By order of Justice Ramos, these motion papers may not be taken apart or otherwise tampered with.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

HYPO REAL ESTATE CAPITAL CORPORATION, on behalf of itself and certain other lenders,	:	Index No. 650871/2010-E Motion Sequence No. 3 Honorable Charles E. Ramos
Plaintiff,	:	
-against-	:	**AFFIDAVIT OF JEFFREY L. PHELPS IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**
THE RELATED COMPANIES, L.P., and PATRICK SMITH,	:	
Defendants.	:	

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

Jeffrey L. Phelps does affirm, depose, and say under penalty of perjury:

1. I submit this affidavit in support of Plaintiff's Motion for Partial Summary Judgment on the First Cause of Action of the Complaint in this matter, which seeks to enforce the Defendants' guarantee of a flat sum of money – $32.5 million (the "$32.5 Million Amount").

2. I was a Director and asset manager at Plaintiff Hypo Real Estate Capital Corporation ("Hypo" or the "Agent") from June 2004 until February 2011. I am currently Vice President at Strategic Asset Services LLC. In both roles, I have been responsible for servicing and managing the loan that underlies the current dispute. I make the following averments based upon my personal knowledge and my review of the relevant documents from Hypo's files.

The Loan Agreement

3. Hypo and various other lenders (collectively with their respective successors and assigns, the "Lenders") and Base Village Owner, LLC ("BVO" or the "Borrower") entered into a Loan and Security Agreement, dated March 1, 2007, which was amended first as of November 30, 2007, and second as of September 3, 2008 (collectively, the "Loan Agreement"). True and correct copies of the Loan and Security Agreement, the First Amendment to the Loan and Security Agreement, and the Second Amendment to the Loan and Security Agreement are attached hereto as Exhibits 1, 2, 3, respectively.

4. In the Loan Agreement, Hypo and other Lenders agreed to lend BVO up to $520,394,080 for the acquisition of land and the construction of improvements in connection with a ski resort complex called "Base Village" in the Town of Snowmass Village, Colorado (the "Project"). Ex. 1 at 1. The Project involved, among other things, the development of condominiums, hotels, retail space, community recreation facilities, skier services, and parking facilities.

5. The Loan Agreement divided the Loan into two Facilities for which the Borrower executed separate promissory notes: Facility A and Facility B.[1] Ex. 1 at 50, § 2.2. According to the Loan Agreement, Facility B matured on March 1, 2010. *Id.* at 22.

6. The Loan Agreement also divided the Project into five Phases. Phase I and Phase III involved the purchase of land *and* the construction of improvements on that land. Phases II, IV and V involved only the purchase of land. Ex. 1 at 41-42.

7. Under the Loan Agreement, the Borrower was to make certain Required Land Release Payments for the Phase II, IV and V Land.[2] Ex. 3 § 2.9 (Amending Schedule 2.4.11).

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[1] All capitalized terms not otherwise defined herein have the meaning provided in the Loan Agreement.

8. If the Borrower made those payments, the underlying land would be released from the lien of the Security Instrument, and the Borrower would have no further obligation to make interest payments with respect to the portion of the land that was released. Ex. 1 §§ 8.2.4, 2.6.6. If the Required Land Release Payments were not made on or before their due dates, the Borrower was required to pay specified Monthly Amounts until such time as the Required Land Release Payments were made.[3] *Id.* § 2.4.11.

9. When the Loan Agreement was executed, the Lenders advanced $34,471,942 for the purchase of the Phase II, IV, and V Land, $31,061,747 for the purchase of the Phase I Land and the initial construction loan for Phase I, and $62,779,330 for the purchase of the Phase III Land and pre-construction work in connection with Phase III.[4]

10. Today, Phase I is substantially complete. Phase III, which was to be a hotel condominium called "The Viceroy" was bifurcated by the parties into two parts – Building 13A and Building 13B. Building 13A is largely complete; Building 13B is not.

The Payment Guaranty

11. The Borrower's obligations under the Loan Agreement were secured by guaranties executed by owners of direct or indirect interests in the Borrower, including an

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[2] Land Release Payments for Phase V were divided into three distinct lots in the Second Amendment to the Loan Agreement. Phelps Aff. Ex. 3 § 2.9 (Amending Schedule 2.4.11).

