

UNOFFICIAL COPY

(Illinois)

92169983

MORTGAGE, FIXTURE FILING AND SECURITY AGREEMENT

From

MARCOURT INVESTMENTS INCORPORATED,

as mortgagor

To

FIRST FIDELITY BANK, NATIONAL ASSOCIATION, NEW JERSEY,

as mortgagee,

.	DEPT-01 RECORDING	\$198.00
.	T#3333 TRAN 9830 02/21/92 11:20:00	
.	\$7701 + C * -92-109983	
.	COOK COUNTY RECORDER	

Covering

Chicago/O'Hare Courtyard-By-Marriott Hotel
6155 North River Road
Rosemont, Illinois 60118

Real Estate Tax I.D. No. 09-34-300-033-0000, Volume 096

Dated as of February 10, 1992

This Document Was Prepared By And
Should Be Returned To:

Sullivan & Crowell
250 Park Avenue
New York, New York 10177
Attention: Arthur S. Adler, Esq.

Arthur S. Adler, Esq.

H449-3801

Property of Cook County Clerk's Office

92169983

198.00

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

1 2 3 3

Table of Contents

	<u>Page</u>
PRELIMINARY STATEMENT	1
GRANTING CLAUSES	2
ARTICLE 1 Definitions	6
Section 1.1 Specific Terms	6
Section 1.2 Generally	14
ARTICLE 2 Mortgagor's Covenants	15
Section 2.1 Title	15
Section 2.2 Franchises; Status; Hotel Name; Operation	17
Section 2.3 Payment of Notes and Other Amounts	17
Section 2.4 Payment of Taxes, Liens and Charges	19
Section 2.5 Payment of Closing Costs	23
Section 2.6 CTYD III Lease; Easement Agreements	24
Section 2.7 Use; Operating Covenant; Operational Licenses and Permits	25
Section 2.8 Maintenance	26
Section 2.9 Compliance with Laws; Environmental Laws; Asbestos	27
Section 2.10 Alterations; Waste; Restoration upon Casualty or Condemnation	31
Section 2.11 Insurance	32
Section 2.12 Casualty Damage	33
Section 2.13 Condemnation	34
Section 2.14 Leases and Rents	35
Section 2.15 Filing and Recording	37
Section 2.16 Further Assurances	38
Section 2.17 Additions to Trust Estate	38
Section 2.18 Rights to Inspect; Notice of Default	38
Section 2.19 No Claims Against Mortgagee	39
Section 2.20 Advances by Mortgagee	40
Section 2.21 Negative Covenants; Restrictions on Transfer and Further Encumbering	40
Section 2.22 Mortgagee's Fees	44

001.0083

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

2021 09 30

	<u>Page</u>
ARTICLE 3 Release of the Property	44
Section 3.1 CTYD III Lease Termination	44
Section 3.2 Granting of Easements in Accordance with CTYD III Lease	46
Section 3.3 Termination Value	47
ARTICLE 4 Application of Moneys	48
Section 4.1 Proceeds of Insurance, Condemnation Awards	48
ARTICLE 5 Prepayment of Notes	49
Section 5.1 Generally	49
ARTICLE 6 Events of Default and Remedies	49
Section 6.1 Events of Default	49
Section 6.2 Sale of Property; Application of Proceeds	54
Section 6.3 Purchase by Mortgagee or the Registered Owners	59
Section 6.4 Receivers	59
Section 6.5 Remedies Cumulative	59
Section 6.6 Waiver of Rights	60
Section 6.7 Waiver of Remedies of Limited Effect	60
Section 6.8 Other Security	61
ARTICLE 7 Miscellaneous	61
Section 7.1 Immunity from Liability	61
Section 7.2 Security Agreement and Financing Statement	63
Section 7.3 Modifications; Waiver; Notices	66
Section 7.4 Illegal Provision	67
Section 7.5 Maximum Interest Payable	67
Section 7.6 Satisfaction	67
Section 7.7 Binding Effect	67
Section 7.8 Table of Contents; Headings	68
Section 7.9 Governing Law	68
Section 7.10 Choice of Forum	68
Section 7.11 Exhibits and Schedules	68

2021 09 30

UNOFFICIAL COPY

1 9 9 3 3

	<u>Page</u>
Section 7.12 No Third Party Beneficiaries	68
Section 7.13 Conflicts among Certain Loan Documents	68
Signatures	69

Exhibits

Exhibit A: Notes

Schedules

- Schedule A: Land Parcel
Parcel 1
Parcel 2 (easement parcels)
- Schedule B: Permitted Exceptions
- Schedule C: Other Properties

Property of Cook County Clerk's Office

021-9983

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

1 0 0 3

MORTGAGE, FIXTURE FILING AND SECURITY AGREEMENT, dated as of February 10, 1992 (together with all amendments and supplements thereto, this "Mortgage"), from MARCOURT INVESTMENTS INCORPORATED, a Maryland corporation ("Mortgagor"), having an address at c/o W.P. Carey & Co., Inc., 620 Fifth Avenue, New York, New York 10020, as mortgagor, to FIRST FIDELITY BANK, NATIONAL ASSOCIATION, NEW JERSEY, a national banking association, as trustee pursuant to the Indenture (as hereinafter defined) (together with any successor or additional trustees pursuant thereto, "Mortgagee"), having an address at 765 Broad Street, Newark, New Jersey 07101.

PRELIMINARY STATEMENT

The defined terms used herein but not otherwise defined have the meanings set forth in Article 1.

Mortgagor is the owner of fee title to a certain parcel of land (the "Land Parcel") and fee title to the Improvements (as herein defined) located thereon. The Land Parcel is more fully described on Schedule A attached hereto and made a part hereof.

Pursuant to the Indenture, Mortgagor has issued its Series F-1 9.94% Secured Notes due 2011 of even date herewith in the original aggregate principal amount of \$5,155,963 and its Series F-2 11.18% Secured Notes due 2011 of even date herewith in the original aggregate principal amount of \$2,844,037 in the forms of Exhibit A hereto to the Original Note Purchasers (such notes, together with any renewals, extensions, amendments or modifications thereof and notes issued pursuant to the Indenture in exchange or substitution therefor, collectively referred to as the "Primary Notes") for the purpose of paying the costs of Mortgagor's acquisition of the Property.

Pursuant to the Indenture, Mortgagor has also issued other Notes in the original aggregate principal of \$101,000,000 (hereinbelow defined as the "Other Notes") for the purpose of paying the costs of Mortgagor's acquisition of certain other properties of Mortgagor, which other properties are encumbered as of the date hereof by mortgages and deeds of trusts in favor of Mortgagee.

1992-09-03

UNOFFICIAL COPY

Property of Cook County Clerk's Office

GRANTING CLAUSES

NOW, THEREFORE, THIS MORTGAGE WITNESSETH: that Mortgagor has executed and delivered this Mortgage in consideration of the premises, the acceptance by Mortgagee of the trusts created hereby, the purchase and acceptance of the Primary Notes by the Original Note Purchasers, and in order to secure the payment of the principal and interest and any premium and other sums payable on the Primary Notes, all future advances and readvances that may subsequently be made pursuant to or in accordance with the Loan Documents to Mortgagor by the Registered Owners or the Mortgagee, including any interest added to principal (but nothing contained herein or in the Primary Notes shall be construed as an obligation on the part of the Registered Owners of the Primary Notes or Mortgagee to make future advances or readvances to Mortgagor), and to secure the performance of the covenants and agreements contained in the Primary Notes, this Mortgage and the other Operative Agreements.

Mortgagor, to secure such payment and performance, has created a security interest in, mortgaged and warranted, granted, conveyed, assigned, bargained, sold, pledged, given, transferred and set over, with power of sale and by these presents does hereby create a security interest in, mortgage and warrant, grant, convey, assign, bargain, sell, pledge, give, transfer and set over unto Mortgagee and to its successors and assigns forever all of Mortgagor's right, title and interest in, to and under all of the property described in the following Granting Clauses (collectively, the "Trust Estate"): 1500 1000

Granting Clause First

All the fee estate in the Land Parcel, as more particularly described as Parcel 1 on Schedule A hereto, together with all titles, interests, liberties, tenements, hereditaments, appurtenances, easements, rights of way, rights, privileges in and to the Land Parcel, belonging or in any way appurtenant thereto (collectively, the "Premises"), including, without limitation, (a) the easements, if any, over certain other land described as Parcel 2 on Schedule A hereto granted by any easement agreements also more particularly described on Schedule A hereto (together with any easement, restrictive covenant or similar agreement entered into subsequent to the date hereof and appurtenant to or benefitting any part of the Trust Estate, the "Easement Agreements"), (b) any streets, ways, sidewalks, passages, alleys, vaults, gores or strips of land adjoining or in any way belonging, relating or pertaining to the Land Parcel, and all sewer rights, waters, water

courses, water rights and powers, mineral rights, air rights and all development rights whatsoever in any way belonging, relating or appertaining to any of the Premises and/or Improvements, or which hereafter shall in any way belong, relate or be appurtenant thereto and whether now owned or hereafter acquired by Mortgagor, (c) all claims or demands of Mortgagor in law or in equity, in possession or expectancy of, in and to the Land Parcel, and (d) subject to the provisions of the Assignment and the Indenture, all rents, income, revenues, issues, awards, proceeds, deposits, tenders, profits and other benefits from and in respect of the property described in this Granting Clause First and Granting Clause Second or from any business, if any, conducted thereon by Mortgagor (including the Rents), in each case whether now existing or hereafter arising or acquired by Mortgagor, it being the intention of the parties hereto that so far as may be permitted by law, all property of the character hereinabove described that is now owned or held or is hereafter acquired by Mortgagor and affixed, attached and annexed to the Property shall be and remain or become and constitute a portion of the Trust Estate and the security covered by and subject to the lien hereof;

Granting Clause Second

The hotel building(s) and all other buildings, structures, paving, parking areas, walkways and landscaping, and all facilities, fixtures, machinery, apparatus, installations, equipment and other property of every kind and type affixed to, attached to or forming part of any structures, buildings or improvements, and any replacements thereof or additions thereto, now or hereafter erected or located upon the Land Parcel (the "Improvements");

Granting Clause Third

All apparatus, movable appliances, building materials, equipment, fittings, furnishings, furniture, machinery and other articles of tangible personal property, and replacements thereof, now or at any time hereafter placed upon or used in any way in connection with the use, enjoyment, occupancy or operation of the Improvements or the Premises, including all of Mortgagor's books and records relating thereto and including all goods, machinery, tools, equipment (including fire sprinklers and alarm systems, cleaning rigs, elevator cabs and elevator, air conditioning, heating, boilers, refrigerating, electronic monitoring, water, lighting, power, sanitation, waste removal, entertainment, recreational, window or structural,

1003 0993

maintenance and all other equipment of every kind), lobby, guest-room and all other indoor or outdoor furniture (including beds, tables, chairs, linen, towels, planters, desks, sofas, racks, shelves, lockers and cabinets), furnishings, telephones, televisions, radios and other appliances, supplies, consumables, inventory, rugs, carpets and other floor coverings, draperies, drapery rods and brackets, awnings, venetian blinds, partitions, chandeliers and other lighting fixtures, lamps, and all other apparatus, equipment, furniture, furnishings, holiday decorations and articles used or useful in connection with the use or operation of the Improvements or the Premises, it being understood that the enumeration of any specific articles of property shall in no way result in or be held to exclude any items of property not specifically mentioned, but excluding (a) such items that are excluded from the definition of Personal Property under the CTYD III Lease and (b) trade fixtures and movable personal property of the types described above owned or leased by third-party tenants under Other Leases (the items referred to in this Granting Clause and not covered by the foregoing exclusions being hereinafter called the "Personal Property");

Granting Clause Fourth

All general intangibles relating to design, development, operation, management and use of the Premises or the Improvements (including, without limitation, all prepaid expenses, accounts receivable and guest histories), all certificates of occupancy, zoning variances, building, use or other permits, approvals, authorizations and consents obtained from and all materials prepared for filing or filed with any governmental agency in connection with the development, use, operation or management of the Premises or the Improvements (except for any such permits and approvals that are not transferable by law), all construction, service, engineering, consulting, leasing, architectural and other similar contracts concerning the design, construction, management, operation, occupancy and/or use of the Premises and Improvements, including Mortgagor's right, title and interest in and to the Management Agreement, dated as of the date (the "Management Agreement"), hereof with respect to the Property, between Tenant, as occupant, and either Marriott Corporation or Courtyard Management Corporation, as manager, and the Franchise Agreement, dated as of the date hereof (the "Franchise Agreement"), with respect to the Property, between Marriott Corporation, as franchisor, and Mortgagor, as franchisee, all architectural drawings, plans, specifications, soil tests, feasibility studies, appraisals, engineering reports and similar materials relating to any

UNOFFICIAL COPY

Property of Cook County Clerk's Office

portion of or all of the Premises and Improvements and all payment and performance bonds or warranties or guarantees relating to the Premises or the Improvements (the items referred to in this Granting Clause being hereafter called the "Permits, Contracts, Plans and Warranties");

Granting Clause Fifth

All real estate tax refunds and all proceeds of the conversion, voluntary or involuntary, of any of the Property into cash or liquidated claims, including, without limitation, judgments, awards of damages, settlements hereafter made, and any other proceeds of insurance and condemnation awards, any awards which may become due by reason of the taking by eminent domain of the whole or any part of the Premises or Improvements or any rights appurtenant thereto, and any awards for change of grade of or access to or from any streets;

Granting Clause Sixth

The rents, issues, profits, royalties, income or other benefits of or from the Trust Estate, the Improvements, the Personal Property and the Permits, Contracts, Plans and Warranties, as well as all proceeds (etc.) of the foregoing, subject however, to the Assignment being executed contemporaneously herewith; and

Granting Clause Seventh

All other property, if any, delivered to Mortgagee by or on behalf of Mortgagor, pursuant to the terms hereof or any other Loan Document, it being the intention of Mortgagor and it being hereby agreed that all property hereafter acquired by Mortgagor and required to be subjected to the lien of this Mortgage pursuant to the terms hereof of any other Loan Document shall along with all products and proceeds of all property described in these Granting Clauses, forthwith upon the acquisition thereof by Mortgagor be subject to the lien of this Mortgage as if such property were now owned by Mortgagor and were specifically described in this Mortgage and Granted hereby or pursuant hereto;

TO HAVE AND TO HOLD all and singular the Trust Estate, whether now owned or held or hereafter acquired, unto Mortgagee and its successors and assigns forever, subject to defeasance only upon the payment and performance of all of such obligations in full;

UNOFFICIAL COPY

WITH POWER OF SALE, upon the terms and conditions herein set forth, for the equal and ratable benefit and security of the Primary Notes and for the enforcement of the payment of the principal, premium and interest on the Primary Notes in accordance with their terms, and all other sums payable hereunder or under the Primary Notes and the performance and observance of the provisions of the Primary Notes and this Mortgage, all as herein set forth.

IT IS HEREBY COVENANTED, DECLARED AND AGREED that the Primary Notes are to be issued under the Indenture and secured by this Mortgage and the Second Mortgages on the Other Properties and that the Trust Estate is to be held by the Mortgagee upon and subject to the provisions of this Mortgage.

ARTICLE 1

Definitions

Section 1.1. Specific Terms. Unless the context otherwise specifies or requires, the following terms have the meanings specified below:

"Additional Rental" has the meaning specified in the CTYD III Lease.

"Affiliates" shall have the meaning ascribed to it in the CTYD III Lease.

"Alterations" shall mean all changes, additions, improvements or repairs to, all alterations, reconstructions, renewals or removals of and all substitutions or replacements for any of the Improvements or Personal Property, both interior and exterior, structural and non-structural, ordinary and extraordinary.

"Assignment" means the Assignment of Leases and Rents, relating to, inter alia, the CTYD III Lease with respect to the Property, dated as of the date hereof, from Mortgagor, as assignor, to Mortgagee, as assignee, and consented to therein by Tenant, as amended or supplemented from time to time as permitted hereby or thereby.

"Assignments with respect to the Other Properties" means the various Assignments of Leases and Rents, dated as of the date hereof, from Mortgagor, as assignor, to Mortgagee, as assignee.

100-2093

UNOFFICIAL COPY

Property of Cook County Clerk's Office

"Award" means (a) all compensation paid in connection with any condemnation proceedings, taking by eminent domain, whether pursuant to judgment or agreement or otherwise, and (b) the entire proceeds of insurance policies required to be maintained under Section 2.11(a) hereof.

