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PREPARED BY AND UPON  
RECORDATION PLEASE  
RETURN TO:  
Cadwalader, Wickersham & Taft  
100 Maiden Lane  
New York, New York 10038  
Attention: William P. McNerney,  
Esq.

0001001638  
8064/0125 45 001 Page 1 of 40  
2000-12-21 11:40:05  
Cook County Recorder 99.00

Property of Cook County Clerk's Office

BEAR, STEARNS FUNDING, INC., as mortgage lender  
and  
STARWOOD HOTELS & RESORTS WORLDWIDE, INC., as mezzanine lender  
(Lender)

INTERCREDITOR AGREEMENT

Dated: As of December 15, 2000  
Location: The Westin River North, Chicago  
320 North Dearborn Street  
Chicago, Illinois  
County: Cook

BOX 333-CT1

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## INTERCREDITOR AGREEMENT

**INTERCREDITOR AGREEMENT** (this "**Agreement**"), dated as of December 15, 2000, between **BEAR, STEARNS FUNDING, INC.**, a Delaware corporation, having an address at 245 Park Avenue, New York, New York 10167 (in such capacity, together with its successors and assigns, "**Mortgage Lender**"), and **STARWOOD HOTELS & RESORTS WORLDWIDE, INC.**, a Maryland corporation, having an address at 777 Westchester Avenue, White Plains, New York 10604 (in such capacity, together with its successors and assigns, "**Mezzanine Lender**").

WHEREAS, pursuant to a certain Loan Agreement, dated as of December 15, 2000 (as amended, supplemented or otherwise modified from time to time, the "**Mortgage Loan Agreement**"), Mortgage Lender has made a loan in the principal amount of \$78,000,000, (the "**Mortgage Loan**") to THR Chicago LLC, a Delaware limited liability company ("**Mortgage Borrower**"), which Mortgage Loan is secured by that certain Mortgage and Security Agreement, dated as of the date hereof, by and between Mortgage Lender and Mortgage Borrower ("**Mortgage**") encumbering that certain parcel of land in the City of Chicago, County of Cook and State of Illinois, as more particularly described on Exhibit A attached hereto;

WHEREAS, pursuant to a certain Promissory Note, dated as of December 15, 2000, made by to THR Chicago Holding LLC, a Delaware limited liability company ("**Mezzanine Borrower**") in favor of Mezzanine Lender (the "**Mezzanine Note**") and a certain Pledge and Security Agreement, dated as of December 15, 2000 between Mezzanine Borrower and Mezzanine Lender (the "**Pledge Agreement**"); the Mezzanine Note, the Mezzanine Pledge and related UCC-1 Financing Statements, as each may be amended, supplemented or otherwise modified in accordance with this Agreement and in effect from time to time, collectively, the "**Mezzanine Loan Documents**"), Mezzanine Lender has made a loan in the principal amount of \$35,000,000, (the "**Mezzanine Loan**"); and

NOW, THEREFORE, in consideration of the foregoing, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

**1. Defined Terms.** The following terms shall have the meanings herein specified unless the context otherwise requires (such meanings to apply to such terms in both the singular and plural forms):

"**Affiliate**" shall mean, as to any Person, any other Person that, directly or indirectly, owns more than fifty percent (50%) of, is in control of, is controlled by or is under common ownership or control with such Person or is a director or officer of such Person or of an Affiliate of such Person. As used in this definition, the term "**control**" means the possession, directly or indirectly, of the power to direct or cause the direction of the management, policies or activities of a Person, whether through ownership of voting securities, by contract or otherwise.

"**Certificates**" shall mean any securities representing beneficial interests in the Mortgage Loan or in a pool of mortgage loans including the Mortgage Loan.

"**Fitch**" means Fitch IBCA, Inc.

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**“Mezzanine Event of Default”** shall mean a “Default” under and as defined in the Mezzanine Loan Documents.

**“Mezzanine Loan Collateral”** shall mean all equity interests in Mortgage Borrower pledged to Mezzanine Lender as security for the Mezzanine Loan.

**“Mezzanine Loan Liabilities”** shall mean, collectively, all of the indebtedness, liabilities and obligations of Mezzanine Borrower evidenced by the Mezzanine Loan Documents and all amounts due or to become due pursuant to the Mezzanine Loan Documents, including interest thereon and any other amounts payable in respect thereof or in connection therewith, including, without limitation, any late charges, default interest, prepayment fees or premiums, exit fees, advances and post-petition interest.

**“Moody’s”** means Moody’s Investors Service, Inc.

**“Mortgage Event of Default”** shall mean an “Event of Default” under and as defined in the Mortgage Loan Agreement.

**“Mortgage Loan Documents”** shall mean the “Loan Documents,” as defined in the Mortgage Loan Agreement.

**“Mortgage Loan Liabilities”** shall mean, collectively, all of the indebtedness, liabilities and obligations of Mortgage Borrower evidenced by the Mortgage Loan Documents and all amounts due or to become due pursuant to the Mortgage Loan Documents, including interest thereon and any other amounts payable in respect thereof or in connection therewith, including, without limitation, any late charges, default interest, prepayment fees or premiums, exit fees, advances and post-petition interest.

**“Non-Consolidation Opinion”** shall mean a legal non-consolidation opinion that is either (a) acceptable to the Rating Agencies, or (b) substantially in form and substance as Exhibit B attached hereto, as the same may be further revised, as required, to reflect any changes in the applicable law, the then current standards of the Rating Agencies or the subject matter thereof.

**“Person”** shall mean any individual, corporation, partnership, limited liability company, joint venture, estate, trust, unincorporated association, any other entity, any federal, state, county or municipal government or any bureau, department or agency thereof and any fiduciary acting in such capacity on behalf of any of the foregoing.

**“Property”** shall have the meaning set forth in the Mortgage Loan Agreement.

**“Qualified Manager”** means (a) Westin River North Management Company or its Affiliate, or (b) a property manager of the Property which is a reputable management company having at least five (5) years’ experience in the management of commercial properties with similar size, scope, use and value as the Property and in the jurisdiction in which the Property is located.

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**“Qualified Transferee”** means (a) Mezzanine Lender or an Affiliate of Mezzanine Lender, or (b) one or more of the following: (i) a real estate investment trust, bank, saving and loan association, investment bank, insurance company, trust company, commercial credit corporation, pension plan, pension fund or pension advisory firm, mutual fund, government entity or plan, (ii) investment company, money management firm or “qualified institutional buyer” within the meaning of Rule 144A under the Securities Act of 1933, as amended, which is regularly engaged in the business of making or owning loans of similar types to the Mezzanine Loan, (iii) a trustee in connection with a securitization of the Mezzanine Loan, so long as such trustee or the servicer therefor is an entity that otherwise would be a Qualified Transferee, (iv) an institution substantially similar to any of the foregoing, in each case of clauses (b) (i), (ii), (iii) or (iv) of this definition, which (A) has the Required Assets and, except with respect to a pension advisory firm or similar fiduciary the Required Capital/Equity, and (B) is regularly engaged in the business of making or owning commercial loans, (v) any entity Controlled (as defined below) by any of the entities described in clause (b) above or (vi) any other entity approved by the Rating Agencies. For purposes of this definition only, “Control” means the ownership, directly or indirectly, in the aggregate of more than fifty percent (50%) of the beneficial ownership interest of an entity and the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of an entity, whether through the ability to exercise voting power, by contract or otherwise.

**“Rating Agencies”** shall mean, prior to the final Securitization of the Mortgage Loan, each of Standard & Poor’s, Moody’s, and Fitch, or any other nationally-recognized statistical rating agency which has been designated by Mortgage Lender and, after the final Securitization of the Mortgage Loan, shall mean any of the foregoing that have rated any of the Certificates.

**“Rating Agency Confirmation”** shall mean a written affirmation from each of the Rating Agencies that the credit rating of the Certificates assigned by such Rating Agency immediately prior to the occurrence of the event with respect to which such Rating Agency Confirmation is sought will not be qualified, downgraded or withdrawn as a result of the occurrence of such event.

**“Required Assets”** shall mean total assets (in name or under management) in excess of (a) \$600,000,000 if Standard & Poor’s is an applicable Rating Agency, (b) \$1,000,000,000 if Moody’s is an applicable Rating Agency, and (c) \$12,000,000,000 if Fitch is an applicable Rating Agency.

**“Required Capital/Equity”** shall mean capital/statutory surplus or shareholder’s equity of no less than (a) \$200,000,000 if Standard & Poor’s is an applicable Rating Agency, (b) \$500,000,000 if Moody’s is an applicable Rating Agency, and (c) \$250,000,000 if Fitch is an applicable Rating Agency.

**“Securitization”** shall have the meaning set forth in the Mortgage Loan Agreement.

**“Standard & Poor’s”** means Standard & Poor’s Ratings Services, a division of The McGraw-Hill Companies, Inc.

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“**Transfer**” means to sell, assign, convey, transfer, mortgage, encumber, grant a security or other interest in, pledge or otherwise dispose of, or where used as a noun, a sale, assignment, conveyance, transfer, mortgage, encumbrance, lien, grant of a security or other interest in, pledge or other disposition.

