

NEW YORK STATE SUPREME COURT
COUNTY OF NEW YORK

BANK OF AMERICA, N.A., WACHOVIA
BANK, N.A., MERRILL LYNCH
MORTGAGE LENDING, INC., U.S. BANK
NATIONAL ASSOCIATION, as TRUSTEE
FOR MAIDEN LANE COMMERCIAL
MORTGAGE BACKED SECURITIES
TRUST 2008-1, DEBT II ESH, L.P., DEBT-U
ESH, L.P. and KEYBANK NATIONAL
ASSOCIATION,

Plaintiffs,

v.

LIGHTSTONE HOLDINGS, LLC and
DAVID LICHTENSTEIN,

Defendants.

Index No.: 601853/09

**AFFIDAVIT IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT IN LIEU OF
COMPLAINT**

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DAVID FALLICK, being duly sworn, deposes and says:

1. I am a Managing Director of plaintiff Bank of America, N.A. ("Bank of America"). I make this affidavit in support of the motion for summary judgment in lieu of complaint by Bank of America and plaintiffs Wachovia Bank, N.A. ("Wachovia"), Merrill Lynch Mortgage Lending, Inc. ("Merrill Lynch"), U.S. Bank National Association, not individually but solely in its capacity as Trustee for Maiden Lane Commercial Mortgage Backed Securities Trust 2008-1 (the "Maiden Lane Trustee"), Debt II ESH, L.P. ("Debt II"), Debt-U ESH, L.P. ("Debt-U") and KeyBank National Association ("KeyBank"). I have personal knowledge of the facts set forth herein.

NATURE OF THE ACTION

2. In this action, plaintiffs seek to enforce a series of Guaranty Agreements (which are each described in paragraph 23 below) made by defendants Lightstone Holdings, LLC (“Lightstone”) and David Lichtenstein, pursuant to which they (as guarantors and primary obligors) owe plaintiffs \$100 million plus attorneys’ fees and costs as a result of their failure to pay upon demand a specific “Guaranteed Obligation” under a series of corresponding mezzanine loans that plaintiffs made to affiliates of Extended Stay Hotels L.L.C. (“ESH”), in all of which defendants had a direct or indirect interest. Plaintiffs bring this action in order to enforce defendants’ obligation under the Guaranty Agreements to pay those amounts.

3. In June 2007, Bank of America, Wachovia and Bear Stearns Commercial Mortgage, Inc. (“Bear Stearns”) (collectively, the “Lenders”) made a series of mezzanine loans to the chain of companies owned by ESH in connection with the mortgage loan that was extended to ESH, each of which loan is evidenced by a promissory note. As partial consideration for each of those mezzanine loans, defendants entered Guaranty Agreements corresponding to each one of those loans, pursuant to which defendants, as guarantors, became absolutely and unconditionally liable as primary obligors to pay, upon the borrowers’ default, the full amount of the outstanding indebtedness due under the mezzanine loans, subject in certain circumstances to a \$100 million cap.

4. The mezzanine loans were secured by the membership interests in each of the ESH entities to which each respective mezzanine loan was made, and the mezzanine loans were initially non-recourse. However, pursuant to each of the mezzanine loan agreements, the mezzanine loans were to become fully recourse to the Borrower, among other things, if and when the Borrower, the Mortgage Borrower, the Property Owner or a Senior Mezzanine Borrower (as those terms are uniformly defined in each of the mezzanine loan agreements

described in paragraph 17 below) filed a voluntary petition under the Bankruptcy Code. Further, the filing of a petition under the Bankruptcy Code by any of those entities is an event of default under the mezzanine loan agreements and makes the entire indebtedness due under those mezzanine loan agreements immediately due and payable.

5. On June 15, 2009, all of the Borrowers, as well as the Mortgage Borrower and the Property Owner, filed voluntary petitions under the Bankruptcy Code. The bankruptcy cases are administratively consolidated under the caption In re Extended Stay Hotels LLC, No. 09-13764-JMP (Bankr. S.D.N.Y.). As a result, the amounts that the ESH entities owed plaintiffs under the mezzanine loan agreements became immediately due and payable. Consequently, demand having been made, under the Guaranty Agreements, as primary obligors, defendants are obligated to make immediate payment of \$100 million, as well as costs and expenses (including reasonable attorneys' fees).