"Bankruptcy Code" means the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§101 et seq.

"Business Day" means any day other than a Saturday, Sunday or a day on which banking institutions are authorized to close in either the State of Maryland or the State of New Jersey.

"Counsel" means any legal counsel reasonably satisfactory to Mortgagee, who may be counsel to, or employed by, Mortgagee or any Registered Owner.

"Courtyard by Marriott System" shall have the meaning given such term in the CTYD III Lease.

"Courtyard by Marriott System Standards" shall have the meaning given such term in the CTYD III Lease.

"CTYD III Lease" means the Lease Agreement, dated as of the date hereof, between Mortgagee, as landlord, and CTYD III Corporation, a Delaware corporation, as tenant, as such CTYD III Lease affects the Property, as amended or supplemented from time to time as permitted by the Assignment.

"Easement Agreements" has the meaning specified in Granting Clause First.

"Environmental Law" shall mean (i) any applicable federal, state, foreign and local law, statute, ordinance, rule, regulation, license, permit, authorization, approval, consent, court order, judgment, decree, injunction, code, requirement or agreement with any governmental entity, (x) relating to pollution (or the cleanup thereof), or the protection of air, water vapor, surface water, groundwater, drinking water supply, land (including land surface of subsurface), plant and animal life from injury caused by a Hazardous Substance or (y) concerning exposure to, or the use, storage, recycling, treatment, generation, transportation, processing, handling, labeling, production or disposal of Hazardous Substances, in each case as amended and as now or hereafter in effect. The term Environmental Law includes, without limitation, the federal Comprehensive Environmental Response Compensation and Liability Act of 1980, the Superfund Amendments and Reauthorization Act, the

federal Water Pollution Control Act, the federal Clean Air Act, the Clean Water Act, the federal Resource Conservation and Recovery Act of 1976 (including the Hazardous and Solid Waste Amendments to RCRA), the federal Solid Waste Disposal Act and the federal Toxic Substances Control Act, the Federal Insecticide, Fungicide and Rodenticide Act, the Federal Occupational Safety and Health Act of 1970, each as amended and as now or hereafter in effect, and (ii) any common law or equitable doctrine (including, without limitation, injunctive relief and tort doctrines such as negligence, nuisance, trespass and strict liability) that may impose liability or obligations or injuries or damages due to or threatened as a result of the presence of, exposure to, or ingestion of, any Hazardous Substance.

"Environmental Violation" shall mean (a) any direct or indirect discharge, disposal, spillage, emission, escape, pumping, pouring, injection, leaching, release, seepage, filtration or transporting of any Hazardous Substance at, upon, under or within the Property, or from the Property to the environment, in violation of any Environmental Law or in excess of any reportable quantity established under any Environmental Law or which is likely to result in any liability to Mortgagor, Tenant, Mortgagee or any Registered Owner, any Federal, State or local government or any other Person for the costs of any removal or remedial action or natural resources damage or for bodily injury or property damage, (b) any deposit, storage, dumping, placement or use of any Hazardous Substance at, upon, under or within the Property or which extends to any real estate contiguous thereto in violation of any Environmental Law or in excess of any reportable quantity established under any Environmental Law or which is likely to result in any liability to any Federal, State or local government or to any other Person for the costs of any removal or remedial action or natural resources damage or for bodily injury or property damage, (c) the abandonment or discarding of any barrels, containers or other receptacles containing any Hazardous Substances in violation of any Environmental Laws, (d) any activity, occurrence or condition which is likely to result in any liability, cost or expense to Mortgagor, Mortgagee or any Registered Owner or any other owner or occupier of the Property, or which is likely to result in a creation of a lien on the Property, under any Environmental law and (e) any violation of or noncompliance with any Environmental Law at or relating to the Property.

"Event of Default" means any act or occurrence of the character specified in Section 6.1(a) through 6.1(1).

UNOFFICIAL COPY

"Excepted Payments" has the meaning specified in the Indenture.

"First Mortgages on the Other Properties" means the various first mortgages or deeds of trust, dated as of the date hereof, from Mortgagor, as grantor, in favor of Mortgagee, as mortgagee or beneficiary, encumbering the Other Properties.

"Franchise Agreement" has the meaning specified in Granting Clause Fourth.

"Grant" means mortgage and warrant, grant, convey, assign, create a security interest in, bargain, sell, pledge, give, transfer and set over.

"Guaranty" means the Guaranty, dated as of the date hereof, by Marriott to Mortgagor, relating to Tenant's obligations under the CTYD III Lease.

"Hazardous Substance" means (i) any substance, material, product, petroleum, petroleum product, derivative, compound or mixture, mineral (including asbestos), chemical, gas, medical waste, or other pollutant, in each case whether naturally occurring, man-made or the by-product of any process, that is toxic, harmful or hazardous or acutely hazardous to the environmental or public health or safety or (ii) any substance supporting a claim under any Environmental Law, whether or not defined as hazardous as such under any Environmental Law. Hazardous Substances include, without limitation, any toxic or hazardous waste, pollutant, contaminant, industrial waste, petroleum or petroleum-derived substances or waste, radon, radioactive materials, asbestos, asbestos containing materials, urea formaldehyde foam insulation, lead, polychlorinated biphenyls.

"Improvements" has the meaning set forth in Granting Clause Second.

"Indenture" means the Trust Indenture, dated the date hereof, between Mortgagor, as issuer, and Mortgagee, as trustee, pursuant to which the Notes have been issued and sold, together with any amendments or supplements thereto executed from time to time as permitted thereby.

"Installment Payments" has the meaning specified in the various Notes.

"Insurance Requirements" shall mean the requirements of all insurance policies required to be maintained in accordance with Section 2.11.

"Land Parcel" has the meaning specified in the Preliminary Statement.

"Late Charge" has the meaning specified in Section 2.3(d).

"Lease Event of Default" shall mean an "Event of Default" as defined in the CTYD III Lease, excluding any Event of Default (as defined in the CTYD III Lease) that may be waived by Mortgagor in accordance with Paragraph 1(a)(iii) of the Assignment, but such exclusion shall be applicable only until such time as Mortgagor shall have given Mortgagee the Exercise Notice described in Paragraph 1(a)(ii) of the Assignment with respect to such Event of Default (as defined in the CTYD III Lease) and then only for so long as such Exercise Notice shall have not been rescinded in accordance with such paragraph.

"Leases" shall mean the CTYD III Lease and any Other Lease.

"Legal Requirements" shall mean all present and future Laws (including but not limited to Environmental Laws) and all covenants, restrictions and conditions now or hereafter of record which may be applicable to Mortgagor or to Trust Estate, or to the use, manner of use, occupancy, possession, operation, maintenance, alteration, repair or restoration of any of the Trust Estate, even if compliance therewith necessitates structural changes or improvements or results in interference with the use or enjoyment of any of the Property. As used in this definition, "Law" shall mean any statute, constitution, rule of law, code, ordinance, order, judgment, decree, injunction, rule, regulation, requirement, or administrative or judicial determination, even if unforeseen or extraordinary, of every duly constituted governmental authority, court or agency, now or hereafter enacted or in effect.

"Lien of this Mortgage" and terms of like import mean the lien or security interest or other interest or charge Granted to Mortgagee hereby (including the after-acquired property clauses hereof) or subsequently Granted hereunder or pursuant hereto to Mortgagee.

"Loan Documents" means the Notes, the Indenture, this Mortgage, the Second Mortgage, the Mortgages on the Other Properties, the Assignment, the Assignments with

respect to the Other Properties, the Recourse Guaranty and the Note Agreements, and the following (each as defined in the Indenture): the Assignment of Guaranty, the Assignment of Agreement to Offer, the Assignment of Contracts and Agreements, and the Borrower Environmental Indemnity, and any agreement, certificate or instrument delivered pursuant to any of the foregoing on or about the date hereof.

"Make Whole Payment" has the meaning specified in the Indenture.

"Management Agreement" has the meaning specified in Granting Clause Fourth.

"Marriott" means Marriott Corporation, a Delaware corporation, together with any Person succeeding thereto by merger, consolidation or acquisition of its assets substantially as an entirety (provided that nothing herein shall be construed to permit any such merger, consolidation or acquisition) and any permitted assignee or permitted successor (immediate or remote).

"Marriott Agreements" means the CTYD III Lease, the Guaranty and each of the following (each as defined in the Note Agreement): the Agreement to Offer, the Purchase Agreement, the Deeds, the Bills of Sale, Marriott's Certificate, Tenant's Certificate, the Management Agreements, the Management Agreement Assignment, the Franchise Agreements, the Permits Assignments, the Sublease, the Loan Commitment and the Omnibus Assignments and any agreement, certificate or instrument delivered pursuant to the foregoing.

"Minimum Rental" has the meaning specified in the CTYD III Lease.

"Mortgagee" has the meaning specified in the introductory paragraph hereof, together with any successor corporate trustee under the Indenture.

"Mortgages on the Other Properties" means, collectively, the First Mortgages on the Other Properties and the Second Mortgages on the Other Properties.

"Mortgagor" has the meaning specified in the introductory paragraph hereof, together with any Person succeeding thereto by merger, consolidation or acquisition of its assets in whole or in part (provided that nothing in this definition shall be construed to permit any such merger, consolidation or acquisition not otherwise permitted hereunder or under any other Operative Agreement) and any

permitted transferee or permitted successor (immediate or remote) of the original-named Mortgagor.

"Note Agreement" means, collectively, the separate Note Purchase and Participation Agreements, dated as of the date hereof, between Mortgagor and each of the Original Note Purchasers severally.

"Notes" means, as of any particular time, all of the Notes, including the Primary Notes, issued pursuant to the Indenture, and any renewals, extensions, amendments or modifications thereof and all Notes issued from time to time in exchange or substitution therefor pursuant thereto.

"Operative Agreements" has the meaning specified in the Note Agreement.

"Original Note Purchasers" means the original purchasers of the Notes.

"Other Lease" means any lease, sublease, license, concession, management, mineral or other agreement of a similar kind that permit the use or occupancy of the Premises or the Improvements for any purpose, or the extraction or taking of any gas, oil, water or other minerals from the Premises in return for payment of any fee, rent or royalty, excluding, however, the CTYD III Lease.

"Other Notes" means, as of any particular time, all of the Notes except for the Primary Notes.

"Other Properties" means the Courtyard-by-Marriott Hotels, including all the lands, improvements and personalty associated therewith, described on Schedule C hereto.

"Overdue Rate" has the meaning specified in the Indenture.

"Permits, Contracts, Plans and Warranties" has the meaning specified in Granting Clause Fourth.

"Permitted Exceptions" means those exceptions and encumbrances listed in Schedule B hereto, and the rights of Tenant to the Property under the CTYD III Lease.

"Permitted Investments" has the meaning specified in the Indenture.

"Person" means any individual, partnership, corporation, trust, estate, unincorporated association,

UNOFFICIAL COPY

syndicate, joint venture or organization, or a government or any department or agency thereof.

"Personal Property" has the meaning specified in Granting Clause Third.

"Portfolio Properties" means the Property and the Other Properties.

"Premises" has the meaning specified in Granting Clause First.

"Primary Notes" means as of any particular time, the Notes described in the third paragraph of the Preliminary Statement hereto.

"Property" means the Premises, together with the Improvements thereon.

"Recourse Guaranty" shall have the meaning given such term in the Indenture.

"Register" shall have the meaning specified in the Indenture.

"Registered Owner of Notes" or a "Registered Owner" means, as of a given date, any Person whose name then appears on the Register to be maintained under the Indenture as the registered owner of any Note. As of the date hereof, the Original Note Purchasers are the Registered Owners.

"Rents" means rents, income, revenues, issues, awards, proceeds, profits, damages, royalties, accelerated rent payments and any other sums of money of any sort whatsoever payable to or receivable by the lessor under any of the Leases or with respect to any business or other activity conducted on any of the Premises, whether payable as rent or otherwise, including, without limitation, sums of money receivable thereunder by virtue of a release of existing easements or other rights in the nature of easements.

"Second Mortgage" means that certain Second Mortgage, Fixture Filing and Security Agreement, dated as of the date hereof, from Mortgagor to Mortgagee encumbering the Trust Estate and securing the indebtedness evidenced by the Other Notes.

"Second Mortgages on the Other Properties" means the various second mortgages or deeds of trust, dated as of

004-0193

the date hereof, from Mortgagor, as grantor, in favor of Mortgagee, as mortgagee or beneficiary, encumbering the Other Properties.

"subject to adjustment", following any amount stated as a specific number in this Mortgage, means that such amount is deemed to be increased by fifty percent of the original stated amount on the fifth (5th) anniversary of the date hereof and on every fifth (5th) anniversary thereafter.

"Tenant" means the tenant under the CTYD III Lease, together with any permitted assignee of or permitted successor to the interest of tenant thereunder.

"Tenant's Fiscal Year" shall have the meaning given to the term "Fiscal Year" in the CTYD III Lease.

"Termination Value" shall have the meaning ascribed in the CTYD III Lease.

"Trust Estate" means all property described in the Granting Clauses.

Section 1.2. Generally. For all purposes of this Mortgage, (i) the terms defined in this Article One shall include the plural as well as the singular; (ii) unless otherwise specified, all references herein to designated "Articles", "Sections", "Recitals", "Schedules" and other subdivisions shall be to the designated Articles, Sections, Recitals, Schedules and other subdivisions of this Mortgage; (iii) the words "including" and "include" and words of similar import, shall be deemed to be followed by the words "without limitation"; (iv) references to the Property, Premises, Trust Estate or any component of the foregoing shall be deemed to refer to the same or any portion thereof; and (v) the words "herein", "hereof" and "hereunder" and words of similar import, shall refer to this Mortgage as a whole and not to any particular Article, Section, Recital, Schedule or other subdivision of this Mortgage.

ARTICLE 2

Mortgagor's Covenants

Mortgagor hereby represents, warrants, covenants and agrees as follows:

Section 2.1. Title.

(a) As of the date hereof, (i) Mortgagor has good and marketable title to an indefeasible fee estate in Parcel 1 of the Premises, subject to no lien, charge or encumbrance except for the Permitted Exceptions, and (ii) this Mortgage is a valid and enforceable first and prior lien on or deed of Parcel 1 of the Premises subject only to the Permitted Exceptions.

(b) As of the date hereof, (i) Mortgagor has good and marketable title to an indefeasible easement interest in and to Parcel 2, if any, and Mortgagor has good and marketable fee title to the Improvements located on Parcel 1 of the Premises, subject to no lien, charge or encumbrance except for the Permitted Exceptions, and (ii) this Mortgage is a valid and enforceable first and prior lien or deed of such easement interest and Improvements subject only to the Permitted Exceptions.

(c) Mortgagor as of the date hereof has good and marketable title to all the Personal Property subject to no lien, charge or encumbrance other than this Mortgage and the Permitted Exceptions. Except with respect to office equipment, motorvans and other items that Tenant leases in accordance with and subject to the terms of Section 5.05C of the CTYD III Lease: neither the Personal Property nor the Permits, Contracts, Plans and Warranties are the subject matter of any lease or other arrangement that is not identified on Schedule B whereby the ownership of any Personal Property or the Permits, Contracts, Plans and Warranties will be held by any person or entity other than Mortgagor or Tenant (which has granted to Mortgagor a security interest therein and which in turn is being collaterally assigned to Mortgagee); none of the Personal Property will be removed from the Premises or the Improvements except to the extent permitted by the CTYD III Lease; and Mortgagor will not create or cause or permit or suffer to be created any security interest covering any of the Personal Property or the Permits, Contracts, Plans and Warranties other than the security interest in the Personal Property and the Permits, Contracts, Plans and Warranties created in favor of Mortgagee by this Mortgage (or the

UNOFFICIAL COPY

1 1 1 3 3

Second Mortgage) or any other agreement collateral hereto (or thereto).

(d) As of the date hereof, the CTYD III Lease is in full force and effect and the lessor's interest thereunder is subject to no lien, charge or encumbrance other than this Mortgage, the other Loan Documents and the Permitted Exceptions. Mortgagor will not enter into any agreement modifying or amending the CTYD III Lease or releasing any obligations imposed upon Tenant thereby (except in accordance with and subject to the express terms of Paragraph 1 of the Assignment).