2. **Consent to Mezzanine Loan and Pledge of Mezzanine Loan Collateral.** Mortgage Lender hereby acknowledges that Mezzanine Lender is making the Mezzanine Loan to Mezzanine Borrower. Mortgage Lender hereby consents to Mezzanine Lender making the Mezzanine Loan to Mezzanine Borrower, to the execution and delivery of the Mezzanine Loan Documents to Mezzanine Lender and to the liens and security interests in the Mezzanine Loan Collateral created in favor of Mezzanine Lender by the Mezzanine Loan Documents. Mortgage Lender hereby acknowledges and agrees that any conditions precedent to Mortgage Lender’s consent to mezzanine financing on the Property as set forth in the Mortgage Loan Documents or any other agreements with Mortgage Borrower, as they apply to the Mezzanine Loan Documents or the making of the Mezzanine Loan, have been either satisfied or waived.

3. **Rating Agency Confirmation.** (a) If there are any Certificates outstanding, then, without receiving a Rating Agency Confirmation, Mezzanine Lender shall not take the following actions:

(i) transfer any or all of its interest in the Mezzanine Loan to any Person other than a Qualified Transferee; and

(ii) exercise its rights under the Mezzanine Loan Documents to obtain title to any of the Mezzanine Loan Collateral unless (A) the transferee of the title to the Mezzanine Loan Collateral is a Qualified Transferee (or was a Qualified Transferee at the time it acquired the Mezzanine Loan), (B) the Property will be managed by a Qualified Manager after the transfer of title and (C) the transferee delivers a Non-Consolidation Opinion. No transfer fee under the Mortgage Loan shall be payable in connection with any transfer resulting from the exercise of Mezzanine Lender’s remedies under the Mezzanine Loan Documents.

(b) In the event that no Certificates are outstanding, Mezzanine Lender shall be required to obtain the consent of Mortgage Lender (which shall not be unreasonably withheld, conditioned or delayed) prior to taking any action that would otherwise require a Rating Agency Confirmation pursuant to Section 3(a).

4. **Mezzanine Loan Payments; Constructive Trust.** In the event Mezzanine Lender receives any payment or other distribution of any kind or character directly or indirectly from Mortgage Borrower or the Property prior to the satisfaction in full of the Mortgage Loan Liabilities, other than as expressly provided for by the terms of the Mezzanine Loan Documents or permitted by the terms of this Agreement and the Mortgage Loan Documents, such payment or other distribution shall be received and shall be held by Mezzanine Lender in trust for Mortgage Lender and promptly turned over by Mezzanine Lender to Mortgage Lender. Mezzanine Lender shall execute such further documents or instruments and

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take such further action as Mortgage Lender may reasonably require from time to time to carry out the intent of this Agreement.

## **5. Amendments to Loan Documentation; Mezzanine Borrower Organizational Documents.**

(a) Notwithstanding any provision in the Mezzanine Loan Documents, Mortgage Lender shall have the right to enter into, execute and agree to modify, amend, consolidate, spread, restate or waive any provision of the Mortgage Loan Documents without obtaining the consent of Mezzanine Lender.

(b) Mortgage Lender shall deliver to Mezzanine Lender copies of any and all modifications, amendments, extensions, consolidations, spreaders, restatements, alterations, changes or revisions to any one or more of the Mortgage Loan Documents (including, without limitation, any side letters, waivers or consents entered into, executed or delivered by Mortgage Lender) within five (5) Business Days after any of such applicable instruments have been executed by Mortgage Lender.

(c) Notwithstanding any provision in the Mortgage Loan Documents, Mezzanine Lender shall have the right to enter into, execute and agree to modify, amend, consolidate, spread, restate or waive any provision of the Mezzanine Loan Documents without obtaining the consent of Mortgage Lender, provided no such modification, amendment, consolidation, spreader, restatement or waiver shall (i) increase the principal amount secured by the Mezzanine Loan, (ii) increase the interest rate payable under the Mezzanine Loan, (iii) provide for the payment of any additional interest, kicker or similar equity feature, (iv) modify the maturity date of the Mezzanine Loan, (v) spread the lien of the Mezzanine Loan to encumber any additional collateral, or (vi) cross-default the Mezzanine Loan with any other indebtedness. Notwithstanding the foregoing, any amounts funded by Mezzanine Lender under the Mezzanine Loan Documents as a result of (A) the making of any protective advances or other advances by Mezzanine Lender expressly permitted by the terms of the Mezzanine Loan Documents and this Agreement, or (B) interest accruals or accretions and any compounding thereof (including default interest) shall not at any time be deemed to contravene this Section 5(c).

(d) Mezzanine Lender shall deliver to Mortgage Lender copies of any and all modifications, amendments, extensions, consolidations, spreaders, restatements, alterations, changes or revisions to any one or more of the Mezzanine Loan Documents respectively (including, without limitation, any side letters, waivers or consents entered into, executed or delivered by Mezzanine Lender) within five (5) Business Days after any of such applicable instruments have been executed by Mezzanine Lender, as applicable.

(e) Mezzanine Lender shall consent to the amendment or modification of Mezzanine Borrower's organizational documents upon request by Mortgage Lender in order to satisfy requests made by the Rating Agencies rating any Certificates, provided, that any such amendment or modification shall not materially impair the rights of the "Starwood Manager" (as defined therein).

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6. Additional Rights and Limitations of Mezzanine Lender. For as long as the Mezzanine Loan remains outstanding:

(a) Notices of Transfer, etc. Mortgage Lender immediately shall notify Mezzanine Lender if Mortgage Borrower seeks or requests a release of the Lien of the Mortgage Loan or seeks or requests Mortgage Lender's consent to, or take any action in connection with or in furtherance of, a Transfer of the Property or a prepayment or refinancing of the Mortgage Loan. In the event of a request by Mortgage Borrower for a Transfer of all or substantially all of the Property, Mortgage Lender shall, if Mortgage Lender has the right to consent, obtain the prior written consent of Mezzanine Lender prior to Mortgage Lender's granting of its consent or agreement thereto, provided, that, in the event of any disagreement between Mortgage Lender and Mezzanine Lender regarding consent to any such Transfer, the right of Mezzanine Lender to consent to such Transfer shall be subject and limited to all rights of Mortgage Lender pursuant to the Mortgage Loan Documents.

(b) Books and Records. Upon any inspection of the books, records or Property of Mortgage Borrower by Mortgage Lender pursuant to the terms of the Mortgage Loan Documents, Mortgage Lender shall, upon request of Mezzanine Lender, take all action to provide Mezzanine Lender access for its own inspection of such books, records or Property, and the Mortgage Lender shall, at the request and on behalf of Mezzanine Lender, discuss the business, financial and other condition of Mortgage Borrower and Mezzanine Borrower, as applicable, with officers of Mortgage Borrower and Mezzanine Borrower, as applicable, and the accountants and other representatives of Mortgage Borrower and Mezzanine Borrower, as applicable.

(c) Mortgage Borrower's Organizational Documents. Mortgage Lender shall not require any material amendment or modification of the provisions of Mortgage Borrower's organizational documents relating to the "Starwood Manager" (as defined therein).

(d) Financial Statements. Mortgage Lender shall provide Mezzanine Lender with copies of each financial statement required to be delivered to Mortgage Lender pursuant to the terms of the Mortgage Loan Documents within one (1) Business Day after receipt by Mortgage Lender.

(e) Intentionally Omitted.

(f) No Consent Rights of Mezzanine Lender. Mezzanine Lender acknowledges that the Mezzanine Loan Documents do not contain any provision or requirement that Mezzanine Lender's consent or approval be obtained for any actions or determinations by Mortgage Borrower or Mezzanine Borrower in connection with the leasing of the Property or alterations to the Property.

(g) Mezzanine Lender hereby waives any equitable right it may have to require that Mortgage Lender marshal any assets of Mortgage Borrower in favor of Mezzanine Lender, to require the separate sales of any portion of the Property or to require that the Mortgage Lender exhaust its remedies against any portion of the Property. Mezzanine Lender agrees that, except with respect to the enforcement of its remedies under the Mezzanine Loan

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Documents permitted hereunder, prior to the satisfaction of all Mortgage Loan Liabilities it shall not acquire, by subrogation or otherwise, any lien, estate, right or other interest in any portion of the Property or any other collateral now securing the Mortgage Loan or the proceeds therefrom that is or may be prior to, or of equal priority to, the lien of any of the Mortgage Loan Documents or the liens, rights, estates and interests created thereby.

7. **Notices of Default; Cure Rights of Mezzanine Lender.** (a) Mezzanine Lender shall give Mortgage Lender notice of any Mezzanine Event of Default and, simultaneously with giving such notices to Mezzanine Borrower, copies of notices given to Mezzanine Borrower of events that with the passage of time and failure to cure, would result in the occurrence of a "Default" or "Event of Default" under the Mezzanine Loan Documents.

(b) Mortgage Lender shall give Mezzanine Lender notice of any Mortgage Event of Default and, simultaneously with giving such notices to Mortgage Borrower, copies of notices given to Mortgage Borrower of events that with the passage of time and failure to cure, would result in the occurrence of a "Default" or "Event of Default" under the Mortgage Loan Documents. In no event shall Mortgage Lender accelerate the Mortgage Loan Liabilities or commence any enforcement action under the Mortgage Loan Documents without providing prior notice thereof to Mezzanine Lender. Any right to an extended grace period granted to Mezzanine Lender pursuant to Section 7(c) below shall be limited to the first two (2) such notices given in any twelve (12) month period.