[3] The Loan Agreement linked these Required Land Release Payments to the Facility B Loan in that the Required Land Release Payments, which aggregate to $202,473,139, applied first to the Facility B Note, the principal of which was $174,473,139. *See, e.g.,* Ex. 1 at 17, §2.6.6(b)(ii), Ex. 3 § 2.9.

[4] Unlike Phase I, which was ready for construction in March 2007, Phase III was in a development stage. Accordingly, the Loan Agreement provided for the Lenders to advance up to $37.5 million to cover certain pre-construction work for Phase III (the "Initial Advance for Phase III Work"). Ex. 1 at 42. In the First Amendment to the Loan Agreement, the parties increased the Initial Advance for Phase III Work to $72 million. Ex. 2 § 2.1(a). To obtain funding beyond the Initial Advance for Phase III Work (*i.e.*, to obtain a construction loan), the Borrower had to satisfy seven enumerated "Phase III Additional Requirements," all but one of which required the Agent's approval. Ex. 1 § 3.3.6. There is a dispute as to whether the Borrower satisfied the Phase III Additional Requirements for Building 13B. That dispute is relevant to the Second Cause of Action, which is not the subject of this motion. It has no bearing on the First Cause of Action which concerns the guaranty of a flat sum of money (*i.e.*, the $32.5 Million Amount).

Amended and Restated Guaranty of Payment, dated as of November 30, 2007, which was amended as of July 1, 2008, executed by The Related Companies L.P. ("Related") and Patrick Smith ("Smith," collectively the "Guarantors") (the "Payment Guaranty"). True and correct copies of the Amended and Restated Guaranty of Payment and the Amendment to the Payment Guaranty are attached hereto as Exhibits 4 and 5.

12. In the Payment Guaranty, the Guarantors unconditionally and absolutely agreed to guaranty the Borrower's repayment of three categories of principal: (a) $32,500,000, (b) the Advances for Project Costs relating to Phase III Work in excess of $37,500,000 (referred to in the Payment Guaranty as the "Additional Phase III Advances"), and (c) $1,521,319 (referred to in the Payment Guaranty as the "Increased Liability Amount"). Ex. 5 § 2. These three categories, collectively, are the "Guaranteed Obligations" under the Payment Guaranty. *Id.*

13. The Payment Guaranty states that the Guaranteed Obligations are irrevocable, unconditional and absolute. Ex. 4 § 1.2. The Payment Guaranty further provides that the Guarantors' obligations cannot be released or reduced by, among other things, defenses of the Borrower (*id.* at § 2.4), or any other action or omission, it being "the unambiguous and unequivocal intention of Guarantors that Guarantors shall be obligated to pay the Guaranteed obligations when due, notwithstanding any occurrence, circumstance, event, action, or omission whatsoever..." *Id.* at § 2.13.

14. Each of these three categories is subject to a separate termination event. The guarantee of the $32.5 Million Amount was to terminate upon (a) the receipt by Hypo of Bona Fide Sales Contracts for condominium units from Phase I and Phase III sufficient to provide Net Sales Proceeds of at least $380 million and (b) the Required Land Release Payment for the Phase II Land. Ex. 4, § 1.1.

15. The Payment Guaranty defines the Guaranteed Obligations as follows:

> ***Guaranteed Obligations*** shall mean the prompt and unconditional payment by Borrower of the principal amount of the Loan, whether now or hereafter advanced, as the same shall become due and payable under the Note and the Loan Agreement, whether at stated maturity, by acceleration or otherwise, provided, however, that Guarantors' aggregate liability in respect of the principal amount of the Loan under this Guaranty (the ***Principal Liability***) shall be limited to the sum of (a) $32,500,000.00, (b) an amount (the ***Additional Phase III Advances***) equal to the aggregate principal amount of Advances made to Borrower with respect to the Project Costs related to the Phase III Work in excess of $37,500,000.00, and (c) $1,521,319.00 (the ***Increased Liability Amount***), and provided, further, that (i) the Guaranteed Obligations hereunder shall be reduced by $32,500,000.00 upon receipt by Agent of (a) Bona Fide Sales Contracts for Units in Phase I and Phase III of Base Village sufficient to provide Net Sales Proceeds of not less than $380,000,000.00, and (b) the Required Land Release Payment for the Phase II Land, (ii) the Guaranteed Obligations hereunder shall be reduced by the amount of the Additional Phase III Advances upon satisfaction of the Phase III Additional Requirements (as defined in the Loan Agreement) in accordance with Section 3.3.6 of the Loan Agreement, and (iii) the Increased Liability Amount hereunder shall be reduced on a dollar-for-dollar basis upon each reduction of the face amount of the Metro Bond Letter of Credit, and shall reduce to zero upon any surrender of the Metro Bond Letter of Credit to Agent.

