement. At no time prior to April 20, 2009 did the Revolver Banks state or give any indication that they believed an Event of Default had occurred.

99. In this manner, the Revolver Banks confirmed to Fontainebleau that they would provide the Revolving Loans when presented with a compliant Notice of Borrowing, and concealed the material fact that they had already determined not to perform their obligations. The Revolver Banks intended, or reasonably should have expected, that Fontainebleau would rely on their representations and omissions. In relying on the legitimate expectation of ongoing funding, Plaintiff continued to incur substantial construction-related expenses and make ongoing commitments to vendors and other tradespeople and its employees.

100. Fontainebleau thus relied on the Revolver Banks' representations to its detriment, by incurring millions of dollars of costs and committed spending based on the expectation that the Revolver Banks would honor their commitments and fund those expenditures. Fontainebleau did not know, and had no way of knowing, that the Revolver Banks were planning to breach the Credit Agreement.

101. As a direct and proximate cause of the Revolver Banks' failure to honor their own representations regarding the Revolving Loans, Fontainebleau has been injured.

1 102. Accordingly, although monetary damages would be inadequate to
2 compensate Fontainebleau for its injury, Fontainebleau is entitled to damages,
3 including consequential damages, in an amount to be determined at trial.

4 **FIFTH CAUSE OF ACTION**

5 **(Breach of Implied Covenant of Good Faith and Fair Dealing** 6 **Under the Credit Agreement -- Against Deutsche Bank)**

7 103. Fontainebleau realleges and incorporates each and every allegation
8 contained in paragraphs 1 through 102 hereof.

9 104. The Credit Agreement is a valid and binding contract, pursuant to
10 which the Revolver Banks and other revolving lenders agreed to fund \$800 million
11 in Revolving Loans.

12 105. New York law, which governs the Credit Agreement, implies in all
13 contracts a covenant of good faith and fair dealing in the course of performance.
14 The purpose of this covenant is to ensure that parties to a contract will not destroy
15 or injure the right of another party to enjoy the fruits of the contract.

16 106. Pursuant to that implied covenant, Deutsche Bank, as a party to the
17 Credit Agreement, owed and owes Fontainebleau a duty of good faith and fair
18 dealing.

19 107. Deutsche Bank has encouraged other Revolver Lenders to breach
20 their obligations under the Credit Agreement. Deutsche Bank has also sought to
21 undermine other Revolver Lenders' attempts to resolve the pending dispute
22 between the Fontainebleau and the Revolver Lenders. In so doing, Deutsche Bank
23 has breached the covenant of good faith and fair dealing that is implied by law in
24 the Credit Agreement.

25 108. Deutsche Bank's motive for taking these steps results from its
26 conflicted position as an affiliate of the owner and developer of the Cosmopolitan
27 Resort and Casino (the "Cosmopolitan"), another Las Vegas Strip resort-casino
28 construction project. The Cosmopolitan is a resort casino and condo project

1 located on the Las Vegas strip that broke ground in the fall of 2005 and is currently
2 scheduled to open in the second quarter of 2010. Like the Fontainebleau, the
3 Cosmopolitan is expected to feature approximately 3,000 residential and hotel
4 units, an 80,000 square foot casino; 265,000 square feet of retail and restaurant
5 space; a 40,000 square foot spa and fitness facility; a theater; and 150,000 square
6 feet of meeting/convention space.

7 109. Deutsche Bank and its affiliates originally were involved in the
8 Cosmopolitan project as a lender, starting in 2003 when Ian Bruce Eichner, the
9 owner/developer, sought financing from Deutsche Bank or its affiliates to
10 purchase the land on the Las Vegas Strip. As the Cosmopolitan project moved
11 forward, this Deutsche Bank financing increased on more than one occasion. In
12 January 2008, when Eichner was unable to raise additional equity, he defaulted on
13 the \$760 million dollar construction loan from Deutsche Bank.

14 110. Deutsche Bank subsequently foreclosed on the Cosmopolitan and, in
15 late summer/early fall of 2008, Nevada Property I, LLC, an affiliate of Deutsche
16 Bank, purchased the Cosmopolitan --nominally a \$3.9 billion dollar project -- for
17 \$1 billion dollars in a foreclosure sale. The property is now held by a subsidiary
18 and is financed through a loan from Deutsche Bank AG.

19 111. The Project, when completed, will be a strong competitor with
20 Cosmopolitan. And Deutsche Bank's more than one billion dollar ownership
21 stake in Cosmopolitan far exceeds its commitment to Fontainebleau, providing
22 Deutsche Bank with a strong incentive to undermine Fontainebleau's
23 development and future prospects.

24 112. As a result of Deutsche Bank's interest in Cosmopolitan, Deutsche
25 Bank is not only trying to circumvent its contractual obligations to Fontainebleau
26 but has actively encouraged other Revolver Lenders, and continues to encourage
27 them, to breach their commitments to the Project, all in violation of the implied
28 covenant of good faith and fair dealing.

113. Fontainebleau has been, and continues to be, directly and proximately harmed as a result of Deutsche Bank's misconduct.