(c) If the notice delivered by Mortgage Lender to Mezzanine Lender relates to a default by Mortgage Borrower in its obligation to pay money under the Mortgage Loan Documents (a "**Monetary Default**"), Mortgage Lender agrees that Mezzanine Lender shall have the right, but not the obligation, to cure such Monetary Default within three (3) days after such notice is given pursuant to Section 12(c) below. If the notice delivered by Mortgage Lender relates to a default by Mortgage Borrower with respect to its failure to perform any of its other obligations (other than an obligation to pay money) under the Mortgage Loan Documents (a "**Non-Monetary Default**"), Mortgage Lender agrees that Mezzanine Lender shall have the right, but not the obligation, to cure such Non-Monetary Default within the cure periods set forth in the Mortgage Loan Documents. Under no circumstances shall any action taken by Mezzanine Lender to cure any default of Mortgage Borrower under the Mortgage Loan Documents provide Mezzanine Lender with any claim against Mortgage Borrower with respect to the Mortgage Loan until the Mortgage Loan is paid in full, provided, that any such cure shall in no event be deemed a waiver, limitation or reduction of any of Mezzanine Lender's rights regarding the Mezzanine Loan Collateral or remedies against Mezzanine Borrower pursuant to the Mezzanine Loan Documents and this Agreement.

8. **Right to Purchase Mortgage Loan.** If the Mortgage Loan has been accelerated, or any proceeding to foreclose or otherwise enforce the Mortgage or other security for the Mortgage Loan has been commenced, upon ten (10) business days prior written notice to Mortgage Lender, Mezzanine Lender shall have the right to purchase, in whole but not in part, the Mortgage Loan for a price equal to the outstanding principal balance thereof together with all accrued interest and other amounts due thereon (including, without limitation any late charges, default interest, prepayment fees or premiums, exit fees, advances and post-petition interest), and any taxes, assessments, or insurance premiums and other amounts advanced by Mortgage

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Lender, including all costs and expenses actually incurred by Mortgage Lender in enforcing the terms of the Mortgage Loan Documents (the “**Mortgage Loan Purchase Price**”). Concurrently with payment to Mortgage Lender of the Mortgage Loan Purchase Price, Mortgage Lender will execute in favor of Mezzanine Lender or its designee assignment documentation, in form and substance reasonably acceptable to Mezzanine Lender, at the sole cost and expense of Mezzanine Lender, to assign the Mortgage Loan and its rights under the Mortgage Loan Documents and its rights in any pending foreclosure proceeding (without recourse, representations or warranties, except for representations as to the outstanding balance of the Mortgage Loan and as to Mortgage Lender’s not having assigned, transferred, hypothecated or encumbered its rights in the Mortgage Loan). The right of Mezzanine Lender to purchase the Mortgage Loan shall automatically terminate upon a foreclosure sale, sale by power of sale or delivery of a deed in lieu of foreclosure.

9. **Manager Termination.** If there shall be a Mortgage Event of Default that remains uncured beyond the expiration of any and all applicable notice and cure periods provided to Mezzanine Lender under this Agreement or any other event shall have occurred pursuant to which Mortgage Lender has the right to select any replacement manager, asset manager and/or leasing agent pursuant to and in accordance with the Mortgage Loan Documents, Mortgage Lender shall have the sole right to select any replacement manager, asset manager and/or leasing agent, whether or not a new manager or agent was retained by Mezzanine Lender.

10. **Insurance Proceeds and Condemnation Awards.** In the event of a casualty to the buildings or improvements constructed on any portion of the Property or a condemnation or taking under a power of eminent domain of all or any portion of the Property, the buildings or improvements thereon, Mortgage Lender shall have a first and prior interest in and to any payments, awards, proceeds, distributions, or consideration arising from any such event (the “**Award**”), provided, that if the amount of the Award is in excess of the Mortgage Loan Liabilities, such excess Award shall be paid to Mortgage Borrower. Notwithstanding the foregoing, in the event of a casualty or condemnation, Mortgage Lender shall release the Awards from any such event to Mortgage Borrower if and to the extent required by the terms and conditions of the Mortgage Loan Documents in order to repair and restore the Property in accordance with the terms and provisions of the Mortgage Loan Documents. Awards made available to Mortgage Borrower for the repair or restoration of the Property shall not be subject to attachment by Mezzanine Lender.

11. **Termination.** This Agreement shall terminate upon the earlier to occur of (a) the full and final payment of all Mortgage Loan Liabilities or the Mezzanine Loan Liabilities, (b) the transfer of the Property by foreclosure or deed in lieu of foreclosure or (c) the completion of foreclosure by Mezzanine Lender of all interests pledged as security for the Mezzanine Loan.

12. **Miscellaneous.**

(a) **Successors and Assigns.** This Agreement shall be binding upon Mezzanine Lender and Mortgage Lender and their respective successors and assigns, whether immediate or remote. Mortgage Lender and the Mezzanine Lender agree, and as a condition to assignment of the Mortgage Loan or the Mezzanine Loan their assignees shall agree, that this Agreement will be assigned to all future assignees of the Mortgage Loan or the Mezzanine Loan.

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(b) No Waiver by Mortgage Lender or Mezzanine Lender. Mortgage Lender shall not be prejudiced in its rights under this Agreement by any act or failure to act by Mortgage Borrower or Mezzanine Lender, or any non-compliance of Mortgage Borrower or Mezzanine Lender with any agreement or obligation, regardless of any knowledge thereof which Mortgage Lender may have or with which Mortgage Lender may be charged; and no action of Mortgage Lender permitted hereunder shall in any way affect or impair the rights of Mortgage Lender and the obligations of Mezzanine Lender under this Agreement. No delay on the part of Mortgage Lender in the exercise of any rights or remedies shall operate as a waiver thereof, and no single or partial exercise by Mortgage Lender of any right or remedy shall preclude other or further exercise thereof or the exercise of any other right or remedy; nor shall any modification or waiver of any of the provisions of this Agreement be binding upon Mortgage Lender except as expressly set forth in a writing duly signed and delivered on behalf of Mortgage Lender. Mezzanine Lender shall not be prejudiced in its rights under this Agreement by any act or failure to act by Mortgage Borrower or Mortgage Lender, or any non-compliance of Mortgage Borrower or Mortgage Lender with any agreement or obligation, regardless of any knowledge thereof which Mezzanine Lender may have or with which Mezzanine Lender may be charged; and no action of Mezzanine Lender permitted hereunder shall in any way affect or impair the rights of Mezzanine Lender and the obligations of Mortgage Lender under this Agreement. No delay on the part of Mezzanine Lender in the exercise of any rights or remedies shall operate as a waiver thereof, and no single or partial exercise by Mezzanine Lender of any right or remedy shall preclude other right or remedy; nor shall any modification or waiver of any of the provisions of this Agreement be binding upon Mezzanine Lender except as expressly set forth in a writing duly signed and delivered on behalf of Mezzanine Lender.

(c) Notices. All notices, demands, requests, consents, approvals or other communications (any of the foregoing, a "Notice") required, permitted, or desired to be given hereunder shall be in writing sent by telefax (with answer back acknowledged and a copy by reputable overnight courier) or by registered or certified mail, postage prepaid, return receipt requested, or delivered by hand or reputable overnight courier addressed to the party to be so notified at its address hereinafter set forth, or to such other address as such party may hereafter specify in accordance with the provisions of this Agreement. Any Notice shall be deemed to have been received: (a) three (3) days after the date such Notice is mailed, (b) on the date of sender's receipt of a machine-generated confirmation of successful transmission of telefax and after advice by telephone to recipient that a telefax notice is forthcoming, (c) on the date of delivery by hand if delivered during business hours on a Business Day (otherwise on the next Business Day), and (d) on the next Business Day if sent by an overnight commercial courier, in each case addressed to the parties as follows:

If to Mortgage Lender: Bear, Stearns Funding, Inc.  
245 Park Avenue  
New York, New York 10167  
Attn: J. Christopher Hoeffel, Vice President  
Facsimile: (212) 272-7047

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with a copy to:

Cadwalader, Wickersham & Taft  
100 Maiden Lane  
New York, New York 10038  
Attn: William P. McNerney, Esq.  
Facsimile: (212) 504-6666

If to Mezzanine Lender:

Starwood Hotels & Resorts Worldwide, Inc.  
777 Westchester Avenue  
White Plains, New York 10604  
Attn: General Counsel  
Facsimile: (914) 640-8260

with a copy to:

Greenburg Traurig, P.A.  
111 North Orange Avenue, 20<sup>th</sup> Floor  
Orlando, Florida 32801  
Attn: Michael J. Sullivan, Esq.  
Facsimile: (407) 420-5909

Any party hereto may change the address at which notices hereunder are required to be given to such party by notice to the other parties in accordance herewith.

(d) Construction and Interpretation of this Agreement. This Agreement shall be governed by and construed in accordance with the laws of the State of New York without reference to principles of conflict of laws. Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be prohibited by or be invalid under such law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

(e) Amendments and Waivers. Neither this Agreement nor any terms hereof may be amended, modified or waived other than by a written agreement executed by the party against which such amendment, modification or waiver is sought to be enforced.

(f) Counterparts. This Agreement may be executed in execution counterparts by the signatories hereto and each such counterpart shall have the force and effect of an original.

[NO FURTHER TEXT ON THIS PAGE]

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IN WITNESS WHEREOF, this Agreement has been executed and delivered as of the date set forth above.