Ex. 5 § 2 (emphasis in original).

16. The Payment Guaranty provides for Hypo to make a demand upon the Guarantors if the Borrower does not pay the Guaranteed Obligations when due:

> If all or any part of the Guaranteed Obligations shall not be punctually paid when due, whether at demand, maturity, acceleration or otherwise, Guarantor shall, immediately upon demand by Agent and without presentment, protest, notice of protest, notice of non-payment, notice of intention to accelerate the maturity, notice of acceleration of the maturity or any other notice whatsoever, pay in lawful money of the United States of America, the amount due on the Guaranteed Obligations to Agent at Agent's address as set forth herein. Such demand(s) may be made at any time coincident with or after the time for payment of all or part of the Guaranteed Obligations and may be made from time to time with respect to the same or different items of Guaranteed

> Obligations. Such demand shall be deemed made, given and received in accordance with the notice provisions hereof . . .

Ex. 4 § 1.4.

17. If the Guarantors do not remit the amount due within five days of such a demand, the Guarantors are required to pay interest at the Default Rate (as defined in the Loan Agreement) from the date of the demand through the date upon which all of the Guaranteed Obligations are satisfied. Ex. 4 § 1.4.

The Borrower's Default

18. On March 1, 2009, BVO failed to make the Required Land Release Payment regarding the Phase V land, and became liable for Phase V Monthly Payments in addition to the Monthly Payments it had already been making related to the Phase II Land and the Phase IV Land.[5] Ex. 3 § 2.9.

19. Thereafter, BVO failed to pay the Monthly Amounts due for the Phase II, IV and V land.

20. On April 3, 2009, Hypo sent the Borrower a letter declaring it in default under the Loan Agreement for failure to pay the Monthly Amounts (the "April 2009 Default Notice"). A true and correct copy of the April 2009 Default Notice is attached hereto as Exhibit 6.

21. The Borrower did not issue a response to the April 2009 Default Notice, and has not paid any Monthly Amounts since the April 2009 Default Notice.

22. On March 1, 2010, the Facility B Loan matured. Ex. 1 at 22.

23. The Borrower failed to pay the outstanding amount for Facility B on that date (or any date thereafter).

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[5] The Borrower began paying Monthly Amounts with respect to the Phase II Land in November 2007. In August 2008, it began paying Monthly Amounts for the Phase IV Land. As of April 1, 2009, the Monthly Amounts totaled $1,250,000 per month ($15 million per year). Ex. 3 § 2.9.

24. On March 23, 2010, Hypo noticed this failure as an Event of Default (the "March 2010 Default Notice"). A true and correct copy of the March 2010 Default Notice is attached hereto as Exhibit 7.

The Pre-Negotiation Agreement

25. In connection with April 2009 Default Notice, Related and the Borrower asked to meet with Hypo to discuss the status of the Loan, and on April 17, 2009, Hypo, the Borrower, and the Guarantors executed a Pre-Negotiation Agreement to facilitate those discussions. A true and correct copy of the Pre-Negotiation Agreement is attached hereto as Exhibit 8.

26. The Pre-Negotiation Agreement provides in part:

> Notwithstanding any other provisions of this letter or any claims of the parties to the contrary, but subject to any defense Borrower may have, if any, against Agent or the Lenders, *the Loan Documents are hereby ratified and confirmed and are in full force and effect*, and shall remain in full force and effect until an agreement modifying the Loan Documents is executed and delivered by the parties hereto and then only to the extent such agreement modifies the Loan Documents.

Ex. 8 ¶ 6 (emphasis added).