6. Despite demand having been made, defendants have failed to pay plaintiffs any of the indebtedness due under the Guaranty Agreements, and plaintiffs seek to recover those amounts in this action.

THE PARTIES

7. Bank of America is a national banking association, with its principal address at Hearst Tower, 214 North Tryon Street, Charlotte, North Carolina.

8. Wachovia is a national banking association, with its principal address at 8739 Research Drive URP-4, NC 1075, Charlotte, North Carolina.

9. Merrill Lynch is a Delaware corporation, with its principal address at 4 World Trade Center, New York, New York.

10. U.S. Bank National Association, suing not individually but solely in its capacity as the trustee for the Maiden Lane Commercial Mortgage Backed Securities Trust 2008-1 (the

“Maiden Lane Trust”), is a national banking association with the principal office of its trust department located at 60 Livingston Avenue, St. Paul, Minnesota. The Maiden Lane Trust holds various debt positions in ESH that it acquired by purchase of certain assets previously held by Bear Stearns, including, inter alia, positions in the Mezzanine Loans described in paragraph 17 hereof.

11. Debt II is a Delaware limited partnership, with its principal address at c/o Starwood Capital Group Global I, L.L.C., 591 West Putnam Avenue, Greenwich, Connecticut. Debt II holds various debt positions in ESH that it acquired by purchase of certain assets previously held by Wachovia, including, inter alia, positions in the Mezzanine Loan described in paragraph 17(a) hereof.

12. Debt-U is a Delaware limited partnership, with its principal address at c/o Starwood Capital Group Global I, L.L.C., 591 West Putnam Avenue, Greenwich, Connecticut. Debt U holds various debt positions in ESH that it acquired by purchase of certain assets previously held by Wachovia, including inter alia, positions in the Mezzanine Loan described in paragraph 17(a) hereof.

13. KeyBank is a national banking association, having an address at 225 Franklin Street, 18th Floor, Boston, Massachusetts.

14. On information and belief, Lightstone is a Delaware limited liability company with its principal place of business at 460 Park Avenue, New York, New York.

15. On information and belief, Lichtenstein is an individual residing at 326 Third Street, Lakewood, New Jersey. On information and belief, Lichtenstein is chief executive officer of Lightstone, and maintains his offices at Lightstone’s offices in New York, New York.

THE ESH LOANS

16. On or about June 11, 2007, the Lenders made five mezzanine loans to each of the following entities, respectively: ESH/Homestead Mezz L.L.C., ESA P Mezz L.L.C., ESA Mezz L.L.C., ESH/Homestead Mezz 2 L.L.C., ESA P Mezz 2 L.L.C., ESA Mezz 2 L.L.C., ESH/Homestead Mezz 3 L.L.C., ESA P Mezz 3 L.L.C., ESA Mezz 3 L.L.C., ESH/Homestead Mezz 4 L.L.C., ESA P Mezz 4 L.L.C., ESA Mezz 4 L.L.C., ESH/Homestead Mezz 5 L.L.C., ESA P Mezz 5 L.L.C. and ESA Mezz 5 L.L.C. (collectively, the "Borrowers"). The loans to the Borrowers are collectively referred to as the "Mezzanine Loans". Under the Mezzanine Loans, the Borrowers obtained loans in the aggregate amount of \$1.9 billion.

17. In connection with the Mezzanine Loans, the Lenders and Borrowers entered into the following loan agreements (collectively, the "Mezzanine Loan Agreements"):

- a. Mezzanine A Loan Agreement, dated as of June 11, 2007 (as amended, restated, replaced, supplemented or otherwise modified from time to time), by and among ESH/Homestead Mezz L.L.C., ESA P Mezz L.L.C. and ESA Mezz L.L.C. (collectively, as Borrower) and Wachovia Bank, N.A., Bear Stearns Commercial Mortgage, Inc. and Bank of America, N.A. (collectively, as Lender),
- b. Mezzanine B Loan Agreement, dated as of June 11, 2007 (as amended, restated, replaced, supplemented or otherwise modified from time to time), by and among ESH/Homestead Mezz 2 L.L.C., ESA P Mezz 2 L.L.C. and ESA Mezz 2 L.L.C. (collectively, as Borrower) and Wachovia Bank, N.A., Bear Stearns Commercial Mortgage, Inc. and Bank of America, N.A. (collectively, as Lender),