**MORTGAGE LENDER:**

**BEAR, STEARNS FUNDING, INC.**, a Delaware corporation

By: Jeffrey N. Lavine  
Name: \_\_\_\_\_  
Title: **Jeffrey N. Lavine**  
**Vice President**

**MEZZANINE LENDER:**

**STARWOOD HOTELS & RESORTS WORLDWIDE, INC.**, a Maryland corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Property of Cook County Clerk's Office

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IN WITNESS WHEREOF, this Agreement has been executed and delivered as of the date set forth above.

**MORTGAGE LENDER:**

**BEAR, STEARNS FUNDING, INC.**, a Delaware corporation

By: \_\_\_\_\_

Name:

Title:

**MEZZANINE LENDER:**

**STARWOOD HOTELS & RESORTS WORLDWIDE, INC.**, a Maryland corporation

By: \_\_\_\_\_

Name: Steven R. Goldman

Title: EVP

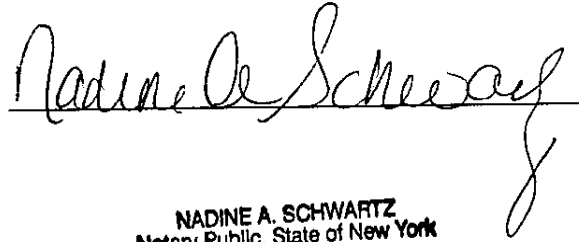
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State of New York, County of New York) ss.:

On the 15<sup>th</sup> day of December in the year 2000 before me, the undersigned, personally appeared Jeffrey N. Lavine personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signatures(s) on the instrument, the individual(s) or the person on behalf of which the individual(s) acted, executed the instrument.



NADINE A. SCHWARTZ  
Notary Public, State of New York  
No. 01SC6039798  
Qualified in New York County  
Certificate Filed in New York County  
Commission Expires 4/10/02

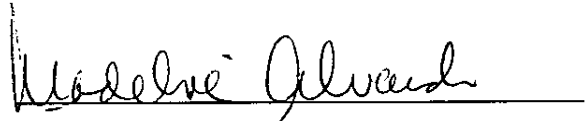
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State of New York, County of New York) ss.:

On the 15<sup>th</sup> day of December in the year 2000 before me, the undersigned, personally appeared Steven R. Goldman personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signatures(s) on the instrument, the individual(s) or the person on behalf of which the individual(s) acted, executed the instrument.



**MADLINE ALVARADO**  
Notary Public, State of New York  
No. 01AL5084019  
Qualified in New York County  
Commission Expires Aug. 25, 2001

Property of Cook County Clerk's Office

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EXHIBIT A

(Legal Description)

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## EXHIBIT "A"

### Legal Description

Those parcels of land in the City of Chicago, County of Cook, State of Illinois, more particularly described as follows:

#### **Parcel 1:**

That part of Block 2 in original Town of Chicago in Section 9, Township 39 North, Range 14, East of the Third Principal Meridian, at and below the horizontal plane of +50.00 feet above Chicago City Datum, bounded and described as follows:

Beginning at the point of intersection of the West line of North Dearborn Street (also being the East line of Lots 1 and 3 in said Block 2) and the North line of Chicago River, as occupied;

Thence West along the North line of said Chicago River, as occupied, a distance of 187.48 feet to a point on a line 134.10 feet East (as measured at right angles) of and parallel with the East line of North Clark Street;

Thence North along said line (said line also being the East face of an existing concrete foundation wall and its northerly and southerly extension thereof), a distance of 305.09 feet;

Thence East at right angles to the last described line, a distance 187.37 feet to a point on the West line of said North Dearborn Street;

Thence South along the West line of said North Dearborn Street, a distance of 311.60 feet to the Point of Beginning, in Cook County, Illinois;

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## Legal Description (continued)

### Parcel 2:

That part of Block 2 in original Town of Chicago in Section 9, Township 39 North, Range 14, East of the Third Principal Meridian, at and above the horizontal plane of +50.00 feet above Chicago City Datum, bounded and described as follows:

Beginning at the point of intersection of the West line of North Dearborn Street (also being the East line of Lots 1 and 8 in said Block 2) and the North line of Chicago River, as occupied;

Thence West along the North line of said Chicago River, as occupied, a distance of 185.48 feet to a point on a line 136.10 feet East (as measured at right angles) of and parallel with the East line of North Clark Street;

Thence North along said line, a distance of 305.16 feet;

Thence East at right angles to the last described line, a distance of 185.37 feet to a point on the West line of said North Dearborn Street;

Thence South along the West line of said North Dearborn Street, a distance of 311.60 feet to the Point of Beginning, in Cook County, Illinois,

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## Legal Description (continued)

### Parcel 3:

Easements appurtenant to and for the benefit of Parcels 1 and 2 aforesaid for purposes of ingress and egress for persons, vehicles and materials to permit the construction, maintenance, repair, replacement, restoration or reconstruction of that portion of any improvements directly abutting the hereinafter described property; for pedestrian and vehicular ingress and egress to and from the land; to install and maintain caissons supporting improvements to be located on the land; permitting encroachments; and permitting general attachment to those improvements constructed on the hereinafter described property which lie at or below the "plaza level", all as set forth in the Easement and Operating Agreement dated January 14, 1986 and recorded January 21, 1986 as Document Number 86025944 and filed in the Office of the Registrar of Titles and made by and between LaSalle National Bank, as Trustee under Trust Agreement dated March 1, 1985 and known as Trust Number 109495, LaSalle National Bank, as Trustee under Trust Agreement dated June 29, 1981 and known as Trust Number 104102, Oxford Properties, Inc., LaSalle National Bank, as Trustee under Trust Agreement dated September 20, 1985 and known as Trust Number 110339 and the JDC-Tishman Chicago Hotel Company, and as amended by First Amendment to Easement and Operating Agreement dated August 23, 1988 and recorded on August 24, 1988 as Document Number 88384561 made by and between LaSalle National Bank as Trustee under Trust Agreement Number 109495, LaSalle National Bank as Trustee under Trust Agreement Number 164102, LaSalle National Bank as Trustee under Trust Number 112420, Quaker Tower Partnership and BCE Development Properties Inc., JDL Chicago Hotel Limited Partnership, et al over, under and upon portions of the following described land:

That part of Block 2 in original Town of Chicago in Section 9, Township 39 North, Range 14, East of the Third Principal Meridian, at and below the horizontal plane of +50.00 feet above Chicago City Datum, bounded and described as follows:

Beginning at the point of intersection of the East line of North Clark Street (also being the West line of Lot 4 and 5 in said Block 2) and the North line of Chicago River, as occupied;

Thence North along the East line of said North Clark Street, a distance of 300.43 feet;

Thence East at right angles to the last described line, a distance of 134.10, feet;

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## Legal Description (continued)

Thence South along a line 134.10 feet East of and parallel with the East line of said North Clark Street, a distance of 305.09 feet to a point on the North line of said Chicago River, as occupied;

Thence West along the North line of said Chicago River, as occupied, a distance of 134.18 feet to the point of beginning,

Also

That part of Block 2 in original Town of Chicago in Section 9, Township 39 North, Range 14, East of the Third Principal Meridian, at and above the horizontal plane of +50.00 feet above Chicago City Datum bounded and described as follows:

Beginning at the point of intersection of the East line of North Clark Street (also being the West line of Lots 4 and 5 in said Block 2) and the North line of Chicago River, as occupied;

Thence North along the East line of said North Clark Street, a distance of 300.43 feet;

Thence East at right angles to the last described line a distance of 136.10 feet;

Thence South along a line 136.10 feet East of and parallel with the East line of said North Clark Street, a distance of 305.16 feet to a point on the North line of said Chicago River, as occupied;

Thence West along the North line of said Chicago River, as occupied, a distance of 136.18 feet to the Point of Beginning, in Cook County, Illinois;

Also

That part of Block 2 in Original Town of Chicago in Section 9, Township 39 North, Range 14 East of the Third Principal Meridian, bounded and described as follows:

Beginning at the intersection of the East line of North Clark Street (also being the West line of Lots 5 in said Block 2) and the South line of West Kinzie Street (also being the North line of Lots 5 thru 8, both inclusive, in said Block 2);

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## Legal Description (continued)

Thence East along the South line of said West Kinzie Street a distance of 321.47 feet to the West line of North Dearborn Street;

Thence South along the West line of said Dearborn Street (also being the East line of Lot 8 in said Block 2) a distance of 178.60 feet to a point 311.60 feet North (as measured along said West line of North Dearborn Street) of the Chicago River, as occupied;

Thence West at right angles to the last described line a distance of 321.47 feet to a point on the East line of said North Clark Street 300.43 feet North (as measured along said East line of North Clark Street) of said Chicago River, as occupied;

Thence North along the East line of said North Clark Street a distance of 177.86 feet to the Point of Beginning.