(e) All Easement Agreements are valid, subsisting and in full force and effect as of the date hereof, and Mortgagor will fully perform or cause to be performed in all material respects the terms to be performed by Mortgagor thereunder, and Mortgagor has no knowledge of any default thereunder in any material respect or failure to perform in any material respect the terms thereof by any other party. All utilities serving the Property are located in and in the future will be located in, and adequate vehicular access to the Improvements is provided by, either a public right-of-way abutting the Land Parcel or an Easement Agreement. All licenses, permits, easements and rights-of-way, including proof of dedication, otherwise required for the use and operation of the Improvements have been obtained from the appropriate governmental authorities having jurisdiction or from private parties.

(f) Mortgagor will forever warrant and defend title to the Premises and the Improvements and to the Personal Property, the rights of Mortgagee in the Trust Estate under this Mortgage and the financing statements executed by Mortgagor simultaneously herewith, and the enforceability, validity and priority of the lien hereof thereon against the claims of all Persons and parties except those having rights under Permitted Exceptions to the extent of those rights.

(g) Mortgagor has full power and authority to Grant its interest in the Trust Estate to Mortgagee in the manner and form herein done or intended hereafter to be done and to make and perform the representations, warranties, covenants and agreements made or to be performed by Mortgagor hereunder or the other Loan Documents.

(h) As of the date hereof, the Premises, the Improvements, the CTYD III Lease, and the Other Leases and the use of the Trust Estate by Tenant and its agents, assignees, employees, invitees, lessees, licensees and tenants in accordance with and subject to the terms of the

UNOFFICIAL COPY

Property of Cook County Clerk's Office

CTYD III Lease comply in all material respects with all applicable requirements of local, state and federal law (except with respect to Environmental Laws, the foregoing shall not be deemed a representation but rather a covenant on the part of Mortgagor to cause the foregoing to be accurate), and all building permits, restrictions of records or agreements affecting the Property.

Section 2.2. Franchises; Status; Hotel Name; Operation.

(a) Mortgagor is doing on the date of this Mortgage, and so long as Mortgagor owns any of the Trust Estate Mortgage will do or cause to be done all things necessary (i) to preserve and keep in full force and effect its existence, franchises, rights and privileges under the laws of the State of its formation and of any other State in which it operates or in which property it owns is located, (ii) to comply with all regulations, rules, ordinances, statutes, orders and decrees of any governmental authority or court applicable to Mortgagor or the Trust Estate, including maintaining all permits and licenses which are required for use and operation of the Improvements and the Premises as presently used and operated and (iii) all things necessary to preserve and keep in full force and effect its right to own, lease, mortgage and grant a security interest in property and to enforce contracts in the state in which the Property is located.

(b) Mortgagor is not and will not become a foreign person, nonresident alien, foreign corporation, foreign partnership, foreign trust or foreign estate as those terms are defined and used in Sections 1445 and 7701 of the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder.

Section 2.3. Payment of Notes and Other Amounts.

(a) Mortgagor will punctually pay all principal, interest, premium, if any, and all other sums due or to become due on the Primary Notes, this Mortgage, the Indenture or any other Loan Document (except that it is the intent of Mortgagor and Mortgagee that this Mortgage not secure the indebtedness evidenced by the Other Notes) in accordance with the terms hereof or thereof, as applicable, all without relief from valuation and appraisal laws, at the time and place and in the manner specified herein or therein, as applicable, in the currency of the United States of America which at the time of such payment shall be legal tender for the payment of public and private debts.

(b) If this Mortgage or the Primary Notes are referred to attorneys for foreclosure or to collect the debt secured hereby, or if there shall arise any suit, action, proceeding or dispute of any kind relating to Mortgagee's rights under this Mortgage or any other Loan Document (including any bankruptcy, insolvency or reorganization proceedings, or any action to protect the security hereof, or the exercise of the power of sale contained in this Mortgage, or any condemnation action involving the Premises), or if Mortgagee or any Registered Owner is made a party or appears as party plaintiff or party defendant in connection with any such suit, action, proceeding or dispute, or is obliged to defend or uphold or enforce this Mortgage or the rights of Mortgagee hereunder or under any Loan Document or the terms of the CRD III Lease or any Other Lease, Mortgagor will pay or cause to be paid all costs and expenses, including reasonable attorneys' fees and legal expenses (including any fees and expenses of in-house counsel), to the extent permitted by law, incurred by Mortgagee or any Registered Owner in connection therewith, together with all statutory costs, disbursements and allowances, and interest thereon accruing from either (x) the date of demand for payment thereof (to the extent such amount shall have been advanced by or on behalf of Mortgagee or a Registered Owner prior to such demand) or (y) ten (10) days after demand (to the extent the amount demanded shall have not been paid prior to such demand), in each case at the Overdue Rate, and such sums and the interest thereon shall be a lien on the Trust Estate prior to any right, title to, interest in or claim upon the Trust Estate attaching or accruing subsequent to the recording of this Mortgage and shall be secured by this Mortgage. Notwithstanding the foregoing, Mortgagor shall not be obligated under this Section 2.3(b) for any such costs, expenses, attorneys' fees and other enforcement costs of Mortgagee or a Registered Owner described in this Section 2.3(b) if the same are incurred with respect to an attempted collection or enforcement claim made by Mortgagee or a Registered Owner which is judicially and finally determined (beyond any right of appeal or certiorari) against Mortgagee or such Registered Owner and, to the extent any of the same shall have previously been paid to Mortgagee or a Registered Owner, Mortgagee shall refund the same to Mortgagor.

(c) Notwithstanding anything to the contrary in this Mortgage or in the Primary Notes, if fulfillment of any provision of this Mortgage, the Primary Notes or any other Loan Document, at the time performance of such provision shall be due, would violate any applicable usury statute or any other applicable law with regard to such provision, then the obligation to be fulfilled shall be reduced to the limit permitted under such statute or law so that no amount is

exacted under this Mortgage, the Primary Notes or such Loan Document that is in excess of the full limit of such validity. The amounts of any such reductions shall be promptly credited against any unpaid principal balance and any excess payments or portion thereof not capable of being so credited shall accrue (with interest at the rate specified in the Primary Notes or the lesser interest rate permitted by law) and shall be refunded to Mortgagor; provided, however, that if following such refund Mortgagee shall subsequently be permitted to receive such excess amount, including any amount accrued, without violating such statute or law, Mortgagor shall pay such accrued amount immediately to Mortgagee; provided also, however, Mortgagor's obligations under this subsection (c) shall terminate at such time as the principal amount of the Primary Notes and all lawful interest thereon, as well as all other obligations of Mortgagor hereunder, are paid in full.

(d) Any payment of amounts due under this Mortgage not made on or before the due date for such payment (taking into account the provisions of Section 2.3(e)) shall accrue interest daily without notice from the due date until paid at the Overdue Rate, and such interest at the Overdue Rate shall be immediately due upon demand by Mortgagee. In addition to such obligation, if any amount due under this Mortgage (other than any principal amount of the Primary Notes that becomes due by reason of acceleration thereof) is not paid on or before the fifth (5th) day after the same is due (taking into account the provisions of Section 2.3(e)), Mortgagor shall pay to Mortgagee an amount equal to five percent (5%) of such payment (such amount, the "Late Charge").

(e) In any case where a payment under this Mortgage would otherwise be due on a day that is not a Business Day, then such payment shall instead be due on the next succeeding Business Day, provided, however, if such payment is not made on the next succeeding Business Day, then interest at the Overdue Rate shall be due and accrue as of, and Mortgagor's liability for the Late Charge shall be determined by reference to, the day such payment would have been due but for the application of the foregoing provisions of this sentence.

Section 2.4. Payment of Taxes, Liens and Charges.

(a) Mortgagor will pay and discharge from time to time, before any interest or penalty accrues thereon or attaches thereto, all taxes of every kind and nature, all general and special assessments, levies, permits, inspection

and license fees, all water and sewer rents, all vault charges, and all other public charges, and all service charges, common area charges, merchant's association contributions, private maintenance charges, utility charges and all other private charges, whether of a like or different nature, imposed upon or assessed against the Trust Estate or any part thereof or arising in respect of the ownership, leasing, occupancy, transfer, use or possession thereof, including all Impositions (as defined in the CTYD III Lease). Tenant's compliance with the terms of Section 5.10A of the CTYD III Lease shall constitute compliance by Mortgagor with the above provisions of this Section 2.4(a). At any time and from time to time, Mortgagee shall have the right (but not the obligation), at its sole option, to enter into a contract, at Mortgagor's expense, with a tax service firm for such firm to deliver to Mortgagee on or about the same times each year, receipts evidencing the payment of all such taxes, assessments, levies, fees and other public charges imposed upon or assessed against the Trust Estate.

(b) Mortgagor will pay any federal, state or municipal taxes (except capital, franchise, income and stock transfer taxes and doing business taxes (unless liability for such doing business taxes results solely by reason of the transaction contemplated by the Loan Documents)) imposed on Mortgagee or any Registered Owner by reason of this Mortgage or such Registered Owner's ownership of any Note. Mortgagor will also pay and hold harmless and indemnify Mortgagee and each Registered Owner from liability for payment of any recording, documentary, stamp, intangible or other taxes with respect to this Mortgage or the Notes or the preparation, execution, delivery, filing, recording, performance or enforcement of this Mortgage, the Primary Notes, the Indenture or any other Operative Agreement.

(c) In the event of the passage of any federal, state, municipal or other governmental law, order, rule or regulation subsequent to the date hereof imposing a tax to be paid by Mortgagee or any Registered Owner, either directly or indirectly, on this Mortgage, the Primary Notes, the Indenture, or any other Operative Agreement (or any amounts payable thereunder) (except capital, franchise, income and stock transfer taxes and doing business taxes (unless liability for such doing business taxes results solely by reason of the transaction contemplated by the Loan Documents)) or to require an amount of taxes to be withheld or deducted therefrom (unless the tax withheld for is not the responsibility of Mortgagor pursuant to Section 2.4(b)), Mortgagor will make such additional payments (or, in the case where withholding is required from any amount payable to Mortgagee or any Registered Owner under the Primary

UNOFFICIAL COPY

Notes, this Mortgage or any other Loan Document, then except to the extent that the tax withheld for is not the responsibility of Mortgagor pursuant to Section 2.4(b), the amount payable under the Primary Notes will be increased to the amount which, after deduction of all taxes to be withheld or deducted from such increased amount, will yield to Mortgagee or the Registered Owner, as applicable, the amount stated to be payable with respect thereto), and to the extent necessary or desirable to obligate Mortgagor to make such additional payments, Mortgagor shall enter into such further instruments, including new Primary Notes to be issued in exchange for the Primary Notes theretofore issued; provided, however, if Mortgagor is prohibited by applicable law from making such additional payments (even with its entering into such further instruments described above), then the obligation to be fulfilled shall be reduced to the limit permitted under such law so that no amount is exacted under this Mortgage or under the Primary Notes that is in excess of the full limit of such validity. The amounts of any such reductions shall accrue (with interest at the Overdue Rate or the lesser interest rate permitted by law), and if Mortgagee shall subsequently be permitted to receive such amount accrued without violating such law, Mortgagor shall pay such accrued amount immediately to Mortgagee; provided, however, Mortgagor's obligations under this subsection (c) shall terminate at such time as the principal amount of the Primary Notes and all lawful interest thereon, as well as all other obligations of Mortgagor hereunder, are paid in full. Notwithstanding anything in the foregoing or elsewhere in the Loan Documents that may be construed to the contrary, Mortgagor shall be entitled to withhold from any payment due to Mortgagee or any Registered Owner on account of income taxes of Mortgagee or such Registered Owner, as applicable, but only to the extent required by Law.

(d) Subject to the provisions of Section 2.4(e), Mortgagor will not suffer any mechanic's, materialman's or laborer's statutory or other lien for labor or materials to be filed of record and to remain outstanding and unpaid upon all or any part of the Premises, the Improvements, the Rents or the Trust Estate.

(e) Mortgagor will not be required to pay, discharge or remove any tax, assessment, levy, fee, charge, lien or encumbrance, or to comply with any legal requirement as provided in Section 2.9(a) applicable to the Premises or to the ownership, occupancy or use thereof if there is no Lease Event of Default and the Tenant is otherwise contesting the same in accordance with, and subject to, the terms of Section 5.13 of the CTYD III Lease. If a Lease Event of Default shall have occurred and be continuing and no other

UNOFFICIAL COPY

Event of Default hereunder shall have occurred and be continuing, Mortgagor will not be required to pay, discharge or remove any tax, assessment, levy, fee, charge, lien or encumbrance, or to comply with any legal requirement as provided in Section 2.9(a) applicable to the Premises or to the ownership, occupancy or use thereof so long as Mortgagor shall be diligently contesting, in good faith and at Mortgagor's sole cost and expense, the existence, amount or validity thereof by appropriate arbitration, administrative or judicial proceedings which during their pendency have the practical effect of preventing (i) the collection of or other realization upon or enforcement of the tax, assessment, levy, fee, charge, legal requirement, lien or encumbrance so contested and (ii) any sale, forfeiture or loss of the Trust Estate or any portion thereof or the payment of any sum required to be paid by Mortgagor hereunder to or for the benefit of Mortgagee or the Registered Owners; provided Mortgagor shall deposit with Mortgagee an amount in cash (or letter of credit in favor of Mortgagee and in form and substance satisfactory to Mortgagee) equal to the amount of such tax, assessment, levy, fee, charge, lien or encumbrance, or the amount that would be required to be expended to comply with such legal requirement (as certified to by an independent licensed contractor approved by Mortgagee), together in each case with an additional amount to pay any penalties or interest or other costs that could be incurred by Mortgagee in removing of record, satisfying or complying with the contested item (any such additional amount to be estimated by independent counsel to Mortgagor); provided, further, such contests and proceedings do not (1) subject Mortgagee or the Registered Owners to any material risk of criminal or civil liability, (2) result in any impairment of the priority of this Mortgage or any material risk of any foreclosure of the contested assessment, encumbrance, lien or tax, (3) delay or prevent payment of any sum required to be paid by Mortgagor hereunder to or for the benefit of Mortgagee or the Registered Owners, or (4) pose a material threat to the safety, security, protection, or continued maintenance, occupancy or use and operation of the Trust Estate or any material portion thereof.

(f) At any time that, and for so long as, Tenant is so obligated pursuant to the terms of the CTYD III Lease, Mortgagor shall make or cause to be made the initial and subsequent deposits required to be made by Tenant pursuant to the terms of said Section 5.16 on account of (i) Impositions (as defined in the CTYD III Lease), (ii) annual insurance premiums and (iii) renewals and replacements of FF&E and Routine Repairs (as each such term is defined in the CTYD III Lease). Tenant's compliance with the terms of

said Section 5.16 shall constitute Mortgagor's compliance with the above provisions of this subsection (f). Said amounts shall be invested, and held, disbursed and applied in accordance with the terms of the Indenture (subject, however, to Tenant's rights under the CTYD III Lease); subject to the terms of the Indenture, after any Event of Default, Mortgagee may use such deposits and any interest accrued thereon, at its option, either to pay such items or to pay any other obligations which are to be paid pursuant to this Mortgage, the Primary Notes, the Indenture or any other Loan Document.

(g) At any time that, and for so long as, Tenant is so obligated pursuant to the terms of the CTYD III Lease, Mortgagor shall deliver or cause to be delivered the Letter of Credit (as defined in the CTYD III Lease) required to be delivered by Tenant pursuant to Section 4.05 of the CTYD III Lease. Subject to the rights of Tenant under the CTYD III Lease, said Letter of Credit shall be held and may be drawn upon, and any proceeds thereof shall be held, disbursed and applied, all in accordance with the Indenture; subject to the terms of the CTYD III Lease, after any Lease Event of Default (including the failure to deliver a replacement Letter of Credit at least 30 days prior to the expiration of the then-outstanding Letter of Credit, unless Tenant shall no longer be obligated pursuant to the CTYD III Lease to maintain such Letter of Credit), Mortgagee may draw on such Letter of Credit and, subject to the terms of the Indenture, use the proceeds thereof and any interest accrued thereon at its option either to pay such items or to pay any other obligations which are to be paid pursuant to this Mortgage, the Primary Notes, the Indenture or any other Loan Document.

Section 2.5. Payment of Closing Costs.

