

BofA Pays \$300M To End Fontainebleau Lender Suit

By **Kurt Orzeck**

Law360, Los Angeles (February 25, 2015, 10:39 PM ET) -- Bank of America NA has paid \$300 million to settle a Nevada federal suit brought by more than 40 lenders and investors claiming they were fraudulently induced to lend more than \$1 billion to the failed Fontainebleau Las Vegas project, the bank said in a Wednesday securities filing.

The term lenders, including Brigade Leveraged Capital Structures Fund Ltd. and Avenue CLO Fund Ltd., have agreed to voluntarily dismiss their remaining claims with prejudice amid the settlement, according to Bank of America's 10-K filing with the U.S. Securities and Exchange Commission.

The bank served as the administrative and disbursement agent on revolving loans attached to the project and has been the target of litigation in district courts in Nevada and in Miami, where the bankruptcy case was filed.

Plaintiffs in the instant suit alleged that Bank of America violated the terms of a credit agreement that required it to disburse funds from revolving loans supporting the failed casino project. They sought damages of more than \$700 million plus interest, the securities filing said.

The disclosure of Bank of America's \$300 million payment came five days after the parties submitted a joint stipulation to dismiss the suit with prejudice to the Nevada federal court, and after a Florida bankruptcy judge indicated last month he would sign off on a revised settlement ending litigation brought by the trustee for Fontainebleau against the company's directors and officers, bringing the estate one step closer to exiting Chapter 7.

The Fontainebleau was envisioned as a \$2.9 billion, 3,815-room resort with a 100,000-square-foot casino. In 2005, BofA loaned \$150 million to project developer Fontainebleau Las Vegas Holdings LLC, and in 2007 the bank gave another \$1.85 billion for construction financing.

But declining revenue projections, lackluster condominium sales, cost overruns and the September 2008 bankruptcy of Lehman Brothers Holdings Inc., a major lender, drove the project's developer into bankruptcy in June 2009.

The project was sold through the bankruptcy court to Icahn Nevada Gaming Acquisition for about \$156 million in 2010.

In the instant suit, launched in 2009, the term lenders alleged that Fontainebleau affiliates concealed that they had two sets of records: one showing the project to be millions of dollars short of cash and another fraudulently showing the project to be fully funded.

A Nevada federal judge in March 2012 granted Bank of America's motion for summary judgment on all causes of action against it in its capacity as disbursement agent. The judge ruled that the bank wasn't wrong to rely on certifications from Fontainebleau and wasn't responsible for launching an investigation into whether the requirements of disbursement were met.

The Eleventh Circuit in July 2013 agreed with those aspects of the lower court's ruling, although it also decided that the bank may have wrongfully dished out funding for the doomed \$2.9 billion project.

BofA may have breached its disbursement contract when it failed to cut off funding to the hotel after learning about certain events that ultimately dealt deadly blows to the project, the appeals court found.

Game changers, including an increase in the project's budget and the Lehman Brothers bankruptcy, should have signaled a halt in funding to the Fontainebleau, and if the bank knew about these changes, a jury could find that the bank was negligent in disbursing funds, according to the July 2013 decision.

If the bank already knew that the conditions for divvying funding were not met, it could be held culpable for breach of contract and negligence, the Eleventh Circuit ruled.

After the appeals court remanded the case to a district court for further proceedings, the parties settled the suit.

A Bank of America spokesman declined to comment Thursday. Attorneys for the plaintiffs didn't immediately respond to requests for comment late Wednesday.

The plaintiffs are represented by J. Michael Hennigan, Kirk D. Dillman, Robert W. Mockler and Caroline M. Walters of McKool Smith PC and Donald J. Campbell and J. Colby Williams of Campbell & Williams.

Bank of America is represented by Brad T. Brian, Gregory J. Weingart, Grant A. Davis-Denny, Ray S. Seilie, Kyle A. Casazza, Matthew A. Macdonald and Jeffrey Y. Wu of Munger Tolles & Olson LLP, Daniel L. Cantor of O'Melveny & Myers LLP and Nicholas J. Santoro of Santoro Whitmire.

The case is Avenue CLO Fund Ltd. et al. v. Bank of America NA et al., case number 2:09-cv-01047, in the U.S. District Court for the District of Nevada.

--Additional reporting by Carolina Bolado and Evan Weinberger. Editing by Brian Baresch.