### Parcel 4:

Easements appurtenant to and for the benefit of Parcels 1 and 2 aforesaid for pedestrian and vehicular ingress and egress to and from the garage to be constructed on the land to Carroll Avenue, as set forth in the Parking Agreement dated January 14, 1986 and recorded January 21, 1986 as Document Number 86025945 made by and between LaSalle National Bank, as Trustee under Trust Agreement dated September 20, 1985 and known as Trust Number 110339, the JDC-Tishman Chicago Hotel Company, LaSalle National Bank, as Trustee under Trust Agreement dated March 1, 1985 and known as Trust Number 109495, Oxford Properties, Inc. and LaSalle National Bank, as Trustee under Trust agreement dated June 26, 1981 and known as Trust Number 104102, over, across, under and upon portions of the following described land:

That part of Block 2 in original Town of Chicago in Section 9, Township 39 North, Range 14, East of the Third Principal Meridian, at and below the horizontal plane of +50.00 feet above Chicago City Datum, bounded and described as follows:

Beginning at the point of intersection of the East line of North Clark Street (also being the West line of Lot 4 and 5 in said Block 2) and the North line of the Chicago River, as occupied;

Thence North along the East line of said North Clark Street, a distance of 300.43 feet;

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## Legal Description (continued)

Thence East at right angles to the last described line, a distance of 134.10 feet;

Thence South along a line 134.10 feet East of and parallel with the East line of said North Clark Street, a distance of 305.09 feet to a point on the North line of said Chicago River, as occupied;

Thence West along the North line of said Chicago River, as occupied, a distance of 134.18 feet to the Point of Beginning,

Also

That part of Block 2 in original Town of Chicago in Section 9, Township 39 North, Range 14, East of the Third Principal Meridian, at and above the horizontal plane of +50.00 feet above Chicago City Datum, bounded and described as follows:

Beginning at the point of intersection of the East line of North Clark Street (also being the West line of Lots 4 and 5 in said Block 2) and North line of the Chicago River, as occupied;

Thence North along the East line of said North Clark Street, a distance of 300.43 feet;

Thence East at right angles to the last described line, a distance of 136.10 feet;

Thence South along a line 136.10 feet East of and parallel with the East line of said North Clark Street, a distance of 305.16 feet to a point on the North line of said Chicago River, as occupied;

Thence West along the North line of said Chicago River, as occupied, a distance of 136.18 feet to the point of beginning, in Cook County, Illinois,

Also

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## Legal Description (continued)

That part of Block 2 in Original Town of Chicago in Section 9, Township 39 North, Range 14 East of the Third Principal Meridian, bounded and described as follows:

Beginning at the intersection of the East line of North Clark Street (also being the West line of Lot 5 in said Block 2) and the South line of West Kinzie Street (also being the North line of Lots 5 thru 8, both inclusive, in said Block 2);

Thence East along the South line of said West Kinzie Street a distance of 321.47 feet to the West line of North Dearborn Street;

Thence South along the West line of said North Dearborn Street (also being the East line of Lot 8 in said Block 2) a distance of 178.60 feet to a point 311.60 feet North (as measured along said West line of North Dearborn Street) of the Chicago River, as occupied;

Thence West at right angles to the last described line a distance of 321.47 feet to a point on the East line of said North Clark Street 300.43 feet North (as measured along said East line of North Clark Street) of said Chicago River, as occupied

Thence North along the East line of said North Clark Street a distance of 177.86 feet to the Point of Beginning.

Parcel Nos: 17-09-408-011-0000  
17-09-409-004-0000  
17-09-409-005-0000

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EXHIBIT B

(Form of Non-Consolidation Opinion)

Property of Cook County Clerk's Office

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GT Draft  
12/15/2000

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**[This draft opinion is a so-called "reasoned opinion." The ability of counsel to the Mezzanine Lender to give this opinion is subject to existing statutory law, case law interpretations, facts, and other matters at the time the opinion is given.]**

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Bear, Stearns Funding, Inc.  
245 Park Avenue  
New York, New York 10167

Re: Mezzanine Loan (the "Mezzanine Loan"), in the aggregate amount of \$35,000,000 from Starwood Hotels & Resorts Worldwide, Inc., a Maryland corporation (the "Mezzanine Lender") to THR Chicago Holding, LLC, a Delaware limited liability company ("Mezzanine Borrower")

Ladies and Gentlemen:

We have acted as counsel to the Lender in connection with the above-referenced Loan. The Loan is secured by, among other things, a pledge and first priority security interest in 100% of the membership interests of THR Chicago LLC, a Delaware limited liability corporation ("First Mortgage Borrower"), which is owned by Mezzanine Borrower together with certain related rights. The Mezzanine Loan is evidenced by a Promissory Note, dated as of December \_\_, 2000, made by the Mezzanine Borrower in favor of Mezzanine Lender (the "Mezzanine Note"), which is secured by a Pledge and Security Agreement, dated as of December \_\_, 2000, between Mezzanine Borrower and Mezzanine Lender (the "Pledge Agreement;" the Mezzanine Note, the Pledge Agreement and related UCC-1 Financing Statement, collectively, the "Mezzanine Loan Documents"). Simultaneous with the Mezzanine Loan, Bear, Stearns Funding, Inc., a Delaware corporation ("First Mortgage Lender") made a loan (the "First Mortgage Loan") in the aggregate amount of \$78,000,000 to First Mortgage Borrower. The First Mortgage Loan is secured by, among other things, a Mortgage and Security Agreement on certain improved real property (the "Property") commonly known as the "Westin River North Hotel" located at 320 North Dearborn Avenue, Chicago, Illinois, and related fixtures, equipment and personal property.

Pursuant to the terms of the Intercreditor Agreement (the "Intercreditor Agreement"), dated as of December \_\_, 2000, between the First Mortgage Lender and Mezzanine Lender, Mezzanine Lender is prohibited from exercising its rights under the Mezzanine Loan Documents to obtain title to any of the Mezzanine Loan Collateral (as defined in the Intercreditor Agreement) unless, among other things, the transferee of the title to the Mezzanine Loan Collateral delivers a Non-Consolidation Opinion (as defined in the Intercreditor Agreement) to the First Mortgage Lender. The Mezzanine Lender desires to exercise its rights under the Mezzanine Loan

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Documents to obtain title to the Mezzanine Loan Collateral in the name of \_\_\_\_\_, a \_\_\_\_\_ limited liability company (the "Transferee").

The Mezzanine Lender has requested that we deliver this opinion letter to the First Mortgage Lender as a condition to exercising its rights under the Mezzanine Loan Documents to obtain title to the Mezzanine Loan Collateral in the name of the Transferee. The First Mortgage Lender has requested our opinion as to whether, under present reported decisional authority and statutes applicable to bankruptcy cases, should the Transferee become a debtor in a case under the United States Bankruptcy Code (Title 11, U.S.C.), a court exercising bankruptcy jurisdiction and reasonable judgment, after full consideration of all relevant factors, would order the substantive consolidation of the assets and liabilities of the Transferee with the assets and liabilities of the First Mortgage Borrower based on any legal theories currently subscribed to by federal courts exercising bankruptcy jurisdiction.

In connection with this opinion, we have reviewed the Mezzanine Loan Documents, the Amended and Restated Limited Liability Company Agreement of First Mortgage Borrower made as of November 28, 2000 by Mezzanine Borrower as the sole member of the First Mortgage Borrower, and the Limited Liability Company Agreement of Transferee, made as of \_\_\_\_\_ by Mezzanine Lender as Transferee's sole member (the "Documents"), as well as the Certificates of Transferee and First Mortgage Borrower attached hereto as Exhibits A and B, respectively (the "Factual Certificates"). We have relied on the accuracy at all relevant times of the Factual Certificates and the representations and warranties contained in the Documents in all material respects insofar as they relate to the separateness of the First Mortgage Borrower and the Transferee without investigation as to factual matters, although we are not aware of any contrary facts. This opinion is based solely upon our review of the Documents and our examination of such matters of law as we deemed necessary for purposes of rendering the opinion set forth herein.

**FACTS**

In rendering this opinion, we have assumed, without investigation, that the facts outlined below, which have been furnished to us by officers of the First Mortgage Borrower and officers of Transferee, and upon which we rely, are now, and will remain at all relevant times, accurate.

1. The First Mortgage Borrower was formed by the filing of its Certificate of Formation on September 23, 1997. As of the date hereof, the Mezzanine Borrower is the sole member of the First Mortgage Borrower.

2. As of the date hereof, THR Asset L.P., a Delaware limited partnership ("THR Asset") is the sole member of the Mezzanine Borrower.

3. Tishman Hotel & Realty L.P., a Delaware limited partnership ("Tishman Hotel") is the sole limited partner of THR Asset, and currently owns 99.9% of the equity of THR Asset. Tischman Asset Corporation, a \_\_\_\_\_ corporation, is the sole general partner of THR Asset, and currently owns 0.1% of the equity of THR Asset.

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4 Westin River North Management Company, a Delaware corporation (“Property Manager”) is the manager of the Property. Mezzanine Lender currently owns 95% of the equity interest in the Property Manager. Starwood Hotels & Resort Trust currently owns 5% of the equity interest in the Property Manager. The Property Manager shall manage the Property pursuant to the terms of a Management Agreement (discussed and defined below).