Mortgagor shall pay or cause to be paid all costs in connection with, relating to or arising out of the preparation, execution and recording of this Mortgage, the making of the Primary Notes and the indebtedness evidenced thereby, and the preparation, execution and delivery of the Indenture and other Loan Documents and Operative Agreements to be executed and delivered on or about the date hereof, including title company premiums and charges, inspection costs, survey costs, recording fees and taxes, attorneys', engineers' and consultants' fees and all other similar expenses of every kind.

Section 2.6. CTYD III Lease; Easement Agreements.

(a) Mortgagor will at all times promptly and faithfully perform, or cause to be performed, all of the covenants, conditions and agreements contained in the CTYD III Lease and Other Leases now or hereafter existing on the part of Mortgagor thereunder to be kept and performed, and will at all times do all things reasonably necessary to compel performance by or otherwise enforce its rights against Tenant under the CTYD III Lease to insure that all obligations, covenants and agreements by Tenant are performed thereunder, subject, however, to the terms of the Assignment.

(b) Mortgagor will at all times promptly and faithfully observe, discharge and perform in all material respects all of the covenants, conditions and agreements contained in any Easement Agreement on the part of Mortgagor to be kept and performed thereunder.

(c) Mortgagor will not alter, modify, amend or terminate any Easement Agreement, give any consent or approval thereunder, or enter into any new Easement Agreement, without in each case the prior written consent of Mortgagee, which consent shall not be withheld or delayed if the alteration, modification, amendment, termination, consent or approval under such Easement Agreement by Mortgagor or such new Easement Agreement will not adversely affect the value, condition or utility of the Trust Estate in any material respect.

(d) Mortgagor will promptly deliver to Mortgagee true and correct copies of all notices received or given by Mortgagor pursuant to any Easement Agreement.

(e) Mortgagor will, immediately upon service thereof on or to Mortgagor, deliver to Mortgagee a true copy of each petition, summons, complaint, notice of motion, order to show cause and of all other provisions, pleadings, and papers, however designated, served in any action or proceeding to evict Mortgagor or to recover possession of any of the Trust Estate or for any other purpose affecting the CTYD III Lease, the Other Leases or this Mortgage.

(f) In case Mortgagor acquires fee title or any greater estate, title or interest in the premises subject to any Easement Agreement(s), this Mortgage shall attach to and cover and be a lien upon the fee title or such other estate so acquired, and such fee title or other estate shall, without further assignment, grant or conveyance, become and be subject to this Mortgage. Mortgagor shall take all

action necessary to ensure that any affiliate of Mortgagor which acquires fee title or any other estate, title or interest in such premises shall acquire such estate, title or interest subject to this Mortgage.

(g) Mortgagee has and will continue to have a valid and enforceable license in its favor pursuant to an Assignment of Contracts and Agreements made to Mortgagee by Mortgagor as of the date hereof, which instrument relates, inter alia, to the Management Agreement and the Franchise Agreement, to use at the Property the name of the hotel currently operated by Tenant in the Improvements, for the period provided in, and subject to the terms and conditions of, the Management Agreement and the Franchise Agreement. Mortgagor will not alter, modify, amend or terminate the Management Agreement or the Franchise Agreement without the prior written consent of Mortgagee.

Section 2.7. Use; Operating Covenant; Operational Licenses and Permits.

(a) Mortgagor shall cause the Property to be continuously open (except as a result of casualty or condemnation, or Alterations permitted hereunder, provided that in each such case Mortgagor performs or causes to be performed all obligations to be performed hereunder with respect to the same) and used as hotels within the Courtyard by Marriott System and for no other purpose, except as provided in Section 5.18 of the CTYD III Lease, provided that if Marriott (or its Affiliate) changes the name of all or substantially all of the hotels operating within the Courtyard By Marriott System, then the Property shall be operated under such other name, subject, however, to the provisions of Section 5.18B of the CTYD III Lease. In all events, the Property shall be operated in accordance with the Courtyard By Marriott System Standards. Tenant's compliance with the terms of Sections 5.02A and 5.02B of the CTYD III Lease shall constitute compliance by Mortgagor with the above provisions of this Section 2.7(a).

(b) On the commencement date of the CTYD III Lease, and at least thirty (30) days after the beginning of each succeeding Tenant's Fiscal Year, Mortgagor shall deliver or cause to be delivered to Mortgagee the operating projection for the Property required to be delivered by Tenant pursuant to the terms of Section 5.02C of the CTYD III Lease, and at least thirty (30) days prior to the beginning of each Tenant's Fiscal Year commencing after the date hereof, Mortgagor shall deliver or cause to be delivered the preliminary operating projection for the Property required to be delivered by said Section 5.02C. Tenant's compliance

with the terms of Section 5.02C of the CTVD III Lease shall constitute compliance by Mortgagor with the above provisions of this Section 2.7(b).

(c) Mortgagor represents that it has obtained or caused to be obtained (to the extent available) and shall, at its sole cost and expense, throughout the term of this Mortgage, maintain or cause to be maintained all hotel, restaurant and alcoholic beverage licenses and any other permits or licenses necessary or appropriate for the ownership, leasing, operation, use, maintenance, repair, Alterations, management or construction of the Improvements, the Premises or the Personal Property. Tenant's compliance with the terms of the first two sentences of Section 5.07 of the CTVD III Lease shall constitute compliance by Mortgagor with the above provisions of this Section 2.7(c).

Section 2.8. Maintenance.

(a) Mortgagor shall keep the Property, or cause the Property to be kept, in good repair and in a safe, clean and sanitary condition, ordinary wear and tear excepted, and shall provide all necessary maintenance, repairs, renewals, replacements and additions for all Improvements and Personal Property. In all events, the Property and the Personal Property shall be maintained in accordance with applicable Legal Requirements and in accordance with the better of the following standards: (i) the Courtyard By Marriott System Standard, and (ii) the maintenance standards employed by Tenant at the Property as of the date hereof. Any Alterations shall be made in conformity with the provisions of this Mortgage.

(b) If any Improvement, now or hereafter constructed, shall (i) encroach upon any setback or any property, street or right-of-way adjoining any portion of the Property, (ii) violate the provisions of any restrictive covenant affecting any portion of the Property, (iii) hinder or obstruct any easement or right-of-way to which any portion of the Property is subject or (iv) impair the rights or others in, to or under any of the foregoing, Mortgagor shall, promptly after receiving notice thereof, either (A) obtain from all necessary parties waivers or settlements of all claims, liabilities and damages resulting from each such encroachment, violation, hindrance, obstruction or impairment, whether the same shall affect Mortgagor, Mortgagee or Tenant, or (B) take such action as shall be necessary to remove all such encroachments, hindrances or obstructions and to end all such violations or impairments, including, if necessary making or causing to be made Alterations in accordance with the terms hereof.

(c) Within thirty (30) days after the date on which there are fewer than seventy (70) hotels in the Courtyard by Marriott System, Mortgagor shall deliver or cause to be delivered to Mortgagee a reasonably detailed written description of the Courtyard by Marriott System Standards then in effect.

(d) Tenant's compliance with a given provision of Section 5.08 of the CTYD III Lease shall constitute compliance by Mortgagor with the corresponding provision of this Section 2.8.

Section 2.9. Compliance with Laws; Environmental Laws; Asbestos.

(a) Subject to Section 2.4(e) hereof, Mortgagor shall, at its expense, comply with and conform to (or cause to be complied with and conformed to) all Insurance Requirements and Legal Requirements, including all applicable Environmental Laws. Mortgagor shall not at any time (i) cause, permit or suffer to occur any Environmental Violation or (ii) permit Tenant, any sublessee or assignee or other Person occupying the Property to cause, permit or suffer to occur any Environmental Violation. Tenant's compliance with a given provision of Section 5.09A of the CTYD III Lease shall constitute compliance by Mortgagor with the above provisions of this Section 2.9(a), except for any Environmental Violations caused by or on behalf of Mortgagor (as distinguished from Tenant).

(b) If Mortgagee has reasonable cause to believe that an Environmental Violation exists with respect to the Property, or if an Event of Default or Lease Event of Default exists, or if requested by Mortgagee in connection with a proposed sale or participation of all or any portion of a Registered Owner's interest in the Primary Notes or in connection with the appointment of a successor trustee on behalf of the Registered Owners in connection herewith, then upon written notice from Mortgagee to Mortgagor, Mortgagor shall engage, or cause Tenant pursuant to Section 5.09B of the CTYD III Lease to engage, such persons ("Site Reviewers") as Mortgagee shall specify to visit the Property and perform, as agents of Mortgagor (or if such Persons are to be engaged by Tenant pursuant to said Section 5.09B, as agents of Tenant), environmental site investigations and assessments ("Site Assessments") on the Property for the purpose of determining whether there exists on the Property any Environmental Violation or any condition which could result in any Environmental Violation. If Mortgagor (or Tenant, as applicable) fails or refuses to commence any Site Assessment or if a Lease Event of Default exists, Mortgagee

shall have the right to do so. Mortgagor shall pay or cause to be paid the cost of any Site Assessment, except that if no Event of Default or Lease Event of Default existed at the time such Site Assessment was commissioned, the cost in connection with a sale or participation of the interest of Mortgagee or any Registered Owner or the appointment of a successor trustee shall be paid or cause to be paid by Mortgagee or the Registered Owners. If a Site Assessment is commenced at the request of Mortgagee solely because of the occurrence of an Event of Default or Lease Event of Default, then upon the curing of such Event of Default or Lease of Default, as applicable, Mortgagor shall have the right to terminate such Site Assessment, and Mortgagor shall pay or cause to be paid all fees and costs of the Site Reviewers incurred to and including the date of termination. Such Site Assessments may, at the option of Mortgagee, include both above and below the ground testing for Environmental Violations and such other tests as may be necessary, in the opinion of the Site Reviewers, to conduct the Site Assessments. Mortgagor shall supply (to the extent in Mortgagor's possession or control) and cause Tenant to supply to the Site Reviewers such historical and operational information regarding the Property as may be reasonably requested by the Site Reviewers to facilitate the Site Assessments, and shall make available, and cause Tenant to make available (in accordance with the CTYD III Lease), for meetings with the Site Reviewers appropriate personnel of Mortgagor (if any) and of Tenant having knowledge of such matters.

(c) The Site Reviewers shall deliver a copy of their report to Mortgagor, Mortgagee and Tenant and shall include in their report a statement estimating the cost of any remediation, monitoring and other compliance program, if any, recommended by the Site Reviewers with respect to the Property as the result of the Site Assessment. If an Environmental Violation occurs or is found to exist and the cost of the remediation, monitoring or other compliance program necessary or appropriate in connection therewith is, in the Site Reviewers' judgment, likely to exceed \$100,000, subject to adjustment, Mortgagor shall provide or cause to be provided to Mortgagee, within ten (10) days after Mortgagee's request therefor, adequate financial assurances that sufficient funds will be available for the implementation of such remediation program in accordance with applicable Environmental Laws. Such financial assurances shall be a bond, letter of credit or other security satisfactory to Mortgagee in form and substance and in an amount equal to the Site Reviewers' reasonable estimate, based upon a Site Assessment performed pursuant to Section 2.9(b), of the anticipated costs of such program.

UNOFFICIAL COPY

(d) If Mortgagor fails diligently to pursue (or cause to be pursued) any of its obligations under this Section 2.9, and such failure continues for a period of ten (10) days after notice (which notice may be the same notice given under Section 6.1(d)) from Mortgagee (or such shorter applicable cure period under any Easement Agreement(s) applicable thereto or under applicable law, regulation or order), Mortgagee shall have the right (but no obligation), in addition to any other rights or remedies it may have pursuant to this Mortgage or at law, to take any and all reasonable actions as Mortgagee shall deem necessary or advisable in order to effect such compliance, for and on behalf of Mortgagor and at the cost and expense of Mortgagor, including to enter the Property for the purpose of making tests, obtaining samples and surveys and performing any other acts as may be reasonably necessary or desirable in the reasonable discretion of Mortgagee, and reimbursement to Mortgagee of the cost thereof shall be secured by this Mortgage and be due and payable on demand with interest thereon at the Overdue Rate from the date such cost is incurred. Mortgagor hereby designates Mortgagee as its attorney-in-fact (and as a substitute attorney-in-fact for Tenant under the power of attorney granted by Tenant to Mortgagor under Section 5.00E of the CTYD III Lease) for purposes of signing and filing such applications and other documents as may be reasonably necessary or desirable for the foregoing purposes, which power-of-attorney shall be deemed to be irrevocable and coupled with an interest. Mortgagee will give Mortgagor not less than three (3) Business Days prior written notice prior to taking any action pursuant to the foregoing power-of-attorney.

(e) Mortgagor shall notify Mortgagee and each Registered Owner immediately after becoming aware of any Environmental Violation (or potential Environmental Violation) or noncompliance with any of the covenants contained in this Section 2.9 and shall forward to Mortgagee immediately upon receipt thereof copies of all orders, reports, notices, permits, applications or other communications relating to any such violation or noncompliance.

(f) All future leases, subleases or concession agreements relating to the Property shall contain covenants of the other party thereto which are identical to the covenants contained in subsections (a), (d), (e) and (h) of Section 2.9 hereof.

(g) Mortgagor shall make all submissions to any governmental authority required pursuant to any applicable Environmental Law (including (if the Property is located in

the State of New Jersey) the New Jersey Environmental Cleanup Responsibility Act, NJSA 13:1K-6 et seq. ("ECRA")), including any submissions that may be required by virtue of any closing, terminating or transferring of operations at the Property or transfer of Mortgagor's interest in the Property or of Tenant's leasehold interest in the Property (provided that nothing in this Section 2.9(g) shall be construed to permit any such closing, termination or transfer). Should any such authority require that a cleanup plan be prepared and that a cleanup be undertaken because of any environmental problems at the Property, then Mortgagor, at Mortgagor's expense, shall prepare and submit the required cleanup plans, provide any required financial assurances and carry out and implement the approved cleanup plan.

(h) Mortgagor shall not install asbestos or any material containing asbestos or permit asbestos or any material containing asbestos to be installed on the Premises or in the Improvements. If any such substance shall be installed on the Premises or in the Improvements, Mortgagor shall promptly remove any such material. If Mortgagor shall fail to do so within an applicable cure period under this Mortgage, Mortgagee may either declare an Event of Default or, upon three (3) Business Days' notice to Mortgagor and (if required by the CTYD III Lease) Tenant, cause the removal of the asbestos from the Premises or the Improvements, and in connection therewith, Mortgagor hereby grants Mortgagee and its employees and agents access to the Premises and the Improvements and an irrevocable, non-exclusive license (subject to the rights (if any) of any tenant under any Lease), if, in the opinion of Mortgagee, irreparable harm to the Trust Estate is imminent or otherwise upon expiration of the applicable cure period hereinabove provided for, to remove any asbestos at Mortgagor's expense. Any costs incurred by Mortgagee in the exercise of its rights under this Section 2.9(h) shall be secured by this Mortgage and shall be payable on demand and with interest thereon at the Overdue Rate from the date such cost is incurred.

(i) Mortgagor shall indemnify Mortgagee and each of the Registered Owners, and shall defend and hold Mortgagee and each of the Registered Owners harmless, from and against all loss, cost, damage and expense (including, without limitation, reasonable attorneys' fees and costs (including any fees and expenses of in-house counsel) incurred in the investigation, defense and settlement of claims) that Mortgagee or any Registered Owner may incur, directly or indirectly, as a result of or in connection with the assertion against Mortgagee or any Registered Owner of any

UNOFFICIAL COPY

Property of Cook County Clerk's Office

claim relating to the presence or removal of any hazardous substance or waste, or the presence or removal of any asbestos, or compliance or non-compliance with any Environmental Law, whether before, during or after the term of this Mortgage, including claims relating to personal injury or damage to personal property including (to the fullest extent permitted by law) any of the same incurred by virtue of Mortgagee's or any Registered Owner's own negligence, it being the purpose of this provision to expressly provide for complete indemnification by Mortgagor. Mortgagee and each of the Registered Owners shall have unlimited recourse as against Mortgagor (but not, except as otherwise provided in the Recourse Guaranty, as against any Exculpated Person (as defined in Section 7.1 hereof)), to the extent of any liability incurred by Mortgagee with respect to any breach of any provision of this Mortgage pertaining to Environmental Laws, Environmental Violations or asbestos, and with respect to the indemnification in this Section 2.9(1). The obligations of Mortgagor pursuant to this Section 2.9(1) shall survive the discharge or foreclosure of the Lien Granted by this Mortgage.