- c. Mezzanine C Loan Agreement, dated as of June 11, 2007 (as amended, restated, replaced, supplemented or otherwise modified from time to time), by and among ESH/Homestead Mezz 3 L.L.C., ESA P Mezz 3 L.L.C. and ESA Mezz 3 L.L.C. (collectively, as Borrower) and Wachovia Bank, N.A., Bear Stearns Commercial Mortgage, Inc. and Bank of America, N.A. (collectively, as Lender),
- d. Mezzanine D Loan Agreement, dated as of June 11, 2007 (as amended, restated, replaced, supplemented or otherwise modified from time to time), by and among ESH/Homestead Mezz 4 L.L.C., ESA P Mezz 4 L.L.C. and ESA Mezz 4 L.L.C. (collectively, as Borrower) and Wachovia Bank, N.A., Bear Stearns Commercial Mortgage, Inc. and Bank of America, N.A. (collectively, as Lender), and
- e. Mezzanine E Loan Agreement, dated as of June 11, 2007 (as amended, restated, replaced, supplemented or otherwise modified from time to time), by and among ESH/Homestead Mezz 5 L.L.C., ESA P Mezz 5 L.L.C. and ESA Mezz 5 L.L.C. (collectively, as Borrower) and Wachovia Bank, N.A., Bear Stearns Commercial Mortgage, Inc. and Bank of America, N.A. (collectively, as Lender).

18. True and correct copies of the pertinent sections of each of the Mezzanine Loan Agreements described in paragraph 17 hereof are annexed hereto as Exhibits A through E, respectively.

19. In connection with the Mezzanine Loans, the Borrowers signed corresponding promissory notes, dated June 11, 2007.

20. On December 16, 2008, the Borrowers signed replacement promissory notes for each Mezzanine Loan. The Borrowers signed the following replacement promissory notes (collectively, the "Notes"):

- a. Replacement Promissory Note, Mezzanine A Loan, dated as of December 16, 2008, by ESH/Homestead Mezz L.L.C., ESA P Mezz L.L.C. and ESA Mezz L.L.C. (collectively, as Borrower) to Debt II, Debt-U, Bear Stearns, Bank of America and KeyBank.
- b. Replacement Promissory Note, Mezzanine B Loan, dated as of December 16, 2008, by ESH/Homestead Mezz 2 L.L.C., ESA P Mezz 2 L.L.C. and ESA Mezz 2 L.L.C. (collectively, as Borrower) to Wachovia, Bear Stearns, Bank of America and Merrill Lynch.
- c. Replacement Promissory Note, Mezzanine C Loan, dated as of December 16, 2008, by ESH/Homestead Mezz 3 L.L.C., ESA P Mezz 3 L.L.C. and ESA Mezz 3 L.L.C. (collectively, as Borrower) to Wachovia, Bear Stearns, Bank of America and Merrill Lynch.
- d. Replacement Promissory Note, Mezzanine D Loan, dated as of December 16, 2008, by ESH/Homestead Mezz 4 L.L.C., ESA P Mezz 4 L.L.C. and ESA Mezz 4 L.L.C. (collectively, as Borrower) to Wachovia, Bear Stearns, Bank of America and Merrill Lynch.
- e. Replacement Promissory Note, Mezzanine E Loan, dated as of December 16, 2008, by ESH/Homestead Mezz 5 L.L.C., ESA P Mezz 5 L.L.C. and ESA Mezz 5 L.L.C. (collectively, as Borrower) to Wachovia, Bear Stearns, Bank of America and Merrill Lynch.

21. True and correct copies of each of the Notes described in paragraph 20 hereof are annexed hereto as Exhibits F through J, respectively.