5 The Property Manager manages the Property pursuant to a certain agreement effective December \_\_, 2000, between Borrower and the Property Manager (the “Management Agreement”). The Management Agreement provides, in relevant part that, the Property Manager shall receive a basic fee in the amount equaling (a) during the period commencing on the Opening Date and ending on the last day of the Accounting Period in which occurs the first anniversary of the Opening Date, an amount equal to two and one half (2.5%) percent of the accrued Total Revenue, (b) during the period commencing on the first day after the last day of the Accounting Period in which occurs the first anniversary of the Opening Date and ending on the last day of the Accounting Period in which occurs the second anniversary of the Opening Date, amount equal to two and three quarters (2.75%) percent of the accrued Total Revenue and (c) after the last day of the Accounting Period in which occurs the second anniversary of the Opening Date, an amount equal to three (3%) percent of accrued Total Revenue. In addition, the Property Manager may be paid an Incentive Fee provided certain thresholds are met by the Property Manager. Moreover, the Management Agreement also provides that the Property Manager shall receive certain fees for certain services. As represented in the Borrower’s Officer’s Certificate, all fees payable to the Property Manager in connection with the Management Agreement are at market rate and are comparable to the fees that would be paid by an unrelated third party for similar services. The Management Agreement has been entered into under terms which are commercially reasonable and similar to those in “arms length” transactions between unaffiliated entities.

6. Transferee was formed on \_\_\_\_\_. Mezzanine Lender is the sole member of Transferee. Transferee was formed for the sole purpose of acquiring title to the Mezzanine Loan Collateral and taking certain actions incidental thereto.

7. At no time prior to the exercise of Mezzanine Lender’s rights under the Mezzanine Loan Documents has Transferee or any affiliate of Transferee had any ownership interest in First Mortgage Borrower.

8. At no time has First Mortgage Borrower or any affiliate of First Mortgage Borrower had any ownership interest in Transferee or any affiliate of Transferee.

9 As a special purpose limited liability company, the Mezzanine Borrower’s Limited Liability Company Agreement provides that for so long as the First Mortgage Loan, the Mezzanine Loan and Pledge remain outstanding, Mezzanine Borrower will have at least one Independent Manager. An Independent Member has been defined in the Mezzanine Borrower’s Limited Liability Company Agreement as an individual who is not at the time of initial appointment, or at any time while serving on the Board of Managers, and has not been at any time: (i) a member, director, stockholder, officer or employee of, the Mezzanine Borrower or any of its respective members, stockholders, subsidiaries or affiliates, or a director, stockholder,

partner, member or officer of any such stockholders, subsidiaries or affiliates, (ii) a customer of, or supplier to, the Mezzanine Borrower or any of its respective members, stockholders, subsidiaries or affiliates, (iii) a person or other entity controlling any such member, stockholder, subsidiary, affiliate, supplier or customer, or (iv) a member of the immediate family of any such stockholder, officer, employee, supplier or customer of any other director of the Mezzanine Borrower.

10. First Mortgage Borrower and Transferee observe all organizational procedures required by, and comply in all material respects with, their articles of organization and the laws of their State of formation, insofar as they relate to their separateness, including the following:

- (i) First Mortgage Borrower and Transferee each maintain its own deposit account or accounts, separate from each other and from those of any other person or entity;
- (ii) First Mortgage Borrower and Transferee each maintain books and records separate from each other and from any other person or entity;
- (iii) First Mortgage Borrower and Transferee each do not commingle its assets or business functions with each other or with those of any other person or entity;
- (iv) First Mortgage Borrower and Transferee each conduct its own business in its own name;
- (v) First Mortgage Borrower and Transferee each maintain separate financial statements, which may form a part of a consolidated financial statement for itself and its affiliates so long as such financial statements indicate its separate existence, are prepared and maintained in accordance with generally accepted accounting principles, and are susceptible to audit. First Mortgage Borrower and Transferee each file separate tax returns, or, at its election, may file combined, consolidated or unitary tax returns in some or all jurisdictions in which it is required to file tax returns, so long as such combined, consolidated or unitary tax returns expressly indicate the separate existence of Company;
- (vi) First Mortgage Borrower and Transferee each pay its own liabilities out of its own funds;
- (vii) First Mortgage Borrower and Transferee each observe in all material respects Delaware limited liability company organizational formalities under the Delaware Limited Liability Company Act;

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- (viii) First Mortgage Borrower and Transferee each maintain an arm's-length relationship with each other and with its affiliates and do not engage in any transactions with each other and with any affiliates except on an arm's-length basis;
- (ix) First Mortgage Borrower and Transferee each pay the salaries of its own employees and maintain a sufficient number of employees in light of its contemplated business operations and allocate fairly and reasonably the salaries of any employees shared with each other or any of its affiliates or other entity;
- (x) First Mortgage Borrower and Transferee each do not guarantee or become obligated for the debts of each other or with any other entity or hold out its credit as being available to satisfy the obligations of each other or others except in connection with the financing or refinancing of the Property;
- (xi) First Mortgage Borrower and Transferee each do not acquire obligations or securities of its member(s) or affiliates;
- (xii) First Mortgage Borrower and Transferee each allocate fairly and reasonably any overhead to shared office space and related office expenses, including utility charges;
- (xiii) First Mortgage Borrower and Transferee each use separate offices, telephone numbers, business forms, stationery, invoices and checks;
- (xiv) First Mortgage Borrower and Transferee each do not pledge its assets for the benefit of each other or any other entity or make any loans or advances to each other or any entity except in connection with the financing or refinancing of the Property;
- (xv) First Mortgage Borrower and Transferee each hold itself out as a separate entity;
- (xvi) First Mortgage Borrower and Transferee each allocate fairly and reasonably any fees or expenses for shared professional services;
- (xvii) First Mortgage Borrower and Transferee each correct any known misunderstanding regarding its separate identity and not identify itself as a division of each other or any other person or entity;
- (xviii) First Mortgage Borrower and Transferee each do not allow the transfer of any direct or indirect ownership interest in themselves such that the

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transferee owns, in the aggregate with the ownership interests of its affiliates and family members in themselves, more than 49% interest in themselves, unless, to the extent required by the documents executed and delivered in connection with the First Mortgage Loan Documents, any such holder or rating agency, any such transfer is conditioned upon the delivery of an acceptable non-consolidation opinion to the holder of the First Mortgage and to any applicable rating agency concerning, as applicable, the new transferee and/or their respective owners;

- (xix) First Mortgage Borrower and Transferee each do not form, acquire or hold any subsidiary; and
- (xx) First Mortgage Borrower and Transferee each maintain adequate capital in light of its contemplated business operations.

11. Neither the assets nor the creditworthiness of the First Mortgage Borrower or Transferee is or will be held out as being available for the payment of any liabilities of the other. The First Mortgage Borrower and the Transferee always describe themselves as separate legal entities and not as a division or department of the other. The First Mortgage Borrower and Transferee maintain an arms' length relationship with each other. No transaction between the First Mortgage Borrower and the Transferee is on terms more favorable than in a similar transaction involving an unrelated third party. Assets have not been and will not be transferred between the First Mortgage Borrower and the Transferee without reasonably equivalent value or with the intent to hinder, delay or defraud their respective creditors. No loans were made between the First Mortgage Borrower and Transferee.

12. The Transferee is not and has not been contractually liable for the payment of any liability of the First Mortgage Borrower, its affiliates or any other entity, and the First Mortgage Borrower is not and has not been contractually liable for the payment of any liability of the Transferee, its affiliates or any other entity.

13. To the extent First Mortgage Borrower and Transferee have utilized or will utilize in the future the services of employees of any other person or entity, First Mortgage Borrower and Transferee have paid and will pay the allocable portion of such employees' or person's salaries out of their own funds.

14. Neither the First Mortgage Borrower nor the Transferee is currently insolvent nor does it expect or intend to become insolvent. Neither the First Mortgage Borrower nor the Transferee engages in or expects to engage in a business for which its remaining property represents an unreasonably small capitalization. Neither the First Mortgage Borrower nor the Transferee has incurred, intends to incur or believes that it will incur indebtedness that it will not be able to repay at its maturity. The activities of the First Mortgage Borrower and Transferee are intended to benefit their respective members and creditors, and not intended to hinder, delay or defraud their creditors or each other.

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15. The First Mortgage Lender reasonably relied on the ownership of the Property by the First Mortgage Borrower and the separateness of the First Mortgage Borrower from the Mezzanine Borrower, Mezzanine Lender and Transferee in making the First Mortgage Loan. The First Mortgage Lender could be prejudiced by substantive consolidation of the First Mortgage Borrower with Transferee. The First Mortgage Lender will object to any attempt to substantively consolidate the First Mortgage Borrower with Transferee.

### DISCUSSION

There are no statutory provisions dealing with substantive consolidation. Instead, the law is all judge-made, an exercise of the bankruptcy courts' equitable powers. As a result, it has been said that "substantive consolidation cases are to a great degree *sui generis*." In re Tureaud, 59 B.R. 973, 975 (N.D. Okla. 1986) (quoting 5 Collier on Bankruptcy ¶ 1100.06 at 1100-33 (15<sup>th</sup> ed. 1984)). Another court stated the matter more bluntly: "as to substantive consolidation, precedents are of little value, thereby making each analysis on a case-by-case basis." In re Crown Machine & Welding, 100 B.R. 25, 27-28 (Bankr. D. Mont. 1989). Furthermore, the case law has not evolved in an entirely consistent manner.