Section 2.10. Alterations; Waste; Restoration upon Casualty or Condemnation.

(a) No Improvements shall be altered or demolished or removed in whole or in part, no structural or exterior work or structural interior work shall be performed, no additions to the existing Improvements or other structures on the Premises, and (except as may be specifically required to comply with Mortgagor's obligations hereunder) no other Alterations shall be made, without in each case the prior written consent of Mortgagee, except for Alterations that may be performed by Tenant in accordance with and subject to the terms of the CTYD III Lease. Mortgagor will not commit or suffer or permit any waste on the Trust Estate, or cut or remove or suffer the cutting or removal of any trees, topsoil or minerals from the Premises for the primary purpose of sale to or use by third parties. Mortgagor shall not make or permit or suffer any alteration to or change in the use of the Trust Estate which will diminish the fair market value thereof or materially increase any ordinary fire or other hazard arising out of construction or operation. If Mortgagor makes any Alterations pursuant to this Mortgage, or Tenant makes any Alterations pursuant to the CTYD III Lease, then (i) all such Alterations shall comply with all Insurance Requirements and Legal Requirements, (ii) Mortgagor shall procure and pay for (or cause to be procured and paid for) all permits and licenses required in connection with any such Alterations, (iii) upon

completion of such Alterations Mortgagor shall deliver or cause to be delivered to Mortgagee one (1) set of as-built plans and specifications, and (iv) Mortgagor shall submit to Mortgagee general releases and final waivers of mechanic liens from all of the contractors and subcontractors who participated in the work, owners and contractors sworn statements and such other documents as Mortgagee may reasonably request. Tenant's compliance with the terms of Sections 5.05A and 5.05B of the CTYD III Lease shall constitute compliance by Mortgagor with the above provisions of this Section 2.10(a), except for any Alterations or waste performed or committed by or on behalf of Mortgagor (as distinguished from Tenant).

(b) Subject to Section 2.11 or 2.12, as applicable, if any part of the Trust Estate shall be lost, damaged or destroyed by fire or other cause or through condemnation or eminent domain, be taken, lost, or physically altered, damaged or destroyed, and title to the Property is not being conveyed by Mortgagor pursuant to Article 9 of the CTYD III Lease (in which event, the terms of Article 3 hereof shall control), Mortgagor will promptly restore the Trust Estate as nearly as practicable to the equivalent of its original condition, regardless of whether or not there shall be insurance proceeds or condemnation awards therefor adequate to pay the costs therefor. Tenant's compliance with the terms of Sections 7.04A and 8.04, as applicable, of the CTYD III Lease shall constitute compliance by Mortgagor with the above provisions of this Section 2.10(b).

Section 2.11. Insurance.

(a) Mortgagor shall at all times maintain or cause to be maintained the liability and property insurance coverages, policies and endorsements described in Sections 7.01, 7.02 and 7.03 of the CTYD III Lease, and shall perform or cause to be performed the obligations of Tenant pursuant to such Sections with respect to the Property, in each case regardless of whether or not the CTYD III Lease shall be in effect. Unless Tenant is providing such insurance pursuant to said Sections, a copy of each policy of such insurance (certified by Mortgagor to be true and complete), and original certificates of such insurance, shall be delivered to Mortgagee, and prior to the cancellation, modification or non-renewal of any policy for such insurance, Mortgagor shall deliver to Mortgagee a certificate or certificates of insurance showing the required coverage to be in effect, together with evidence satisfactory to Mortgagee of payment of the premium therefor, and within thirty (30) days thereafter, a copy of

the renewal or replacement policy or policies (certified by Mortgagor as true and complete).

(b) Mortgagor shall not take out separate insurance concurrent in form or contributing in the event of loss with that required to be maintained under this Section 2.11 unless Mortgagee and the Registered Owners are each included thereon as a named insured with loss payable to Mortgagee under a "New York" or standard noncontributory mortgage endorsement or an additional insured under any liability policy, as applicable. Mortgagor shall immediately notify Mortgagee whenever any such separate insurance is taken out by Mortgagor and shall promptly deliver to Mortgagee a copy of the policy or policies of such insurance (certified by Mortgagor as true and complete) and certificates of insurance with respect thereto.

(c) The designation of any form, type or amount of insurance coverage by Mortgagee hereunder or in accordance herewith shall in no event be deemed a representation, warranty or advice by Mortgagee that such insurance is adequate for the purposes of Mortgagor's business or the protection of Mortgagor's (or any other Person's) interest in the Trust Estate.

Section 2.12. Casualty Damage.

(a) Immediately upon becoming aware of the same, Mortgagor shall give Mortgagee prompt written notice of any damage to or loss affecting the Trust Estate by fire or any other casualty, and shall deliver or cause to be delivered to Mortgagee, within forty-five (45) days after such casualty, a reasonably detailed determination of the estimated cost of restoration (provided that if at the time in question, no Lease Event of Default shall have occurred and be continuing, no such delivery shall be required where the cost of restoration is reasonably estimated by Tenant to be less than \$250,000.00, subject to adjustment). Tenant's compliance with the terms of Section 7.04A of the (TYD III Lease shall constitute compliance by Mortgagor with the above provisions of this Section 2.12(a).

(b) As long as no Lease Event of Default exists, then as between Mortgagee and Mortgagor, Mortgagor shall have the responsibility for doing or causing to be done all of the following: (i) appearing in and controlling all actions to negotiate and prosecute, adjust or appeal any claim for insurance proceeds, (ii) attempting to maximize the Award for the benefit of itself and Mortgagee, (iii) paying all expenses incurred by Mortgagor, Mortgagee or any Registered Owner in connection therewith, and (iv) collecting the Award

(subject to the rights of the Tenant pursuant to the CTYD III Lease), and if the Award exceeds Two Hundred Fifty Thousand Dollars (\$250,000.00), subject to adjustment, depositing the same with Mortgagee, to be held and disbursed or applied as provided in Section 4.1. The foregoing notwithstanding, if Mortgagee estimates the damage to be in excess of One Million Dollars (\$1,000,000.00), subject to adjustment, or if a Major Credit Downgrade or a Shrinkage Event (as each such term is defined in the CTYD III Lease), Five Hundred Thousand Dollars (\$500,000.00), subject to adjustment, then Mortgagee shall have the right to participate in any such proceeding, action, negotiation, appeal, prosecution or adjustment (and to be represented at Mortgagee's expense by counsel selected by Mortgagee) and Mortgagor shall pay or cause to be paid the reasonable cost thereof. Mortgagor from time to time will deliver and cause to be delivered to Mortgagee all instruments requested by it to permit such participation.

(c) Subject to Section 2.12(b) and Article 4, any Award payable in the event of such casualty, after deducting therefrom all expenses and attorneys' fees, are hereby assigned and will be paid to Mortgagee, who shall under no circumstances be under any obligation to question the amount of any such Award and who may accept the same in the amount in which the same shall be paid.

Section 2.13. Condemnation.

(a) Mortgagor shall give Mortgagee prompt written notice of any condemnation proceedings or proposed taking by eminent domain that might affect the Trust Estate immediately upon obtaining knowledge of the institution of any proceedings for the condemnation or taking of the Trust Estate or any portion thereof, and shall deliver or cause to be delivered to Mortgagee, within forty-five (45) days after receipt of such notice, a reasonably detailed determination of the estimated cost of restoration and scope of restoration possible (provided that if at the time in question, no Lease Event of Default shall have occurred and be continuing, no such delivery shall be required where the Award (net of expenses and costs to be incurred in connection therewith) or the cost of the restoration is reasonably estimated by Tenant to be less than \$250,000.00, subject to adjustment). Tenant's compliance with the terms of Sections 8.01A and 8.01B of the CTYD III Lease shall constitute compliance by Mortgagor with the above provisions of this Section 2.13(a).

(b) As long as no Lease Event of Default exists, then as between Mortgagee and Mortgagor, Mortgagor shall have the

responsibility for doing or causing to be done all of the following: (i) appearing in and controlling all actions to negotiate and prosecute, adjust or appeal any claim for an Award, (ii) attempting to maximize the Award for the benefit of itself and Mortgagee, (iii) paying all expenses incurred by Mortgagor, Mortgagee or any Registered Owner in connection therewith, and (iv) collecting the Award (subject to the rights of the Tenant pursuant to the CTYD III Lease), and if the Award exceeds Two Hundred Fifty Thousand Dollars (\$250,000.00), subject to adjustment, depositing the same with Mortgagee, to be held and disbursed or applied as provided in Section 4.1. The foregoing notwithstanding, if Mortgagee estimates the Award or the restoration cost to be in excess of One Million Dollars (\$1,000,000.00) or if a Major Credit Downgrade or a Shrinkage Event (as each such term is defined in the CTYD III Lease), Five Hundred Thousand Dollars (\$500,000.00), in each case, subject to adjustment, then Mortgagee shall have the right to participate in any such proceeding, action, negotiation, appeal, prosecution or adjustment (and to be represented at Mortgagor's expense by counsel selected by Mortgagee) and Mortgagor shall pay or cause to be paid the reasonable cost thereof. Mortgagor from time to time will deliver and cause to be delivered to Mortgagee all instruments requested by it to permit such participation.

(c) Subject to Section 2.13(b) and Article 4, any Award payable in the event of such condemnation proceedings, after deducting therefrom all expenses and attorneys' fees, are hereby assigned and will be paid to Mortgagee, who shall under no circumstances be under any obligation to question the amount of any such award or compensation and who may accept the same in the amount in which the same shall be paid.

Section 2.14. Leases and Rents.

(a) The Assignment, when duly recorded or filed in the appropriate public records, will create a valid and enforceable lien upon the CTYD III Lease, the Other Leases and Rents (subject to a requirement, if any, that might exist under applicable law to reduce the rents to possession or to obtain an order of sequestration for, or an appointment of a receiver to collect, the Rents or similar judicial action or order, which Mortgagor hereby waives to the fullest extent permissible), and Mortgagor has not assigned or executed any assignment of, and will not assign or execute any assignment of, the CTYD III Lease, any Other Leases or any Rents from the Premises or the Improvements, to anyone other than Mortgagee pursuant to the Assignment.

1000 0000

UNOFFICIAL COPY

1 2 3 3

(b) Any Leases subsequently entered into with respect to any part of the Trust Estate (i) shall be subordinate to this Mortgage, except for (x) the CTYD III Lease, which shall be superior to the lien of this Mortgage (subject, however, to the terms of Section 11.04 of the CTYD III Lease), and (y) any Lease as to which Mortgagee has in writing expressly consented to or requested not be subordinate to this Mortgage and (ii) shall be assigned to Mortgagee pursuant to an assignment of lease and rents in the form of the Assignment, with such changes therein as Mortgagee shall reasonably request (which assignment shall constitute a Loan Document for purposes of this Mortgage and the other Loan Documents). Mortgagor, upon Mortgagee's request to Mortgagor, shall cause each tenant under any such Lease required to be subordinate to this Mortgage pursuant to the immediately preceding sentence, to execute an agreement providing for attornment, the form and substance of which shall be subject to the reasonable approval of Mortgagee.

(c) Mortgagor shall not (1) accept prepayment of any installments of Rents to become due under any Other Lease (except prepayments in the nature of security for performance by tenants thereunder), or (2) consent to an assignment of a tenant's interest or to a subletting.

(d) Notwithstanding anything herein that may be construed to the contrary, Mortgagor will not execute any Other Leases of the Premises or Improvements, without Mortgagee's prior written consent, which may be withheld in Mortgagee's sole discretion. Mortgagor shall deliver to Mortgagee copies of all Leases other than concession and license agreements entered into during the term of this Mortgage.

(e) Mortgagee will not become a mortgagor in possession so long as it does not enter or take actual possession of the Trust Estate. In addition, neither the Registered Owners nor Mortgagee shall be responsible or liable for performing any of the obligations of the lessor under any Lease, for any waste by any lessees or others, for any dangerous or defective conditions of any of the Trust Estate, for negligence in the management, upkeep, repair or control of any of the Trust Estate or any other act or omission by any other person.

(f) To the extent not so provided by applicable law, each Other Lease of the Premises or Improvements, or of any part thereof, shall provide that, in the event of the enforcement by Mortgagee of the remedies provided for by law or by this Mortgage, the tenant thereunder will, upon

1 2 3 3

request of any person succeeding to the interest of Mortgagor as a result of such enforcement, automatically become the tenant of said successor in interest, without change in the terms or other provisions of such Lease, provided that said successor in interest shall not be bound by (1) any payment of rent or additional rent for more than one (1) month in advance except prepayments in the nature of security for the performance by said lessee of its obligations under said Lease, or (2) any amendment or modification of such Lease made without the written consent of Mortgagee or such successor in interest. Each such Lease shall also provide that, upon request by said successor in interest, the tenant thereunder shall execute and deliver an instrument or instruments confirming such attornment.

Section 2.15. Filing and Recording. Mortgagor will, upon the execution and delivery hereof, as provided in Section 8 of the Note Agreement and thereafter from time to time, cause this Mortgage, the CTYD III Lease (or a memorandum thereof), the Assignment, each supplement and amendment to each of said instruments and financing statements with respect thereto (collectively, the "Recordable Documents") to be filed, registered and recorded as may be required by law to provide constructive notice of and maintain the priority of the lien hereof upon the Trust Estate and to provide constructive notice of and protect the priority of the CTYD III Lease and the Assignment. Mortgagor will, from time to time, perform or cause to be performed any other act as required by law, and will execute or cause to be executed any and all further instruments (including financing statements, continuation statements and similar statements with respect to any of said documents) reasonably requested by the Mortgagee for such purposes. If Mortgagor shall fail to execute, deliver and file such financing statements and other instruments in accordance with the provisions of this Section, then Mortgagee shall be and is hereby irrevocably appointed the agent and attorney-in-fact of Mortgagor to do so, but, in the event such appointment shall prove unenforceable, this sentence shall not prevent any default in the observance of this Section from becoming (after the notice and grace period provided in Section 6.1) an Event of Default. Mortgagor will pay or cause to be paid all recording taxes and similar fees incident thereto and all reasonable out-of-pocket expenses, taxes and other similar governmental charges directly incurred in connection with the preparation, execution, delivery or acknowledgment of the Recordable Documents, any instruments of further assurance and the Primary Notes.

Section 2.16. Further Assurances. Upon demand Mortgagor will, at the cost of Mortgagor and without expense to Mortgagee or the Registered Owners, do, execute, acknowledge and deliver all such further acts, deeds, conveyances, mortgages, assignments, notices of assignment, transfers and assurances as Mortgagee shall from time to time reasonably require for the better assuring, conveying, assigning, transferring and confirming unto Mortgagee the property and rights hereby conveyed or assigned or intended now or hereafter so to be, or which Mortgagor may be or may hereafter become bound to convey or assign to Mortgagee or for carrying out the intention or facilitating the performance of the terms of this Mortgage, or for filing, registering or recording this Mortgage, and on demand Mortgagor will also execute and deliver and hereby authorizes Mortgagee to execute and file in the name of Mortgagor to the extent it may lawfully do so, one or more financing statements, chattel mortgages or comparable security instruments to evidence more effectively the lien hereof upon the Personal Property.

Section 2.17. Additions to Trust Estate. All right, title and interest of Mortgagor in and to all extensions, improvements, betterments, renewals, substitutes and replacements of, and all additions and appurtenances to, the Trust Estate hereafter acquired by or released to Mortgagor or constructed, assembled or placed by Mortgagor on the Premises, any fee title or other interest referred to in Section 2.6(f), and all conversions of the security constituted thereby, immediately upon such acquisition, release, construction, assembling, placement or conversion, as the case may be, and in each such case without any further Grant, conveyance, assignment or other act by Mortgagor shall become subject to the operation of this Mortgage as fully and completely and with the same effect as though now owned by Mortgagor and specifically described in the Grant of the Trust Estate above, but at any and all times Mortgagor will execute and deliver to Mortgagee any and all such further assurances, deeds of trust, conveyances or assignments thereof as Mortgagee may reasonably require for the purpose of expressly and specifically subjecting the same to the operation of this Mortgage.