22. As of and since December 16, 2008, Bank of America, Wachovia, Merrill Lynch, the Maiden Lane Trust, Debt II, Debt-U and KeyBank are the holders of the Notes corresponding to the Mezzanine Loans.

THE GUARANTY AGREEMENTS

23. In connection with and as partial consideration for the Mezzanine Loans, defendants each signed corresponding guaranty agreements. Those agreements are as follows (collectively, the "Guaranty Agreements"):

- a. Guaranty Agreement, Mezzanine A Loan, executed as of June 11, 2007 (as amended, restated, replaced, supplemented or otherwise modified from time to time), by Lightstone Holdings, LLC, David Lichtenstein, Extended Stay Inc. and Homestead Village L.L.C. (collectively, as Guarantor) for the benefit of Wachovia Bank, N.A., Bear Stearns Commercial Mortgage, Inc. and Bank of America, N.A. (collectively, Lender),
- b. Guaranty Agreement, Mezzanine B Loan, executed as of June 11, 2007 (as amended, restated, replaced, supplemented or otherwise modified from time to time), by Lightstone Holdings, LLC, David Lichtenstein, Extended Stay Inc. and Homestead Village L.L.C. (collectively, as Guarantor) for the benefit of Wachovia Bank, N.A., Bear Stearns Commercial Mortgage, Inc. and Bank of America, N.A. (collectively, Lender),
- c. Guaranty Agreement, Mezzanine C Loan, executed as of June 11, 2007 (as amended, restated, replaced, supplemented or otherwise modified from time to time), by Lightstone Holdings, LLC, David Lichtenstein, Extended

Stay Inc. and Homestead Village L.L.C. (collectively, as Guarantor) for the benefit of Wachovia Bank, N.A., Bear Stearns Commercial Mortgage, Inc. and Bank of America, N.A. (collectively, Lender),

- d. Guaranty Agreement, Mezzanine D Loan, executed as of June 11, 2007 (as amended, restated, replaced, supplemented or otherwise modified from time to time), by Lightstone Holdings, LLC, David Lichtenstein, Extended Stay Inc. and Homestead Village L.L.C. (collectively, as Guarantor) for the benefit of Wachovia Bank, N.A., Bear Stearns Commercial Mortgage, Inc. and Bank of America, N.A. (collectively, Lender), and
- e. Guaranty Agreement, Mezzanine E Loan, executed as of June 11, 2007 (as amended, restated, replaced, supplemented or otherwise modified from time to time), by Lightstone Holdings, LLC, David Lichtenstein, Extended Stay Inc. and Homestead Village L.L.C. (collectively, as Guarantor) for the benefit of Wachovia Bank, N.A., Bear Stearns Commercial Mortgage, Inc. and Bank of America, N.A. (collectively, Lender).

24. True and correct copies of each of the Guaranty Agreements described in paragraph 23 hereof are annexed hereto as Exhibits K through O, respectively.

25. Under Section 1.1 of each Guaranty Agreement, each Guarantor:

irrevocably and unconditionally guaranties to Lender [i.e., plaintiffs] and its successors and assigns the payment and performance of the Guaranteed Obligations as and when the same shall be due and payable, whether by lapse of time, by acceleration of maturity or otherwise. Guarantor hereby covenants and agrees that it is liable for the Guaranteed Obligations as a primary obligor.

26. Section 1.2 of each Guaranty Agreement defines "Guaranteed Obligations" as including, among other things, "the obligations or liabilities of Borrower to Lender under Section 9.4 of the Loan Agreement."

27. Section 9.4(b) of each Mezzanine Loan Agreement provides that, if (among others) the Mortgage Borrower, an Operating Lessee, a Mortgage Loan Principal, the Borrower, a Senior Mezzanine Borrower or the Property Owner (as those terms are defined in the Mezzanine Loan Agreements),¹ files a voluntary petition under the Bankruptcy Code, the debt due under the Mezzanine Loans becomes recourse to the Borrower and the Borrower is liable to plaintiffs for the full amount due under the Mezzanine Loans.