Early cases involving substantive consolidation applied a test that resembled the test for piercing the corporate veil or determining whether one corporation was the alter ego of another. A leading case in this regard is Fish v. East, 114 F.2d 177 (10<sup>th</sup> Cir. 1940), in which the court set forth the "instrumentality" rule. The court held that the assets of a subsidiary organized by its parent corporation to raise money from the public for the parent should be consolidated with the parent because, based on an analysis of the facts, the two corporations were actually one enterprise with the subsidiary operating as a mere instrumentality of the parent. In so holding, the court identified ten factors as supporting a decision to consolidate:

- (1) The parent corporation owns all or a majority of the capital stock of the subsidiary.
- (2) The parent and subsidiary corporation have common directors or officers.
- (3) The parent corporation finances the subsidiary.
- (4) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation.
- (5) The subsidiary has grossly inadequate capital.
- (6) The parent corporation pays the salaries or expenses or losses of the subsidiary.
- (7) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.

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(8) In the papers of the parent corporation and in the statements of its officers “the subsidiary” is referred to as such or as a department or division.

(9) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take direction from the parent corporation.

(10) The formal legal requirements of the subsidiary as a separate and independent corporation are not observed.

Courts frequently cited and relied on the Fish case and the factors cited therein in analyzing facts and determining whether a subsidiary and its parent should be consolidated. See, e.g., In re Gulfco Investment Corp. 593 F.2d 921, 928-29 (10<sup>th</sup> Cir. 1979); Anaconda Building Materials Co. v. Newland, 336 F.2d 625, 629 (9<sup>th</sup> Cir. 1964); Fisser v. International Bank, 282 F.2d 231, 238 (2d Cir. 1960); Maule Industries v. Gerstel, 232 F.2d 294, 297 (5th Cir. 1956).

Under this approach, courts did not generally permit consolidation without a showing that organization of the subsidiary resulted in some blatant abuse, even in cases where one or more of the above factors was present. As noted by one court:

Few questions of law are better settled than that a corporation is ordinarily a wholly separate entity from its stockholders, whether they be one or more. . . . But notwithstanding such situation and such intimacy of relation, the corporation will be regarded as a legal entity, as a general rule, and the courts will ignore the fiction of corporate entity only with caution, and when the circumstances justify it, as when it is used as a subterfuge to defeat public convenience, justify wrong, or perpetuate a fraud.

Commerce Trust Co. v. Woodbury, 77 F.2d 478, 487 (8<sup>th</sup> Cir. 1935), cert. denied, 296 U.S. 614, 56 S. Ct. 134 (1935). Thus, it was observed that “The reported cases have generally been easily decided because the courts could point to blatant abuses of the separate corporate entities in the enterprise structure.” Landers, A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy, 42 U. Chi. L. Rev. 589, 635 (1975). It has been noted that “[i]n the older cases, the application of substantive consolidation was limited to extreme cases involving fraud or neglect of corporate formalities and accounting procedures.” In re Standard Brands Paint Co., 154 B.R. 563, 568 (Bankr. C.D. Cal. 1993).

More recently, beginning with In re Vecco Construction Industries, 4 B.R. 407, 410 (Bankr. E.D. Va. 1980)(1898 Act), the courts have focused on a revised series of factors to be considered in determining whether to substantively consolidate affiliated debtor corporations:

1. The degree of difficulty in segregating and ascertaining individual assets and liabilities.
2. The presence or absence of consolidated financial statements.



3. The profitability of consolidation at a single physical location.
4. The commingling of assets and business functions.
5. The unity of interests and ownership between the various corporate entities.
6. The existence of parent and intercorporate guarantees on loans.
7. The transfer of assets without observance of corporate formalities.

While courts have considered the various factors listed above, the same courts have stated that the existence of these factors is not dispositive. "Rather, they should be evaluated within the larger context of balancing the prejudice resulting from the proposed order of consolidation with the prejudice movant alleges it suffers from debtor's separateness." In re DRW Property Co. 82, 54 B.R. 489, 495 (Bankr. N.D. Tex. 1985) (citing In re Donut Queen, 41 B.R. 706, 709-10 (Bankr. E.D.N.Y. 1984)). In weighing the relative costs and benefits, the courts have considered the costs of identifying separate assets where the books and records of the two identities are mixed (e.g., DRW Property, 54 B.R. at 495-96); the reliance, or lack thereof, by creditors of one corporation on the assets of the related entity (e.g., In re Stop & Go of America, Inc., 49 B.R. 743, 748-49 (Bankr. D. Mass. 1985); Donut Queen, 41 B.R. at 710-11; In re Baker & Getty Financial Services, 78 B.R. 139, 142-43 (Bankr. N.D. Ohio 1987)); and whether creditors who dealt with one corporation knew of its relationships with the affiliated entity, In re Snider Brothers, 18 B.R. 230, 235-36 (Bankr. D. Mass. 1982). The courts recognized, however, that "[t]here is no one set of elements which, if established, will mandate consolidation in every instance." Snider Bros., 18 B.R. at 234.

After the decision in Vecco Construction, the focus began to shift from the application of long lists of factors to weighing the benefits of substantive consolidation in a particular case against the harms produced in the case by consolidation. "As time progressed, case law evolved from looking at entanglement/bad acts as justification for substantive consolidation to analyzing substantive consolidation in terms of balancing the benefits that substantive consolidation would bring against the harm that substantive consolidation would cause." Standard Brands, 154 B.R. at 568.

There now appear to be two competing methods of balancing the benefits and harms of substantive consolidation, represented by the decisions in In re Augie/Restivo Baking Company, 860 F.2d 515 (2d Cir. 1988), and Eastgroup Properties v. Southern Motel Association, 935 F.2d 245 (11th Cir. 1991). In Augie/Restivo, the Second Circuit concluded that while "[n]umerous considerations have been mentioned as relevant" in deciding whether two entities should be substantively consolidated, a close analysis "reveals that these considerations are merely variants on two critical factors: (i) whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit [citations omitted] or (ii) whether the affairs of the debtors are so entangled that consolidation will benefit all creditors [citations omitted]." Augie/Restivo, 860 F.2d at 518. The court further held that it was impermissible for

the bankruptcy court to consolidate substantively the two entities solely on the basis that substantive consolidation would benefit the creditors of both debtors: "a proposed reorganization plan alone can [not] justify substantive consolidation." 860 F.2d at 520.

The Second Circuit noted that:

With regard to the first factor, creditors who make loans on the basis of the financial status of a separate entity expect to be able to look to the assets of their particular borrower for satisfaction of that loan. Such lenders structure their loans according to their expectations regarding that borrower and do not anticipate either having the assets of a more sound company available in the case of insolvency or having the creditors of a less sound debtor compete for the borrower's assets. Such expectations create significant equities. Moreover, lenders' expectations are central to the calculation of interest rates and other terms of loans, and fulfilling those expectations is therefore important to the efficiency of credit markets. Such efficiency will be undermined by imposing substantive consolidation in circumstances in which creditors believed they were dealing with separate entities.

860 F.2d at 518-19.

With respect to the second factor, the court held that:

Commingling, therefore, can justify substantive consolidation only where the time and expense necessary even to attempt to unscramble them is so substantial as to threaten the realization of any net assets for all the creditors [citations omitted], or where no accurate identification and allocation of assets is possible. In such circumstances, all creditors are better off with substantive consolidation.

860 F.2d at 519.

More recently, in the bankruptcy case of In re Raejean Bonham, 229 F.3d 750 (9<sup>th</sup> Cir. 2000), 2000 U.S. App. LEXIS 24799 (9<sup>th</sup> Cir. October 24, 2000), the Ninth Circuit Court of Appeals affirmed a bankruptcy court's *nunc pro tunc* substantive consolidation of two non-debtor corporations with an individual debtor's chapter 7 bankruptcy case. The court held that the "bankruptcy court's power of substantive consolidation has been considered part of the bankruptcy court's general equitable powers since the passage of the Bankruptcy Act of 1898." (citing In re Reider, 31 F.3d at 1105; Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 219, 85 L. Ed. 1293, 61 S. Ct. 904 (1941)). Id. at \*18. The Ninth Circuit adopted the Second

Circuit's test for determining under what circumstances substantive consolidation should be granted, and held that in the case before it, where the debtor commingled its assets with that of non-debtors, used the names of non-debtor entities interchangeably, lacked separate financial statements and tax returns, and the debtor made all decisions for each of the non-debtor entities, substantive consolidation was appropriate. *Id.* at \*31-34.

In *Eastgroup Properties*, the Eleventh Circuit held that substantive consolidation is appropriate if the proponent of consolidation shows that "(1) there is substantial identity between the entities to be consolidated; and (2) consolidation is necessary to avoid some harm or realize some benefit." 935 F.2d at 249. Once the proponent has established that substantive consolidation is appropriate, the burden shifts to an objecting party in interest to show that (a) it has reasonably relied on the separate credit of one of the entities to be consolidated, and (b) it will be prejudiced by consolidation. *Id.* If the creditor makes its required showing, the court can order consolidation "only if it determines that the demonstrated benefits of consolidation heavily outweigh the harm." *Id.* The Eleventh Circuit drew this test from the decision in *In re Auto-Train Corp.*, 810 F.2d 270, 276 (D.C. Cir. 1987). The United States Court of Appeals for the Eighth Circuit adopted a similar test in *In re Giller*, 962 F.2d 796, 798 (8<sup>th</sup> Cir. 1992). The Eleventh Circuit noted that the *Veeco Construction* factors may, but not necessarily will, be relevant in determining whether a proponent has made it out a prima facie case for consolidation. The court also indicated that its standard for substantive consolidation was intended to be more "liberal" than the older tests. 935 F.2d at 248.