Section 2.18. Rights to Inspect; Notice of Default.

(a) Mortgagee and the Registered Owners, by their respective agents, accountants and attorneys, shall have the right (but not the obligation), at all reasonable times and on reasonable notice to Tenant or (if Mortgagor shall be in possession) to Mortgagor, to make on-site inspections of the

UNOFFICIAL COPY

Property of Cook County Clerk's Office

Property (subject to the rights of Tenant under Section 5.15 of the CTYD III Lease).

(b) Mortgagor shall cause Tenant to keep proper records and books of account in accordance with the accounting principles set forth in the Uniform System of Accounts (Hotel Ass'n of New York City, Inc., 8th rev. ed. 1986) as hereafter amended, or in accordance with generally accepted accounting principles, whichever is applicable. Mortgagee (alone or together with the Registered Owners) shall have the right (but not the obligation), subject to the rights of Tenant under Article VI of the CTYD III Lease, at least annually, and at additional times on reasonable grounds (which shall include the occurrence of an Event of Default), to audit such records and books to ascertain that the Property is being maintained in accordance with the standards required by this Mortgage, that Mortgagor is otherwise complying with its obligations hereunder and that Tenant is complying with its obligations under the CTYD III Lease with respect to the Property (provided that the costs and expenses incurred by Mortgagee and the Registered Owners in connection with such audit shall be borne by them, except where such audit was requested in connection with an Event of Default or Lease Event of Default, in which case, Mortgagor shall pay or cause to be paid such costs and expenses). Mortgagee and the Registered Owners shall have the right, subject to the rights of Tenant under Article VI of the CTYD III Lease, at least annually, and at additional times on reasonable grounds (which shall include the occurrence of an Event of Default), to exercise the rights afforded to Mortgagee and the Registered Owners under Section 6.01C of the CTYD III Lease with respect to meetings with members of Tenant's and Marriott's senior and middle management (provided that the out-of-pocket costs and expenses incurred by Mortgagee and the Registered Owners in connection with such meetings shall be borne by them, except where such meeting was requested in connection with an Event of Default or Lease Event of Default, in which case Mortgagor shall pay or cause to be paid such costs and expenses).

Section 2.19. No Claims Against Mortgagee.
Nothing contained in this Mortgage shall constitute any consent or request by Mortgagee, express or implied, for the performance of any labor or services or the furnishing of any materials or other property in respect of the Trust Estate or any part thereof, nor as giving Mortgagor any right, power or authority to contract for or permit the performance of any labor or services or the furnishing of any materials or other property in such fashion as would permit the making of any claim against Mortgagee in respect

thereof or any claim that any lien based on the performance of such labor or services or the furnishing of any such materials or other property is prior to this Mortgage.

Section 2.20. Advances by Mortgagee. On or after the expiration of any applicable grace period pursuant to Article 6, if Mortgagor shall fail to perform or cause to be performed any of the covenants contained herein, Mortgagee may make advances to perform the same on Mortgagor's behalf (but shall in no event be obligated to do so), provided that, with respect to Sections 2.4 and 2.9, such performance is not then being contested in compliance with such Section 2.4(a), and all sums so advanced shall be secured hereby; and Mortgagor will repay on demand all sums so advanced on its behalf with interest at the Overdue Rate, such interest to be computed from and including the date of the making of such advance to and including the date of such repayment, provided, however, in no event shall the total indebtedness secured hereby, including loan proceeds disbursed plus any additional charges, exceed 200% of the face amount of the Primary Notes.

Section 2.21. Negative Covenants: Restrictions on Transfer and Further Encumbering.

(a) Mortgagor is a Maryland corporation, the voting stock of which is owned in the manner represented by Mortgagor in the Loan Documents.

(b) Mortgagor shall not (i) sell, lease, sublease, transfer, convey, alienate, assign, mortgage, pledge, encumber, or otherwise dispose of its interest or any part thereof in the Trust Estate or any part thereof (including Mortgagor's interest as lessor under the CYD III Lease), except as may be expressly permitted in Article 3 or as may be expressly permitted in Section 707 of the Indenture, or be divested of its title to the Trust Estate or any interest therein in any manner or way, whether voluntarily or involuntarily or otherwise by operation of law (other than resulting from a taking so long as Mortgagor complies with Sections 2.13 and 4.1 hereof), or engage in any common, cooperative, joint, time-sharing or other congregated ownership of all or part thereof; (ii) claim, demand or otherwise be entitled to any credit on, or make any deduction from principal, interest or premium, if any, on the Primary Notes by reason of payment of any taxes or other impositions levied or assessed or to be levied or assessed on the Trust Estate or any part thereof or claim or be entitled to any deductions from the taxable value of the Trust Estate, or any part thereof, by reason of this Mortgage or the Primary Notes; (iii) create or suffer to be

UNOFFICIAL COPY

Property of Cook County Clerk's Office

created, directly or indirectly, any mortgage, lien, encumbrance, charge or other exception to title or ownership upon or against its interest in the Trust Estate or any part thereof, other than Permitted Exceptions; (iv) make or permit to remain outstanding any loan or advance to any person; (v) own or acquire any stock or securities of any Person or guarantee any obligation of any Person; (vi) engage directly or indirectly in any business other than the acquisition and ownership of its interests in the Portfolio Properties, the leasing of the same pursuant to the CTYD III Lease, the financing of the same pursuant to the Loan Documents, the disposition of the same and activities incidental to the foregoing; (vii) use moneys from any employee benefit plan (as defined in the Employee Retirement Income Security Act of 1974, as amended) established by Mortgagor to perform any of Mortgagor's obligations under this Mortgage or transfer its interests in the Trust Estate to any such employee benefit plan, or effect a transfer, or permit or suffer a transfer, directly or indirectly in Mortgagor (or any direct or indirect owner of Mortgagor) or in the Trust Estate that would be in violation of Section 706 of the Indenture; or (viii) except as may be permitted in Section 2.21(d), create, assume or suffer to exist any indebtedness for borrowed money other than the Notes.

Further, if at any time a transfer of direct or indirect ownership interests in Mortgagor would result in Mortgagor being controlled (by virtue of voting-stock ownership), directly or indirectly, by a single Person, then, as condition to such transfer, Mortgagor covenants that it shall at all times thereafter, until the obligations secured hereby shall have been paid, cause its corporate charter or its by-laws (or, if Mortgagor is not a corporation, its organizational documents) to provide that there shall at all times (except during any temporary period of vacancy, which shall be promptly filled) be at least one director of Mortgagor (or if Mortgagor is a partnership, at least one director of a general partner in Mortgagor) who shall not be an employee, director or officer of such Person (or any other Person controlling, controlled by or under common control with such Person) and whose vote shall be required for any bankruptcy or similar filing by Mortgagor or consent by Mortgagor to any such filing (and if Mortgagor is neither a corporation nor a partnership, then it shall adopt such measures in lieu of the foregoing as Mortgagee may reasonably request) to ensure compliance with the intent of the foregoing.

Mortgagor shall at all times maintain the following procedures to avoid or minimize any risk of

substantive consolidation of Mortgagor with the bankruptcy or reorganization of any other Person; maintenance of books and records and bank accounts separate from those of any other Person; filing Mortgagor's own tax returns (to the extent permitted by law); observance of corporate (or similar organizational) formalities with respect to regular meetings of Mortgagor's directors and management and the maintenance of minutes regarding the same; and holding Mortgagor out to the public as a legal entity separate and distinct from any of Mortgagor's affiliates. In addition, if at any time Mortgagor shall issue a Rejection (as defined in the CTYD III Lease) of any Portfolio Property, Mortgagor shall immediately cause such Property to be transferred to a Person that is not a Person owned, directly or indirectly, by Mortgagor.

(c) Notwithstanding the terms of Section 6.1(c)(ii) hereof, it shall not be an Event of Default under said Section 6.1(c)(ii) if (i) there shall occur a transfer of direct or indirect ownership interests in Mortgagor where both immediately subsequent to such transfer and at all times thereafter, one or more Institutional Investors, directly or through their Affiliates, controls the day-to-day and long-term policymaking functions of Mortgagor, either by ownership, directly or indirectly, of voting stock or by contract, (ii) Mortgagor shall give Mortgagee not less than thirty (30) days' notice prior to any transfer of direct or indirect control in Mortgagor, (iii) the transfer shall not result in a default under any provision hereof (including Section 2.21(b)) or of any other Loan Document (including Section 706 of the Indenture) and no Event of Default (and no event that but for the giving of notice or the passage of time following the giving of such notice would constitute an Event of Default) shall have occurred and be continuing. As used above in this Section 2.21(c), an "Institutional Investor" means any of the following persons existing under the laws of the United States or any state thereof or of the District of Columbia or of Canada or any province thereof: (i) any bank, bank holding company, savings institution or trust company, acting for its own account, (ii) any insurance company, (iii) any public employees' pension or retirement system, (iv) any other pension, retirement or profit sharing fund or trust for which any bank, trust company or national banking association or investment advisor registered under the Investment Advisers Act of 1940, as amended, is acting as trustee or agent, or if self managed, having funds of at least \$75,000,000, or (v) any other Person that is an experienced asset manager for assets comparable in size and value to Mortgagor's interests in the Properties or that has regularly acted in such capacity for publicly offered

investments (such as, without limitation, the shares in Corporate Property Associates 10 Incorporated and Corporate Property Associates 11 Incorporated, each a Maryland corporation). It is agreed that each of Trammell Crow Ventures #3 Limited, a Texas limited partnership and W.P. Carey & Co., Inc., a New York corporation, is an Institutional Investor for purposes of this Section 2.21(c).

(d) Notwithstanding Section 2.21(b)(iii), if at the time in question (i) no Event of Default has occurred and is continuing and there shall exist no event that with the giving of notice or the passage of time following the giving of such notice would constitute an Event of Default, (ii) Mortgagor is a "real estate investment trust" as defined in Section 856 of the Internal Revenue Code of 1986, as amended (the "Code"), and (iii) Mortgagor's taxable income exceeds the amount of cash available for distribution to Mortgagor's shareholders (including cash available from prior years) after payment of all obligations of Mortgagor (other than those prohibited hereunder), and therefore has insufficient cash available for distribution to enable it to maintain its status as a REIT, and Tenant or Marriott shall not be obligated (or shall not timely comply with its obligation) to make a loan or a payment for such excess under the CTYD III Lease or any other Marriott Agreement, then Mortgagor shall have the right to obtain a financing (which may not be secured by any mortgage, lien, encumbrance or security interest in or on the Property or any portion of the Trust Estate) in an amount equal to the sum of (x) such excess amount, plus (y) such additional amount as may be necessary in order for Mortgagor to avoid or reduce the amount of income tax payable by Mortgagor, plus (z) an amount as a reasonable reserve for current or anticipated near-term obligations of Mortgagor (but the amounts set forth in clauses (y) and (z) shall not in the aggregate exceed in any one year 5 percent of Mortgagor's taxable income for such year) from a direct or indirect owner of Mortgagor or any other Person, provided that (1) the indebtedness shall be fully and expressly subordinated to the indebtedness secured hereby and all other obligations of Mortgagor under the Loan Documents and shall be payable only out of and to the extent of cash flow ultimately payable by Mortgagor to Mortgagee from the Property, after payment in full of all amounts then due and owing and under the Loan Documents (which cash flow may be pledged to any Person even if not an Institutional Investor), (2) such indebtedness shall not be accelerable and the holder thereof shall not have the right to impose or attach any lien against or with respect to the Trust Estate, in each case until the expiration of 91 days after such time as all obligations of Mortgagor under this Mortgage and the other Loan Documents have been paid in full, (3) if direct

or indirect interests in Mortgagor are pledged in connection with such indebtedness, the pledgee (or an Affiliate thereof) shall be an Institutional Investor and (4) not fewer than twenty (20) days prior to the execution of any loan agreement or the making of such loan, Mortgagor shall deliver to Mortgagee a copy of the proposed loan documents, the form of which shall be reasonably acceptable to Mortgagee, and a certificate of an officer of Mortgagor describing the proposed transaction and stating that such transaction is permitted by the above provisions of this Section 2.21. In addition, the Mortgagor shall provide the Mortgagee with copies of executed agreements with respect to such loan and all other similar closing documents within ten days after the making of such loan.

Section 2.22. Mortgagee's Fees. Mortgagor will pay or cause to be paid, as the same become due and payable, all fees and disbursements payable to or on behalf of Mortgagee pursuant to the Indenture or any other Loan Document.

ARTICLE 3

Release of the Property

Section 3.1. CTYD III Lease Termination.

(a) Not later than five (5) days after receipt by Mortgagor from Tenant of any Termination Notice (as defined in the CTYD III Lease) pursuant to Section 9.01 or 10.02G of the CTYD III Lease, offering to terminate the CTYD III Lease with respect to the Property in exchange for Tenant's payment of the Termination Amount (as defined in the CTYD III Lease), Mortgagor shall furnish a copy of such notice to Mortgagee and the Registered Owners, together with any certificate, resolution and other communications delivered in connection therewith.

(b) Mortgagor agrees that it shall not issue or purport to issue to Tenant a rejection of Tenant's offer contained in a Termination Notice with respect to the Property, unless Mortgagee shall give its prior written consent to such rejection (and any purported issuance of such rejection without such consent shall be null and void), which consent may be withheld in Mortgagee's sole and absolute discretion, and further, unless Mortgagee, in its sole and absolute discretion consents, Mortgagor shall issue to Tenant an acceptance of such offer.

UNOFFICIAL COPY

(c) Provided no Event of Default hereunder shall have occurred and be continuing, Mortgagor shall have the right to agree with Tenant pursuant to Section 12.01A(i) of the CTYD III Lease as to the Fair Market Value (as defined in the CTYD III Lease) of the Property or, failing such agreement, to appoint an appraiser pursuant to Section 12.01A(ii) of the CTYD III Lease, or failing the designation of a third appraiser or a timely determination by such third appraiser as required by Sections 12.01A(ii) and (iii) of the CTYD III Lease, to apply to the President or Chairman of the American Arbitration Association located in the nearest city in which the Premises are located for the appointment of the third appraiser or a substituted third appraiser (as applicable) pursuant to Section 12.01A(iii) of the CTYD III Lease, provided that in each such case, Mortgagor shall give to Mortgagee upon exercising any of such rights (but in no event later than five (5) days after such exercise). If an Event of Default hereunder shall have occurred and be continuing, all of the foregoing rights on the part of Mortgagor shall be exercised by Mortgagor, but any agreement as to Fair Market Value or the selection of the appraiser by Mortgagor shall be subject to Mortgagee's approval (which shall not be unreasonably withheld or delayed). Further, if Mortgagor shall fail timely to comply with the provisions of the CTYD III Lease with respect to the procedure to be complied with following the receipt of a Termination Notice (including Mortgagor's obligation pursuant to the CTYD III Lease, at Tenant's request, to convey the Property to Tenant), Mortgagee may, and shall have the right and power (which right and power are coupled with an interest), and is hereby irrevocably appointed the agent and attorney-in-fact of Mortgagor and of any and every future assignee or owner of any interest in the Property, to take, upon three (3) Business Days' notice to Mortgagor, all actions necessary to comply with the applicable provisions of the CTYD III Lease and this Mortgage, including, without limitation, the execution and delivery, in the name and on behalf of Mortgagor or other assignee or owner of any interest in the Property, of deeds or other instruments of conveyance or assignment conveying and assigning Mortgagor's interest in the Property to Tenant or a designee thereof. Each deed or other instrument of conveyance or assignment executed and delivered by Mortgagee pursuant to the preceding sentence shall be binding upon Mortgagor and every future owner of Mortgagor's interest in the Property with the same effect as if Mortgagor and every such owner had personally executed and delivered the same and may be relied upon by any grantee (including Tenant), and every such owner, by receipt or acquisition of any right, title or interest in any interest of Mortgagor in the Property, hereby irrevocably appoints Mortgagee its agent

and attorney-in-fact with power and authority (which power and authority are coupled with an interest) to execute and deliver such deeds or other instruments of conveyance or assignment in its behalf and name.

(d) Not less than twenty (20) days prior to the scheduled release of the Property from the lien of this Mortgage, and as a condition to such release, Mortgagor shall furnish or cause to be furnished to Mortgagee and each of the Registered Owners, duplicate originals of all of the certified resolutions, covenants and other instruments and communications required to be delivered by Tenant or Mortgagor under the CTYD III Lease in connection with the Termination Notice and the resultant termination of the CTYD III Lease with respect to the Property.