The Loan Advance Agreements

27. Starting in April 2009, and continuing into June 2010, the Lenders advanced an additional $83 million to the Borrower in connection with the Project. Each advance was made pursuant to a separate "Agreement with Respect to Requested Loan Advance and Reservation of Rights" (a "Loan Advance Agreement") between Hypo, the Borrower and the Guarantors. Hypo and the Borrower entered into 13 Loan Advance Agreements. The first Loan Advance Agreement was entered into on April 16, 2009. The last Loan Advance Agreement was made in June 2010. True and correct copies of each of the thirteen Loan Advance Agreements are attached hereto as Exhibits 9 through 21, respectively.

28. In each Loan Advance Agreement, the Lenders agreed to make an Advance in exchange for and in reliance on various representations from Borrower and Guarantors, including that, "all of the Loan Documents . . . are unmodified, and in full force and effect and . . . to . . . [each Obligor's] . . . knowledge . . . neither Agent nor any of the Lenders are in default of any of their respective obligations under the Loan Documents." [6] Exs. 9-18 ¶ 3; Exs. 19-21 ¶ 6.

The Acceleration of the Loan and the Demand for Payment under the Payment Guaranty

29. On July 6, 2010, Hypo sent a letter to the Borrower (the "Acceleration Letter") noticing the existence of various Events of Default, including the Borrower's failure to pay the Monthly Amounts and its failure to pay the Facility B Note when it matured. A true and correct copy of the Acceleration Letter is attached hereto as Exhibit 22.

30. The Acceleration Letter demanded immediate payment of the full outstanding principal balance of the Loan, as well as interest accrued on the principal prior to April 10, 2009, accrued interest at the Default Rate beginning on April 10, 2009, and late payment charges, for a total demand of $434,539,356.71 plus attorneys' fees and other costs incurred by the Lenders related to this matter. Ex. 22.

31. The Borrower has not remitted any of the outstanding principal or other demanded payments.

32. On July 8, 2010, Hypo sent a letter to the Guarantors (the "Demand Letter"), demanding payment by the Guarantors of the Guaranteed Obligations pursuant to the Payment Guaranty. A true and correct copy of the Demand Letter is attached hereto as Exhibit 23.

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[6] Starting with the second Loan Advance Agreement, this representation was followed by the caveat that "the foregoing shall not constitute an acknowledgment or confirmation by the applicable Obligor that it does not have, and shall not constitute a waiver of, any claims, counterclaims, offsets, abatements or deductions against or related to any of its obligations under the Loan Documents or otherwise against Agent or any Lender." *See, e.g.,* Ex. 10 ¶ 3.

33. The Guarantors have not remitted to Hypo any of the amounts listed as due in the Demand Letter.

34. Neither of the termination events with respect to the $32.5 Million Amount has occurred. Hypo has not received Bona Fide Sales Contracts for condominium units for Phase I and III sufficient to provide Net Sales Contracts of $380 million (or anything near that amount). Moreover, the Required Land Release Payment for the Phase II Land has never been made.

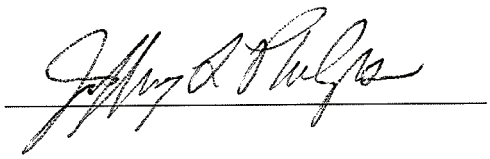
35. As of June 2010, when the last Loan Advance Agreement was signed, the outstanding principal balance on the Loan was $386,062,978. Ex. 21 ¶ 6. Hypo has not received any repayment of the principal from BVO, Related, or Smith. As of June 25, 2010, the date of the draw made per the June 2010 Loan Advance Agreement, the total amount advanced to the Borrower, inclusive of principal and interest, was $487,183,643.

The Lenders Exercise Their Remedies

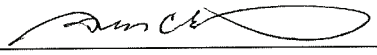
36. Hypo also commenced a non-judicial foreclosure proceeding and a receivership action in Colorado against the Project. A Receiver has been appointed for the property, but the foreclosure sale has not yet occurred.

37. The Lenders have since made advances to the Borrower via the Receiver; as a result, as of August 31, 2011, the principal balance of the Loan was $399,389,571, and the total amount advanced is $504,518,381.

Dated: New York, New York
September 27, 2011



Sworn to and subscribed before me this
27th day of September, 2011



NOTARY PUBLIC

JAMES C. REID
Notary Public, State of New York
No.01RE6243326
Qualified in Westchester County
Commission Expires June 20, 2015