While the bulk of the cases cited above involved the proposed consolidation of corporations, the same principles have been applied in the few reported cases involving the proposed consolidation of a partnership with its general partner. E.g., *FDIC v. Colonial Realty Co.* 966 F.2d 57 (2d Cir. 1992) (collecting cases and holding that *Augie/Restivo* should be applied to consolidation of general partnership with its partners); *Holywell Corp. v. Bank of New York*, 59 B.R. 340, 346-48 (S.D. Fla. 1986) (applying *Veeco Construction* factors to consolidation of limited partnership with its general partners and other affiliated entities).

In our view, based on the facts set forth above, a court should not be persuaded to grant an order consolidating the assets and liabilities of Transferee with those of First Mortgage Borrower under any of the tests described above. Under the more traditional tests, there has been no fraud or neglect of organizational formalities and accounting procedures. The First Mortgage Borrower has represented that it is operated independently from the Transferee, owns its own assets, does not commingle its property or functions with those of the Transferee, has adequate capital, and adheres to the formal legal requirements for maintaining a separate organizational identity. Thus, the First Mortgage Borrower is not the mere instrumentality of Transferee, nor are the affairs of the First Mortgage Borrower and Transferee so entangled that it would be prohibitively costly and time-consuming to untangle them.

Consolidation should not be appropriate under *Augie/Restivo* either. As discussed above, there is no entanglement of the First Mortgage Borrower and Transferee. The First Mortgage Borrower will be operated as a separate entity from Transferee, and because, as described above,

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the First Mortgage Borrower issues financial statements that are separate from those of Transferee and because the First Mortgage Borrower and Transferee maintain their own assets and pay their own liabilities, creditors will not be able to argue persuasively that they dealt with the First Mortgage Borrower and Transferee as a single entity.

Finally, substantive consolidation should not be proper under Eastgroup Properties. First, there is no entanglement between First Mortgage Borrower and Transferee. Second, as described above, the First Mortgage Lender reasonably relied, among other things, upon the separate existence and credit of First Mortgage Borrower and Transferee when it made the First Mortgage Loan. Third, also as described above, the First Mortgage Lender or another party in interest could be prejudiced by substantive consolidation. Fourth, while at this time the benefits of substantive consolidation cannot be known, there are few, if any, equities on the side of creditors of First Mortgage Borrower or Transferee who knew, by virtue of the facts described above, that the assets of the First Mortgage Borrower were not available to satisfy their debts, but who are arguing nonetheless in favor of substantive consolidation. Substantive consolidation is an equitable doctrine, and under these circumstances a court should not conclude that the benefits heavily outweigh the harms.

The recent decision of the United States Supreme Court in Grupo Mexicano de Desarrollo, S.A., et al. v. Alliance Bond Fund, Inc., et al., 119 S. Ct. 1961 (1999) might be used to argue that a bankruptcy court does not have the power to order the substantive consolidation of the Borrower and a Borrower Entity. In Grupo Mexicano, the Supreme Court held that a federal district court did not have authority to enjoin a corporation from disposing of its assets. There, the Supreme Court based its analysis on the premise that the equity jurisdiction of the federal courts originated from "equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789." Id. at 1964. The Court concluded that because the relief requested by the respondents was not the type of remedy traditionally accorded by courts of equity, the district court lacked the authority to expand the original equitable jurisdiction by creating such a remedy. This decision of the Supreme Court has not yet been applied to other equitable remedies, but the analysis would appear to be the same. Based on the Supreme Court's analysis in Grupo Mexicano, and our understanding that the remedy of substantive consolidation was not a remedy that was historically available to a court of equity, it might be argued that no federal bankruptcy court should have the authority to substantively consolidate the Borrower and any of the Transferee.

### OPINION

Based on and subject to the foregoing, as well as the further qualification that there is no definitive judicial authority confirming the correctness of the analysis, we are of the opinion that, under present reported decisional authority and statutes applicable to bankruptcy cases, (i) should Transferee become the debtor in a case under the Bankruptcy Code, and if the matter were properly briefed and presented to a court exercising bankruptcy jurisdiction, the court, exercising reasonable judgment after full consideration of all relevant factors, should not order the substantive consolidation of the assets and liabilities of First Mortgage Borrower with those of

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Transferee, based on any legal theories currently subscribed to by federal courts exercising bankruptcy jurisdiction.

### **LIMITATIONS**

We do not express herein any opinion as to any matter governed by any law other than the Bankruptcy Code, and thus we express no opinion as to the law of any state. We note that the question of whether the assets and liabilities of First Mortgage Borrower will be substantively consolidated with those of Transferee will depend on the future actions of First Mortgage Borrower and Transferee. We cannot opine as to what action a court will take in the future when reviewing actions that have not occurred as of the date hereof. We express no opinion as to the substantive consolidation of the assets and liabilities of First Mortgage Borrower with those of Transferee if such consolidation is done in a manner so as to not adversely affect any rights of First Mortgage Lender.

This opinion letter addresses the legal consequences of only the facts existing or assumed as of the date hereof. The opinions expressed herein are based on an analysis of existing laws and court decisions and cover certain matters not directly addressed by such authorities. Such opinions may be affected by actions taken or omitted, events occurring, or changes in the relevant facts, after the date hereof. We have not undertaken to determine, or to inform any person of, the occurrence or non-occurrence of any such actions, events or changes. The opinions expressed herein are not a guaranty as to what any particular court would actually hold, but an opinion as to the decision a court would reach if the issues are competently presented to it and the court followed existing precedent as to legal and equitable principles applicable in bankruptcy cases. In this regard, we note that legal opinions on bankruptcy law matters unavoidably have inherent limitations that generally do not exist in respect of other issues on which opinions to third parties are typically given. These inherent limitations exist primarily because of the pervasive equity powers of bankruptcy courts, the overriding goal of reorganization to which other legal rights and policies may be subordinated, the potential relevance to the exercise of judicial discretion of future arising facts and circumstances and the nature of the bankruptcy process. The recipients of this opinion should take these limitations into account in analyzing the bankruptcy risks associated with the transactions described herein.

Any Bankruptcy Code analysis must recognize that the power of a court of competent jurisdiction with respect to a Bankruptcy Code case, proceeding or matter is extremely broad. For instance, pursuant to the powers granted in section 105(a) of the Bankruptcy Code, “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the [the Bankruptcy Code].” 11 U.S.C. § 105(a). Therefore, the conclusions reached herein must be considered in light of and subject to these broad statutory and equitable powers of the relevant court over a debtor’s property, estate, creditors and equity interest holders. We are members of the Bar of the State of Florida and do not express any opinion with respect to the laws of any jurisdiction other than the laws of the United States of America and the laws of the State of Florida.

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This opinion is solely for your benefit (and your successors and assigns) and the benefit of any nationally recognized rating agency, and may not be relied upon any other person without our prior written approval. We disclaim any obligation to update this opinion letter for events occurring or coming to our attention after the date hereof.

Very truly yours,

\_\_\_\_\_  
Greenberg Traurig, P.A.

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**EXHIBIT A**

**TRANSFeree OFFICER'S CERTIFICATE**

In connection with the non-consolidation opinion dated \_\_\_\_\_, \_\_\_\_ (the "Opinion") to be delivered by Greenberg Traurig, P.A. in connection with the First Mortgage Loan in the amount of \$87,000,000 by Bear, Stearns Funding, Inc. to THR Chicago LLC and the transfer of the title of the 100% membership interest of THR Chicago Holding LLC in THR Chicago LLC to \_\_\_\_\_, the undersigned hereby certifies that, to the best of his knowledge after due inquiry and review of the Opinion:

1. The undersigned understands that Greenberg Traurig, P.A. is relying on this Certificate in connection with the execution and delivery of the Opinion.
2. The facts and assumptions contained in the Opinion are true and correct as of the date hereof.
3. The undersigned has no reason to believe that any statement or fact expressed in the Opinion is untrue, inaccurate or incomplete.
4. The undersigned has been duly authorized to execute this Certificate on behalf of \_\_\_\_\_.

Dated: \_\_\_\_\_

Transferee

By: \_\_\_\_\_  
Its Managing Member

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# UNOFFICIAL COPY

## EXHIBIT B

### THR CHICAGO LLC

#### NO. 1, LTD. OFFICER'S CERTIFICATE

In connection with the non-consolidation opinion dated \_\_\_\_\_ (the "Opinion") to be delivered by Greenberg Traurig, P.A. in connection with the First Mortgage Loan in the amount of \$87,000,000 by Bear, Stearns Funding, Inc. to THR Chicago LLC and the transfer of the title of the 100% membership interest of THR Chicago Holding LLC in THR Chicago LLC to \_\_\_\_\_, the undersigned hereby certifies that, to the best of his knowledge after due inquiry and review of the Opinion:

1. The undersigned understands that Greenberg Traurig, P.A. is relying on this Certificate in connection with the execution and delivery of the Opinion.

2. The facts and assumptions contained in the Opinion are true and correct as of the date hereof.

3. The undersigned has no reason to believe that any statement or fact expressed in the Opinion is untrue, inaccurate or incomplete.

4. The undersigned has been duly authorized to execute this Certificate on behalf of THR Chicago LLC, a Delaware limited liability company

Dated: \_\_\_\_\_

THR Chicago LLC, a Delaware limited liability company

By: \_\_\_\_\_  
Its Managing Member