IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIGADE LEVERAGED CAPITAL STRUCTURES, FUND, LTD.; BATTALION CLO 2007-I LTD.; CANPARTNERS INVESTMENTS IV, LLC; CASPIAN CAPITAL PARTNERS, L.P.; CASPIAN SELECT CREDIT MASTER FUND, LTD.; MARINER LDC; CASPIAN ALPHA LONG CREDIT FUND, L.P.; CASPIAN SOLITUDE MASTER FUND, L.P.; OLYMPIC CLO I LTD.; SHASTA CLO I LTD.; WHITNEY CLO I LTD.; SAN GABRIEL CLO I LTD.; SIERRA CLO II LTD.; ING PRIME RATE TRUST; ING SENIOR INCOME FUND; ING INTERNATIONAL (II)-SENIOR LOANS NOW KNOWN AS ING (L) FLEX-SENIOR LOANS; ING INVESTMENT MANAGEMENT CLO I, LTD.; ING INVESTMENT MANAGEMENT CLO II, LTD.; ING INVESTMENT MANAGEMENT CLO III, LTD.; ING INVESTMENT MANAGEMENT CLO IV, LTD.; ING INVESTMENT MANAGEMENT CLO V, LTD.; PHOENIX CLO I, LTD.; PHOENIX CLO II, LTD.; PHOENIX CLO III, LTD.; VENTURE II CDO 2002 LIMITED; VENTURE III CDO LIMITED; VENTURE IV CDO LIMITED; VENTURE V CDO LIMITED; VENTURE VI CDO LIMITED; VENTURE VII CDO LIMITED; VENTURE VIII CDO LIMITED; VENTURE IX CDO LIMITED; VISTA LEVERAGED INCOME FUND; VEER

No. 60085

FILED

JAN 29 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

14-03015

CASH FLOW; CLO LIMITED; MONARCH MASTER FUNDING LTD.; NORMANDY HILL MASTER FUND, L.P.; GENISIS CLO 2007-1 LTD.; SCOGGIN CAPITAL MANAGEMENT II LLC; SCOGGIN INTERNATIONAL FUND LTD; SCOGGIN WORLDWIDE FUND LTD; SPCP GROUP, LLC; SOLA LTD; SOLUS CORE OPPORTUNITIES MASTER FUND LTD; AND VENOR CAPITAL MASTER FUND, LTD.,
Appellants,
vs.
UNION LABOR LIFE INSURANCE COMPANY,
Respondent.

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order, certified as final under NRCP 54(b), dismissing a construction-loan-related tort action. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Appellants Brigade Leveraged Capital Structures Fund, Ltd., et al. are hedge fund lenders that participated in a syndicate funding the credit for the development and construction of the now-defunct Fontainebleau Resort and Casino in Las Vegas, Nevada. The project was funded by three distinct loan facilities: (1) a $1.85 billion credit agreement (the Credit Agreement Facility), (2) a $675 million second mortgage note offering,[1] and (3) a $315 million financing of the retail portion of the project (the Retail Facility). The Credit Agreement Facility was funded by

[1]The second mortgage note is not implicated in this appeal.

a syndicate of lenders including Bank of America (BofA), who also operated as the disbursement agent of the syndicate. Likewise, the Retail Facility was funded by a similar but distinct syndicate of lenders including Lehman Brothers, who acted as the agent of the retail syndicate. Brigade was a participating lender in the BofA syndicate funding the Credit Agreement Facility, while respondent Union Labor Life Insurance Company (ULLICO) was a participating lender in the Lehman syndicate funding the Retail Facility.

In order to access the funds to build the facility, the project developer, Fontainebleau Las Vegas, LLC (FBLV), was required to submit to BofA advance funding requests that contained a representation that each of the Retail Facility lenders had made all monthly advances required of them. The purpose of this certification was to reassure the Credit Agreement Facility lenders that the total funds pledged to the project were actually being committed, thereby reducing the risk that the project would not be completed. Therefore, if FBLV failed to provide certification to BofA that the Retail Facility was fully funded for a particular month, then the funding from the Credit Agreement Facility would halt. However, the Retail Facility lenders were permitted under their co-lending agreement to step in and fund any deficient amounts resulting from a co-lender's default.

In 2008, Lehman filed for bankruptcy protection and failed to make the required September 2008 Retail Facility advance. In an effort to keep the Lehman default from halting the flow of funds, FBLV, contrary to the terms of the Credit Agreement Facility, directly provided the necessary funds to cover Lehman's September 2008 advance to the Retail Facility. Lehman then paid its share of the funding obligations for

October and November 2008. However, in December 2008, Lehman informed FBLV that it would cease further funding of the Retail Facility altogether. Thereafter, ULLICO, as allowed by the co-lending agreement, agreed to fund Lehman's portion of the monthly retail advances for December 2008 and January, February, and March 2009. In exchange, FBLV and certain of its principals executed guaranty agreements in favor of ULLICO for repayment of the advances. However, in April 2009, construction on the project was halted and, in June 2009, FBLV filed for bankruptcy protection.