(e) Tenant (i) shall deliver to Mortgagor a Termination Notice with respect to the Property, (ii) shall comply with all of its obligations under the CTYD III Lease with respect to the termination of the CTYD III Lease in connection with a Termination Notice on the Property, and (iii) shall make payment to Mortgagee pursuant to the CTYD III Lease for the Property in an amount at least sufficient to pay the amounts owing under Section 8.04 of the Indenture (which amount shall be applied in accordance with the terms of the Indenture), then Mortgagee, on the scheduled purchase date, shall execute and deliver to Mortgagor (or, at Mortgagee's election, to a title company in escrow for release against such payment and compliance with such obligations) a release of lien, financing statement terminations, and such other instruments as may be reasonably requested by Mortgagor releasing the Property and the Trust Estate (as it relates to the Property) from the lien of this Mortgage and the Assignment and the other Loan Documents against receipt of such payment and compliance with such requirements.

Section 3.2. Granting of Easements in Accordance with CTYD III Lease. If no Lease Event of Default shall have happened and be continuing, Mortgagor, at the request of Tenant, may join Tenant in granting, modifying or abandoning such rights-of-way, easements and other interests to the extent required of Mortgagor under Section 5.04A of the CTYD III Lease, and Mortgagee shall execute and deliver any instrument necessary or appropriate to consent to said action and/or to release said interest, right or portion from the lien hereof upon receipt and approval by Mortgagee (such approval not to be unreasonably withheld) of:

- (a) such instrument;
- (b) (i) a certificate of Tenant stating (A) that such grant, modification or abandonment is not detrimental in any material respect to the proper conduct of business on the Property, (B) the consideration, if any, being paid for such grant, modification or abandonment, (C) that such grant, modification or abandonment does not materially impair the use of the Property or materially reduce its value and (D) that, for so long as the CTYD III Lease shall be in effect, Tenant will perform all obligations, if any, of Mortgagor under such instrument, and (ii) duly authorized and binding undertakings of each of (x) Tenant stating that Tenant will remain obligated under the CTYD III Lease and the Operative Agreements in accordance with their terms and (y) Mortgagor stating that Mortgagor will remain obligated under this Mortgage and the other Loan Documents subject to and in accordance with its and their terms; and
- (c) such other instruments, certificates, surveys, and opinions of counsel as Mortgagee may reasonably request.

Section 3.3. Termination Value. If (i) Tenant (or Marriott) shall pay to Mortgagee Termination Value with respect to the Property pursuant to the CTYD III Lease or (ii) Marriott shall make a payment to Mortgagee on account of the purchase of the Property pursuant to the Agreement to Offer (as defined in the Note Agreement), and if either such payment is sufficient to pay the amount required to be paid under Section 8.04 of the Indenture (which amount shall be applied in accordance with Section 8.04 of the Indenture), then Mortgagee, upon such payment, shall execute and deliver to Mortgagor (or at Mortgagee's election, to a title company in escrow, for release upon such payment) a release of lien, financing statement terminations, and such other instruments as may be reasonably requested by Mortgagor releasing the Property and the Trust Estate (as it relates to the Property) from the lien of this Mortgage, the Assignment and the other Loan Documents, against receipt of such payment and compliance with such requirements.

001.0183

ARTICLE 4

Application of Moneys

Section 4.1. Proceeds of Insurance, Condemnation Awards.

(a) Moneys received by Mortgagee as payment for loss under any policy of insurance (other than mortgage title insurance) or as an award or compensation for the taking, in condemnation or other eminent domain proceedings, of Mortgagor's interest in the Property or any part thereof or interest therein or a conveyance to a condemning authority on a negotiated basis in lieu of condemnation: first, shall be paid to Tenant if, when and to the extent Tenant is entitled to receive the same pursuant to the terms of the CTYD III Lease, and second, to the extent not required to be so paid over to Tenant, and not required under the CTYD III Lease to be held pending such payment or to be applied on account of Tenant's obligations to make the payment owed in respect of a Termination Notice given with respect to the Property described in Section 9.01A or 9.01B of the CTYD III Lease, shall be held, applied or disbursed in accordance with the Indenture.

(b) With respect to insurance proceeds or condemnation awards relating to the Property held by Mortgagee for disbursement to Tenant under Section 7.04 of the CTYD III Lease for the restoration of the Property, Mortgagee, in its capacity as "Depository", agrees as follows: amounts to be made available by Mortgagee for the restoration of the Improvements, Personal Property and/or Premises shall be held and invested by Mortgagee, to the extent practicable, as directed by Mortgagor, in Permitted Investments until the same are required to be disbursed to Tenant pursuant to Section 7.04 of the CTYD III Lease, but Mortgagee shall not be responsible for selection of the maturities of such investments and shall be permitted to charge the funds held by Mortgagee for the reasonable actual expenses incurred by Mortgagee from time to time in connection with the investment of the amounts held by Mortgagee and the disbursement thereof, including reasonable architectural, engineering, legal and construction and money management fees. All amounts deposited with Mortgagee and earnings thereon shall serve as additional security for Mortgagor's obligations hereunder and the other Loan Documents, subject, in the case of moneys so deposited by Tenant, to Tenant's rights under the CTYD III Lease and, in all cases, the Indenture.

UNOFFICIAL COPY

1 1 1 3

(c) Notwithstanding the foregoing provisions of this Section 4.1, in the event any of such provisions governing restoration and application of insurance proceeds or condemnation awards shall be inconsistent with the provisions of any reciprocal easement, operating or similar agreement referred to on Schedule A, the provisions of such other agreement shall supersede and control the inconsistent provisions hereof.

ARTICLE 5

Prepayment of Notes

Section 5.1. Generally. No prepayment of Primary Notes may be made except to the extent and in the manner expressly permitted or required by the Indenture.

ARTICLE 6

Events of Default and Remedies

Section 6.1. Events of Default. Each of the following shall be an "Event of Default" hereunder:

(a) if default shall be made in payment of the principal, interest, Make Whole Payment, if any, on any Primary Note on the date the same becomes due and payable, either as an Installment Payment, at maturity, as part of any prepayment or otherwise, as in the Primary Notes, the Indenture and this Mortgage provided, and (i) such default shall continue for two (2) Business Days after notice from Mortgagee; provided that Mortgagee shall not be required to give such notice with respect to more than three (3) such defaults, or (ii) following such time as Mortgagor has received notices with respect to three (3) such defaults, under clause (i) above, such default shall continue for a period of five (5) days;

(b) if any representation or warranty made by Mortgagor set forth in the Note Agreement, this Mortgage, the Assignment, the Indenture or any other Loan Document or any certificate or instrument delivered to either Mortgagee or any Registered Owner pursuant to any Loan Document shall be inaccurate, as of the time when the same shall have been made or as to continuing warranties as of any time when the same shall be in effect, provided, however, if the condition giving rise to such misrepresentation or breach of

UNOFFICIAL COPY

warranty is reasonably susceptible of cure, (i) no Event of Default under this Section 6.1(b) shall be deemed to occur unless such condition continues for a period of thirty (30) days or more after notice thereof by Mortgagee to Mortgagor, and (ii) if such condition cannot be cured by the payment of money or with due diligence, or both, within such 30-day period and if Mortgagor shall promptly have commenced, during such 30-day period, to cure the same and shall prosecute the curing thereof with diligence and Mortgagor shall have so notified Mortgagee thereof, the period within which such condition may be cured shall be extended for such an additional period of time as may be reasonably necessary to cure such condition with diligence and continuity; provided further, however, with respect to any such condition that has a material adverse effect on the Property, in no event shall such additional period extend more than forty-five (45) days;

(c) (i) if default by Mortgagor shall be made in the due observance or performance of any covenant or agreement contained in Section 2.11(a), or (ii) if Mortgagor shall permit or suffer any sale, transfer, issuance, conveyance, assignment, pledge, encumbrance, hypothecation or other disposition of any sort of any ownership interest, direct or indirect, in Mortgagor, or permit or suffer any merger, consolidation or dissolution affecting Mortgagor (except as may be expressly permitted in Section 2.21(c) or 2.21(d)) and, with respect to any such event that is reasonably susceptible of cure, the same shall continue after ten (10) days' notice from Mortgagee;

(d) if default shall be made in the due observance or performance of any other covenant, condition or agreement of Mortgagor contained herein or in the Notes, the Indenture or any other Loan Document; provided, however, if the condition giving rise to such default is reasonably susceptible of cure, (i) no Event of Default under this Section 6.1(d) shall be deemed to occur unless such default continues for a period of thirty (30) days or more after notice thereof by Mortgagee to Mortgagor, and (ii) if any such default cannot be cured by the payment of money and cannot with due diligence be cured within such 30-day period and if Mortgagor shall promptly have commenced, during such 30-day period, to cure such default and shall prosecute the curing thereof with diligence and Mortgagor shall have so notified Mortgagee thereof, the period within which such default may be cured shall be extended for such an additional period of time as may be reasonably

UNOFFICIAL COPY

necessary to cure such default with diligence and continuity; provided further, however, with respect to any such default that has a material adverse effect on the Property, in no event shall such additional period extend more than forty-five (45) days;

(e) [INTENTIONALLY OMITTED];

(f) if a Lease Event of Default under the CTYD III Lease shall have occurred and be continuing;

(g) if a receiver, United States Trustee, trustee or liquidator (or other similar official) of Mortgagor shall be appointed in any proceeding or by any federal or state officer or agency and shall not be discharged within ninety (90) days after such appointment, or if Mortgagor shall consent to such appointment, or if a custodian for purposes of any federal or state bankruptcy statute of substantially all of the assets of Mortgagor is appointed or otherwise takes possession thereof and shall not be discharged within ninety (90) days, or if by decree of any federal or state court Mortgagor shall be adjudicated bankrupt or be declared insolvent under any federal or state bankruptcy law or if an order for relief shall be entered in any bankruptcy proceeding and such decree or order is not vacated within ninety (90) days after entry;

(h) if Mortgagor shall file a petition commencing a voluntary case with respect to Mortgagor under any federal or state bankruptcy, insolvency or similar law or shall make a general assignment for the benefit of Mortgagor's creditors or shall admit in writing Mortgagor's inability to pay its debts generally as they become due or shall consent to the appointment of a receiver of the Trust Estate or any part thereof, or if a petition or an answer proposing the reorganization or liquidation of Mortgagor, as debtor, pursuant to the Bankruptcy Code or any similar law, federal or state, shall be filed by Mortgagor on behalf thereof in any court;

(i) if any of the creditors of Mortgagor shall commence an involuntary case to reorganize or liquidate Mortgagor pursuant to the Bankruptcy Code or any similar law, federal or state, and if such petition shall not be discharged, denied or stayed within ninety (90) days after the date on which such petition was filed;

(j) if one or more final judgments for the payment of money in an aggregate amount in excess of \$1,000,000, subject to adjustment, excluding judgments for insured claims or indemnified claims (provided amounts received from such insured and indemnified claims are received and applied to such judgments in due course and, with respect to indemnified claims, the indemnifying party shall not otherwise be in default beyond any applicable grace period under any Operative Agreement), shall be rendered against Mortgagor and Mortgagor shall not either (i) discharge the same or cause it to be discharged within twenty (20) days from the entry thereof, or (ii) appeal in a timely manner therefrom or from the order, decree or process upon which or pursuant to which said judgment was granted, based or entered, and concurrently therewith secure a stay of execution pending such appeal; or

(k) any Event of Default (as defined in the Mortgages on the Other Properties) under any of the Mortgages on the Other Properties shall have occurred and be continuing; or

(l) or there shall occur any other event that is characterized as an "Event of Default" under a Loan Document;

provided, however, with respect to certain Lease Events of Default or certain other Events of Default that result from a Lease Event of Default, Mortgagor shall have certain further rights to cure such default as set forth in Section 301(b) of the Indenture;

Then in every such case, during the continuance of any Event of Default:

I. Mortgagee may by notice to Mortgagor, in which case Mortgagor hereby expressly waives notice, declare the principal amount of the Primary Notes (if not then due and payable) and all other amounts then due and payable on the Primary Notes and under this Mortgage to be due and payable immediately, and upon any such declaration the principal of the Primary Notes, the Make Whole Payment and all such other amounts, shall become and be immediately due and payable, anything in the Primary Notes or in this Mortgage contained to the contrary notwithstanding.

II. Mortgagee, personally or by its agents or attorneys, may enter into and upon the Trust Estate and may exclude Mortgagor and its respective agents and servants wholly therefrom; and, at the expense of the Trust Estate,

may use, operate, manage and control the same and conduct the business thereof, may maintain and restore the Trust Estate, may insure and reinsure the same and may make all necessary or proper repairs, renewals and replacements and any useful alterations, additions, betterments and improvements thereto and thereon, all as Mortgagee may deem advisable; and in every case, Mortgagee shall have the right to manage and operate the Trust Estate and to carry on the business thereof and exercise all rights and powers of Mortgagor with respect thereto either in the name of Mortgagor or otherwise as Mortgagee shall deem necessary or appropriate. Mortgagee shall be entitled to collect and receive all earnings, revenues, rents, issues, awards, proceeds, profits and income of the Trust Estate and said earnings, revenues, rents, issues, awards, proceeds, profits and income are hereby assigned to Mortgagee, its successors and assigns. After deducting the expenses of conducting the business thereof and of all maintenance, repairs, renewals, replacements, alterations, additions, betterments and improvements and taxes, assessments, insurance and prior or other proper charges upon the Trust Estate, as well as reasonable compensation for the services of Mortgagee and all attorneys, servants and agents by Mortgagee and the Registered Owners properly engaged and employed (included compensation and expenses in connection with any appeal), the moneys arising as aforesaid shall be applied as follows:

(1) in case an Event of Default described in clause (a) of this Section shall not have happened, first to the payment of the Installment Payments and any other payments of the principal of the Primary Notes and interest thereon, when and as the same shall become payable, second to the payment of any other sums required to be paid by Mortgagor under this Mortgage, and third, to the payment of the surplus, if any, to whomsoever shall be entitled thereto; or

(2) in case an Event of Default described in clause (a) of this Section shall have happened, in the order of priorities set forth in clauses second, third and fourth of Section 6.2(d).

III. Mortgagee, with or without entry, personally or by its agents or attorneys, may sell the Trust Estate and all estate, right, title, interest, claim and demand therein and right of redemption thereof at one or more private or public sales, as an entirety or in parcels and at such times and places and upon such terms as may be specified in the notice or notices of sale to be given to Mortgagor or as may be required by law. Any number of sales may be conducted from time to time. The power of sale shall

UNOFFICIAL COPY

Property of Cook County Clerk's Office

not be exhausted by any one or more such sale as to any part of the Trust Estate remaining unsold, but shall continue unimpaired until all of the Trust Estate shall have been sold or the Primary Notes and all indebtedness of Mortgagor secured hereby shall have been paid. In addition, Mortgagee will have the statutory power of sale, if any, as may be provided by the law of the state in which the Property is located. This Mortgage is made upon the statutory conditions provided for by the laws of the state in which the Property is located.

IV. Mortgagee may take all steps to protect and enforce the rights and remedies provided hereby or by applicable law, whether by action, suit or proceeding in equity or at law (for the complete or partial foreclosure hereof or in aid of the execution of any power herein granted or for the enforcement of any other appropriate legal or equitable remedy) or otherwise as Mortgagee shall deem most effectual to protect and enforce the same and Mortgagor hereby assents to a decree in any such proceeding.

V. Mortgagee will have all rights and remedies provided to a secured party by the Uniform Commercial Code with respect to such portion of the Trust Estate, if any, as is governed by the Uniform Commercial Code, and this instrument shall constitute a security agreement under the Uniform Commercial Code.

Section 6.2. Sale of Property; Application of Proceeds. (a) In connection with any sale under this Article 6, Mortgagee may postpone the sale of the Trust Estate by public announcement at the time and place of such sale, and from time to time thereafter may further postpone such sale by public announcement made at the time of sale fixed by the preceding postponement.