114. Accordingly, Fontainebleau seeks an injunction restraining Deutsche Bank from continuing its violations of the duty of good faith and fair dealing as set forth above. In addition, although monetary damages would be inadequate to compensate Fontainebleau for its injury, Fontainebleau is entitled to damages from Deutsche Bank in an amount to be determined at trial.

SIXTH CAUSE OF ACTION

(Intentional Interference with Contractual Relations --

Against Deutsche Bank)

115. Fontainebleau realleges and incorporates each and every allegation contained in paragraphs 1 through 114 hereof.

116. The Credit Agreement is a valid and binding contract, pursuant to which the Revolver Banks and other revolver lenders agreed to fund \$800 million in Revolving Loans.

117. Pursuant to the terms of the Credit Agreement, Fontainebleau has a contractual relationship with each Revolver Bank as a lender to the agreement.

118. The Credit Agreement expressly states that the obligations of the various lenders thereunder, including each Revolver Bank, are several and not joint. Thus, as the Credit Agreement makes clear, “[t]he failure of any Lender to make any Loan, to fund any such participation or make any payment ... shall not relieve any other Lender of its corresponding obligation” Accordingly, each Revolver Bank has a separate and independent obligation to fund its own commitment under the Revolving Loan.

119. As a result, a breach by one Revolver Bank does not eliminate the obligation of any other Revolver Bank to satisfy its commitments under the contract.

1 120. Deutsche Bank, as a Revolver Bank, is aware of the Credit
2 Agreement, of the other Revolver Banks' commitments, and of the fact that these
3 commitments are several and independent.

4 121. Deutsche Bank has intentionally and without justification interfered
5 in contractual relationships between Fontainebleau and the other Revolver Banks,
6 and continues to do so, as alleged above, by encouraging them to breach their
7 commitments and by interfering with attempts to resolve the dispute in recent and
8 ongoing negotiations.

9 122. These acts by Deutsche Bank were and are intended or designed to
10 disrupt the contractual relationships between Fontainebleau and the other
11 Revolver Lenders and cause the failure of the Project, all to the economic benefit of
12 Deutsche Bank and its Cosmopolitan project.

13 123. Deutsche Bank was motivated to destroy the Project, and injure
14 Fontainebleau, to benefit the Cosmopolitan, the competing construction project in
15 which Deutsche Bank has a vastly larger financial stake.

16 124. As a direct and proximate cause of Deutsche Bank's interference in
17 the contractual relationship between Fontainebleau and the other Revolver
18 Lenders, the other Revolver Lenders have breached the agreement and terminated
19 their commitments, and Fontainebleau has been injured.

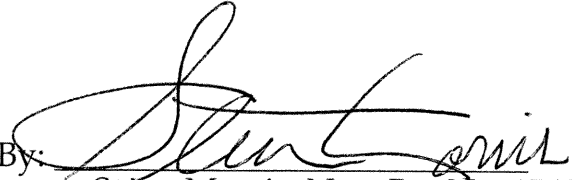
20 125. Accordingly, Fontainebleau seeks an injunction restraining
21 Deutsche Bank from continued interference with Fontainebleau's contractual
22 relations, as set forth above. In addition, although monetary damages would be
23 inadequate to compensate Fontainebleau for its injury, Fontainebleau is entitled to
24 damages from Deutsche Bank in an amount to be determined at trial.
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1 WHEREFORE, Fontainebleau demands judgment against the Revolver Banks,
2 and each of them,

- 3 (a) On the First, Second, Third and Fourth Causes of Action, decreeing
4 specific performance by the Revolver Banks of their obligations under
5 the Credit Agreement and related documentation, including
6 providing the Revolving Loans pursuant to the March 2 Notice of
7 Borrowing and the April 21 Notice of Borrowing;
- 8 (b) On the First, Second, Third, and Fourth Causes of Action, awarding
9 Fontainebleau damages in an amount to be determined at trial, but in
10 no event less than three billion dollars;
- 11 (c) On the Second Cause of Action, declaring that as of April 21, 2009: (i)
12 no Event of Default had occurred under the Credit Agreement; (ii) the
13 Credit Agreement was in full force and effect, including with respect
14 to the Revolver Banks, and (iii) the Termination Letter was ineffective
15 and a nullity;
- 16 (d) On the Fifth Cause of Action, enjoining Deutsche Bank from further
17 violations of the duty of good faith and fair dealing under the Credit
18 Agreement;
- 19 (e) On the Sixth Cause of Action, enjoining Deutsche Bank from further
20 tortious interference in Fontainebleau's contractual relations;
- 21 (f) On the Fifth and Sixth Causes of Action, awarding damages against
22 Deutsche Bank in an amount to be determined at trial;
- 23 (g) Awarding Fontainebleau the costs and disbursements of this action,
24 including attorneys' fees; and
- 25 (h) Awarding Fontainebleau such other and further relief as this Court
26 may deem just and proper.
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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of MORRIS PETERSON; that I am familiar with the firm's practice of collection and processing documents for mailing; that, in accordance therewith, I caused the following document to be deposited with the U.S. Postal Service at Las Vegas, Nevada, in a sealed envelope, with first class postage prepaid, on the date and to the addressee(s) shown below: **AMENDED COMPLAINT**

TO:

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DATED this 15th day of May, 2009.

By 