In June 2009, Brigade and other lenders of the Credit Facility Agreement commenced litigation against BofA in the United States District Court. They alleged that BofA, as their agent, breached its duties by failing to protect their interests. Specifically, they argued that BofA received notice of Lehman's default in September and October 2008 and did nothing. They asserted that BofA improperly approved advances to the Credit Agreement Facility after September 2008. The court granted summary judgment in favor of BofA in March 2012.

In March 2011, Brigade and other credit lenders brought this action alleging fraud/aiding and abetting fraud, negligent misrepresentation, and conspiracy to commit fraud/aiding and abetting fraud against ULLICO for its decision to fund Lehman's portion of the monthly advances and its execution of the associated guaranty agreement. ULLICO filed a motion to dismiss with prejudice, asserting failure to state a claim and the defense of judicial estoppel. The district court granted ULLICO's motion as to the judicial estoppel defense and dismissed the case with prejudice. Brigade now appeals the ULLICO dismissal.

On appeal, we address whether to take judicial notice of the United States District Court's decision in the BofA case. We then address whether the district court erred in granting ULLICO's motion to dismiss.[2]

Standard of review

This court rigorously reviews a district court order granting an NRCP 12(b)(5) motion to dismiss, accepting all of the plaintiff's factual allegations as true and drawing every reasonable inference in the plaintiff's favor to determine whether the allegations are sufficient to state a claim for relief. *Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009).

Judicial notice of the BofA decision

Brigade requests that this court take judicial notice of the order granting summary judgment in the connected BofA case. We conclude that judicial notice of the BofA decision is warranted in this case because the order is a matter of public record and is a reliable source. *See Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009). We also take judicial notice of the facts in the order because the cases are connected—they concern the same parties involved in a similar pattern of behavior. *See id.* at 91-92, 206 P.3d at 106. Moreover, the BofA decision is relevant to the judicial estoppel claim as it demonstrates that the court

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[2]In a footnote, ULLICO asserts that Brigade lacked standing to assert its claims since it was merely an assignee of the original lenders and assignment of tort claims was prohibited. This claim, while asserted by other parties below, was not raised by ULLICO at the trial level. Given ULLICO's failure to raise the issue in their motion to dismiss, we consider this argument waived. *See Mason v. Cuisenaire*, 122 Nev. 43, 48, 128 P.3d 446, 449 (2006) ("[F]ailure to raise an argument in the district court proceedings precludes a party from presenting the argument on appeal.").

did not adopt Brigade's position in the BofA litigation. *See In re Amerco Derivative Litig.*, 127 Nev. ___, ___ n.9, 252 P.3d 681, 699 n.9 (2011) (requiring a valid reason for taking judicial notice of facts in a different case). Accordingly, judicial notice is warranted here.

Propriety of the grant of ULLICO's motion to dismiss

On appeal, the parties disagree as to the basis for the district court's decision. Brigade contends that the district court based the dismissal solely on ULLICO's arguments regarding judicial estoppel. ULLICO, conversely, contends that the district court expressly rejected the judicial estoppel argument and instead based its dismissal on ULLICO's remaining contentions.

While the district court stated that the doctrine of judicial estoppel was not "fully applicable," its analysis dismissing the case entirely concerned the allegations against BofA. Because the discussion concerning BofA could have only concerned the judicial estoppel claim, we conclude that the district court's dismissal of this case was based on judicial estoppel.

We review the propriety of this application of judicial estoppel de novo. *NOLM, LLC v. Cnty. of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004). Generally, judicial estoppel applies when:

> (1) the same party has taken two positions; (2) the positions were taken in judicial . . . proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.

Mainor v. Nault, 120 Nev. 750, 765, 101 P.3d 308, 318 (2004) (internal quotations omitted).

We conclude that the district court erroneously applied the doctrine of judicial estoppel in this case as the positions taken by Brigade here are not inconsistent and the tribunal has not adopted ~~did not adopt~~ Brigade's position concerning the BofA case. The allegations against BofA and against ULLICO concern different time periods and different conduct—the BofA action concerned BofA's alleged knowledge that FBLV paid Lehman's share of the retail advances in September 2008 after knowing of the default and bankruptcy filing, whereas the allegations against ULLICO involve its participation in FBLV's resulting cover-up of FBLV's payments made on behalf of Lehman in and after December 2008. ~~Moreover, and most importantly, the BofA action was unsuccessful.~~

Accordingly, we[3]

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Cherry

[3]Because we resolve this case on judicial estoppel grounds, we decline to reach the parties' remaining contentions.

Order modified per order filed 3/10/14.
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cc: Hon. Mark R. Denton, District Judge
Robert F. Saint-Aubin, Settlement Judge
McKool Smith P.C.
Randolph Law Firm, P.C.
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Eighth District Court Clerk