28. Section 1.2 of the Guaranty Agreements further provides that:

Notwithstanding any thing to the contrary in this Guaranty or any of other Loan Documents, the liability of Guarantor (x) to Lender in respect of the Guaranteed Obligations under this Guaranty arising under Section 9.4(a)(xiv) or Section 9.4(b) (other than clause (g)) of the Loan Agreement, (y) to Mortgage Lender in respect of the Guaranteed Obligations under and as defined in the Guaranty (as such term is defined in the Mortgage Loan Agreement) arising under Section 9.4(a)(xvi) or Section 9.4(b) of the Mortgage Loan Agreement and (z) to the Other Mezzanine Lenders in respect of the Guaranteed Obligations under and as defined in the Guaranty (as such term is defined in the Other Mezzanine Loan Agreements) arising under Section 9.4(a)(xiv) or Section 9.4(b) (other than clause (g)) of Section 9.4(b) of the Other Mezzanine Loan Agreements, shall not exceed One Hundred Million and No/100 Dollars (\$100,000,000.00) in the aggregate.

29. Under Section 5.6 of each Guaranty Agreement, defendants are jointly and severally liable for the obligations and liabilities owed under each of the Guaranty Agreements.

¹ The Borrowers under the Mezzanine Loan Agreements are the entities identified in paragraph 16 hereof.

DEFENDANTS' OBLIGATION TO PAY \$100 MILLION

30. On or about June 15, 2009, each of the Borrowers filed voluntary petitions under Chapter 11 of the Bankruptcy Code in the Southern District of New York, in derogation of Section 9.4(b) of the Mezzanine Loan Agreements. In addition, the Mortgage Borrower and the Operating Lessee also filed bankruptcy petitions as part of the same proceedings. Those bankruptcy proceedings are described in paragraph 5 hereof.

31. As a result of the voluntary petitions, under Section 9.4(b) of each of the Mezzanine Loan Agreements, each of the Borrowers thereby became obligated to pay immediately the full amount of the aggregate indebtedness due under the Mezzanine Loans and the Notes, i.e., \$1.9 billion.

32. Under Section 1.1 of each of the Guaranty Agreements, defendants are liable as primary obligors to pay immediately the full amount of the aggregate indebtedness due under Mezzanine Loans and Notes, subject to the cap of the \$100 million.

33. Plaintiffs have made demand on defendants for immediate payment of the Guaranteed Obligations due and owing under the Guaranty Agreements, i.e., \$100 million. True and correct copies of plaintiffs' demands are annexed hereto as Exhibit P.

34. Defendants have failed to pay any part of the Guaranteed Obligations.

35. Defendants have breached each of the Guaranty Agreements and are liable to plaintiffs in the amount of \$100 million.

36. In addition, under Section 1.8 of each of the Guaranty Agreements, defendants are obligated to pay any and all costs and expenses (including court costs and reasonable attorneys' fees) incurred by plaintiffs in connection with enforcing their rights under the Guaranty Agreements, including with respect to this action.

37. In connection with enforcing their rights under each of the Guaranty Agreements, each of plaintiffs have incurred costs, expenses, attorneys' fees and court costs, all of which they are entitled to recover under Section 1.8 of the Guaranty Agreements.

RELIEF REQUESTED

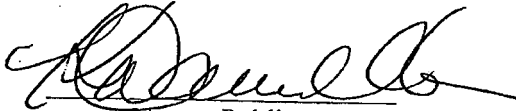
38. Accordingly, plaintiffs seek entry of an order granting them summary judgment and awarding them judgment in the amount of \$100 million jointly and severally against each of defendants Lightstone Holdings, LLC and David Lichtenstein, plus prejudgment interest on said amount at the interest rate set forth in Section 2.2 of each of the Mezzanine Loan Agreements.

39. In addition, plaintiffs seek entry of an order directing that an inquest be held with respect to the amount of costs, expenses, attorneys' fees and court costs that should be awarded to plaintiffs.



DAVID FALLICK

Sworn to before me this
6 day of July, 2009.



Notary Public

K. DANIELLE CALDWELL
Notary Public - State of New York
No. 01CH6081643
Qualified In New York County
My Commission Expires Dec. 04, 2010