(b) Upon the completion of any sale made by Mortgagee under or by virtue of this Article, Mortgagee shall execute and deliver to the purchaser good and sufficient deeds and other instruments conveying, assigning and transferring all its estate, right, title and interest in and to the property and rights so sold. Mortgagee is hereby irrevocably appointed the true and lawful attorney of Mortgagor and any subsequent owner of the Trust Estate to make, in its own name and stead or in the name of Mortgagor, all necessary conveyances, assignments, transfers and deliveries of the property and rights so sold, and for that purpose Mortgagee may execute all necessary deeds and instruments of assignment and transfer and may substitute persons with like power, Mortgagor or any subsequent owner of the Trust Estate hereby ratifying and confirming all that

UNOFFICIAL COPY

1 2 3 3

their said attorney or such substitutes shall lawfully do by virtue hereof. Nevertheless, Mortgagor or any subsequent owner of the Trust Estate, if so requested in writing by Mortgagee, shall ratify and confirm any such sale by executing and delivering to the Mortgagee or to such purchasers any instrument which, in the reasonable judgment of the Mortgagee is suitable or appropriate thereof. Any such sale made under or by virtue of this Article, whether made under the power of sale herein granted or under or by virtue of judicial proceedings or of a judgment or decree of foreclosure and sale, shall operate to divest all the estate, right, title, interest, claim and demand whatsoever, whether at law or in equity, of Mortgagor in and to the property and rights so sold, and shall be a perpetual bar at law and in equity against Mortgagor and its successors and assigns and any and all Persons who claim or may claim the same from, through or under Mortgagor or its successors or assigns.

(c) The receipt of Mortgagee for the purchase money paid as a result of any such sale shall be a sufficient discharge therefor to any purchaser of the Trust Estate sold as aforesaid; and no such purchaser or his representatives, grantees or assigns, after paying such purchase money and receiving such receipt, shall be bound to see to the application of such purchase money upon or for any purpose hereof, shall be answerable in any manner whatsoever for any loss, misapplication or nonapplication of any of such purchase money or shall be bound to inquire as to the authorization, necessity, expediency or regularity of any such sale.

(d) In the event of any sale made under or by virtue of this Article (whether made under the power of sale herein granted or under or by virtue of judicial proceedings or of a judgment or decree of foreclosure and sale), the entire principal of and interest on the Primary Notes and the Make Whole Payment thereon, if any, and all other sums required to be paid by Mortgagor pursuant hereto, if not previously due and payable, shall immediately become due and payable, anything in the Primary Notes or in this Mortgage to the contrary notwithstanding. The purchase money or proceeds of any sale made under or by virtue of this Article, together with any other sums which then may be held by the Mortgagees as part of the Trust Estate or the proceeds thereof, shall, unless otherwise required by applicable law, be applied: first, to the payment of the costs and expenses of such sale, including reasonable compensation to Mortgagee and the Registered Owners and their agents and counsel, and of any judicial proceeding wherein the same be made. Also including, all advances,

UNOFFICIAL COPY

disbursements and expenditures made or incurred by the Mortgagee before and during a foreclosure, and before and after judgment of foreclosure, and at any time prior to sale, and, where applicable, after sale, and during the pendency of any related proceedings, for the following purposes, in addition to those otherwise authorized by the Mortgage or by the Illinois Mortgage Foreclosure Act (as the same may be amended, the "Act") (collectively "Protective Advances"), shall have the benefit of all applicable provisions of the Act, including those provisions of the Act hereinbelow referred to:

(a) all advances by the Mortgagee in accordance with the terms of the Mortgage to: (i) preserve, maintain, repair, restore or rebuild the improvements upon the mortgaged real estate; (ii) preserve the lien of the Mortgage or the priority thereof; or (iii) enforce the Mortgage, as referred to in Subsection (b)(5) of Section 15-1302 of the Act;

(b) payments by the Mortgagee of: (i) principal, interest or other obligations in accordance with the terms of any senior mortgage or other prior lien or encumbrance; (ii) real estate taxes and assessments, general and special and all other taxes and assessments of any kind or nature whatsoever which are assessed or imposed upon the mortgaged real estate or any part thereof; (iii) other obligations authorized by the Mortgage; or (iv) with court approval, any other amounts in connection with other liens, encumbrances or interests reasonably necessary to preserve the status of title, as referred to in Section 15-1505 of the Act;

(c) advances by the Mortgagee in settlement or compromise of any claims asserted by claimants under senior mortgages or any other prior liens;

(d) attorneys' fees and other costs incurred: (i) in connection with the foreclosure of the Mortgage as referred to in Sections 1504(d)(2) and 15-1510 of the Act; (ii) in connection with any action, suit or proceeding brought by or against the Mortgagee for the enforcement of the Mortgage or arising from the interest of the Mortgagee hereunder; or (iii) in connection with the commencement, prosecution or defense of any other action related to the Mortgage or the mortgaged real estate;

(e) the Mortgage's fees and costs, including attorneys' fees, arising between the entry of judgment

UNOFFICIAL COPY

of foreclosure and the confirmation hearing as referred to in Subsection (b)(1) of Section 15-1508 of the Act;

(f) expenses deductible from proceeds of sale as referred to in Subsections (a) and (b) of Section 15-1512 of the Act;

(g) expenses incurred and expenditures made by the Mortgagee for any one or more of the following:

(i) if the mortgaged real estate or any portion thereof constitutes one or more units under a condominium declaration, assessments imposed upon the unit owner thereof deemed by the Mortgagee to be required to be paid; (ii) if mortgagor's interest in the mortgaged real estate is a leasehold estate under a lease or sublease, rentals or other payments required to be made by the lessee under the terms of the lease or sublease; (iii) premiums for casualty and liability insurance paid by the Mortgagee whether or not the Mortgagee or a receiver is in possession, if reasonably required, in reasonable amounts, and all renewals thereof, without regard to the limitation to maintaining of existing insurance in effect at the time any receiver or mortgagee takes possession of the mortgaged real estate imposed by Subsection (c)(1) of Section 15-1704 of the Act; (iv) repair or restoration of damage or destruction in excess of available insurance proceeds or condemnation awards; (v) payments deemed by the Mortgagee to be required for the benefit of the mortgaged real estate or required to be made by the owner of the mortgaged real estate under any grant or declaration of easement, easement agreement, agreement with any adjoining land owners or instruments creating covenants or restrictions for the benefit of or affecting the mortgaged real estate; (vi) shared or common expense assessments payable to any association or corporation in which the owner of the mortgaged real estate is a member in any way affecting the mortgaged real estate; (vii) if the loan secured hereby is a construction loan, costs incurred by the Mortgagee for demolition, preparation for and completion of construction, as may be authorized by the applicable commitment, loan agreement or other agreement; (viii) payments deemed by the Mortgagee to be required pursuant to any lease or other agreement for occupancy of the mortgaged real estate and (ix) if the Mortgagee is insured, payments of FHA or private mortgage insurance required to keep such insurance in force.

All Protective Advances shall be so much additional indebtedness secured by this Mortgage, and shall

UNOFFICIAL COPY

become immediately due and payable without notice and with interest thereon from the date of the advance until paid at the rate of interest payable after default under the terms of the instruments evidencing the indebtedness hereby secured.

This Mortgage shall be a lien for all Protective Advances as to subsequent purchasers and judgment creditors from the time this Mortgage is recorded pursuant to Subsection (b)(5) of Section 15-1302 of the Act.

All Protective Advances shall, except to the extent, if any, that any of the same is clearly contrary to or inconsistent with the provisions of the Act, apply to and be included in:

(a) determination of the amount of indebtedness secured by this Mortgage at any time;

(b) the indebtedness found due and owing to the Mortgagee in the judgment of foreclosure and any subsequent supplemental judgments, orders, adjudications or findings by the court of any additional indebtedness becoming due after such entry of judgment, it being agreed that in any foreclosure judgment, the court may reserve jurisdiction for such purpose;

(c) if right of redemption has not been waived by this Mortgage, computation of amount required to redeem, pursuant to Subsections (d)(2) and (e) of Section 15-1603 of the Act;

(d) determination of amounts deductible from sale proceeds pursuant to Section 15-1512 of the Act;

(e) application of income in the hands of any receiver or the Mortgagee in possession; and

(f) computation of any deficiency judgment pursuant to Subsections (b)(2) and (e) of Sections 15-1508 and 15-1511 of the Act.

second, to the payment of the whole amount then owing on the Primary Notes for the payment of accrued and unpaid interest; third, to the payment of the whole amount then owing on the Primary Notes for the payment of principal; fourth, to the payment of any other sums secured by this Mortgage; and fifth, to the payment of the surplus, if any, to whosoever shall be lawfully entitled thereto. Such application of proceeds pursuant to clauses second and third

001-0083

above shall be pro-rated among the outstanding Primary Notes without preference or priority.

Section 6.3. Purchase by Mortgagee or the Registered Owners. Upon any sale made under or by virtue of this Article (whether made under any power of sale herein granted or under or by virtue of any judicial proceedings or of a judgment or decree of foreclosure and sale), Mortgagee, on behalf of the Registered Owners, or any of them, may bid for and acquire the Trust Estate or any part thereof and in lieu of paying cash therefor may make settlement for the purchase price by crediting upon the indebtedness of Mortgagor secured by this Mortgage the net proceeds of sale after deduction of all costs, expenses, compensations and other charges to be paid therefrom as herein provided. The Person making such sale shall accept such settlement without requiring the production of the Primary Notes, and without such production there shall be deemed credited thereon the net proceeds of sale ascertained and established as aforesaid. Mortgagee or the Registered Owners, or any of them, upon so acquiring the Trust Estate or any part thereof, shall be entitled to hold, deal with and sell the same in any manner permitted by applicable laws.

Section 6.4. Receivers. During the continuance of any Event of Default hereunder, or if there shall be any imminent risk of damage to the Trust Estate or any part thereof during the continuance of any default hereunder, immediately upon the commencement of any legal proceeding by Mortgagee for or in aid of the enforcement of the Primary Notes or of this Mortgage, and without regard to the adequacy of the security or the Trust Estate, Mortgagee shall be entitled to the appointment of a receiver or receivers of the Trust Estate or the appointment of Mortgagee as a mortgagee-in-possession and of all the earnings, revenues, rents, issues, profits and income thereof, and Mortgagor hereby consents to any such appointment.

Section 6.5. Remedies Cumulative. Subject to the terms of the Indenture, no remedy herein shall be exclusive of any other remedy or remedies, and each such remedy shall be cumulative and in addition to every other remedy given hereunder or now or hereafter existing at law or in equity; and, subject to the terms of the Indenture, every power and remedy of Mortgagee or the Registered Owners hereunder may be exercised from time to time and as often as may be deemed expedient by Mortgagee or the Registered Owners. No delay or omission of the Mortgagee to exercise any right or power accruing upon an Event of Default shall impair any such

UNOFFICIAL COPY

right or power or shall be construed to be a waiver of any such Event of Default or an acquiescence thereof.

Section 6.6. Waiver of Rights. To the extent not prohibited by applicable law, Mortgagor agrees that it will not at any time or in any manner whatever claim or take any benefit of any stay, extension or moratorium law or doctrine which may affect the terms of this Mortgage; nor claim or take any benefit of any law providing for the valuation or appraisal of the Trust Estate or any part thereof, prior to or after any sale thereof; nor, prior to or after any such sale, claim or exercise any right to redeem the property so sold or to be sold or any part thereof, or claim or exercise any right to require Mortgagee to proceed to enforce or exercise any rights, powers or remedies that Mortgagee may have under any of the documents or instruments evidencing or securing the Primary Notes or the Other Notes in any particular manner, in any particular order, or in any particular state or other jurisdiction; and Mortgagor hereby expressly waives all benefit or advantage of any such law and covenants not to hinder, delay or impede the execution by Mortgagee or any Registered Owners of any power or remedy herein granted or available at law or in equity, but to suffer and permit the execution of every power and remedy as though no such law existed. Mortgagor further agrees that any particular proceeding, including foreclosure through court action or power of sale, may be brought or prosecuted without regard to the fact that any one or more prior or contemporaneous proceedings have been conducted or are then ongoing, either in the same or different fora or jurisdictions. To the fullest extent not prohibited by applicable law, Mortgagor waives all right to have the Trust Estate marshalled upon any foreclosure hereof. Mortgagor further agrees that if any law referred to in this Section and now in force, of which Mortgagor, its successors or assigns or other person might take advantage despite the terms of this Section shall hereafter be repealed or cease to be in effect (either generally or with respect to Mortgagor, its successors or assigns or such other person, as applicable), then such law shall not thereafter be deemed to preclude the application of this Section in accordance with its terms. Mortgagor is making these waivers, agreements and relinquishments knowingly and as a material inducement to Mortgagee in making the loan evidenced by the Notes, after consultation with and considering the advice of independent legal counsel selected by Mortgagor.

Section 6.7. Waiver of Remedies of Limited Effect. No waiver of remedies with respect to an Event of Default shall extend to any subsequent or other default or impair any right consequent thereon.

Section 6.8. Other Security.

(a) Mortgagee may resort to any other security held by Mortgagee for the payment of the Primary Notes or the payment or performance of the other obligations secured hereby in such order and manner as Mortgagee may elect, and no such action by Mortgagee shall operate to modify or terminate any of the rights, powers or remedies contained in the Primary Note or the Security Documents.

(b) Mortgagor and Mortgagee hereby intend that the Trust Estate is pursuant to the Second Mortgage additional security for the repayment of each of the Other Notes, and that Other Properties constitute additional security for the repayment of the Primary Notes; and whether or not Mortgagee accelerates the Primary Notes or any of the Other Notes, and whether or not any of the Other Notes is otherwise in default, Mortgagee may exercise any and all rights and remedies provided in this Mortgage and in any of the instruments evidencing or securing any of the Notes.

(c) Notwithstanding anything contained herein to the contrary, Mortgagee shall be under no duty to Mortgagor, any affiliate of Mortgagor or others, including the holder of any junior, senior or subordinate mortgage on the Trust Estate or any portion thereof or any part thereof or on any other security held by Mortgagee, to exercise or exhaust all or any of the rights, powers and remedies available to Mortgagee, whether under the Primary Notes, this Mortgage or any other document evidencing or securing the payment of the Primary Notes or the Other Notes or the performance of the obligations to Mortgagee under the Indenture prior to the sale of, or enforcement on, the Trust Estate or any portion thereof.

ARTICLE 7

Miscellaneous

Section 7.1. Immunity from Liability. No recourse shall be had for the payment of the principal of or interest or premium, if any, or any other amount due on the Primary Notes or under ny other Loan Document, or for any claim based thereon or hereon or otherwise in respect thereof or hereof against (A) Mortgagor or any partner in or shareholder of Mortgagor, or any shareholder, owner, principal (disclosed or undisclosed), partner, officer, director, agent or employee of or in Mortgagor or of or in any partners in or shareholder of Mortgagor (all of the Persons described in this clause (A), other than Mortgagor,

UNOFFICIAL COPY

Property of Cook County Clerk's Office

being hereinafter referred to collectively as the "Exculpated Persons"); (B) any legal representative, heir, estate, successor or assignee of any Mortgagor or any Exculpated Person; or (C) any corporation, partnership (or any partner thereof), individual or entity to which the Trust Estate or any part thereof shall have been transferred or any assets of any of them. Notwithstanding the provisions of this paragraph, nothing herein, or in the Indenture, the Primary Notes, or in any other Loan Document shall: (i) prevent recourse to the Trust Estate for the sums due under any instrument or agreement which is part of the Trust Estate, including, without limitation, the right to proceed against Tenant under the CTYD III Lease pursuant to the Assignments or against Marriott pursuant to the Assignment of Guaranty or the Assignment of Agreement to Offer or assignment of any other Marriott Agreement; (ii) constitute a waiver, release or discharge of any indebtedness or obligation evidenced by the Primary Notes or arising under this Mortgage or the Indenture or any of the other Loan Documents or secured by any of the Loan Documents, but the same shall continue until paid or discharged; (iii) limit the right to enforce the Recourse Guaranty or any other guaranty of Mortgagor's obligations under the Primary Notes, this Mortgage or any other Loan Document that may be given by any Exculpated Person or rights in favor of Mortgagee or any Registered Owner by reason of a misrepresentation or breach of warranty made by any Exculpated Person in the Note Agreement or a certificate to be delivered pursuant thereto; (iv) relieve Mortgagor from personal liability and responsibility for (but only to the extent of the damages arising by reason of): (a) a breach of the ERISA representations made by Mortgagor contained in the Note Agreement and the Indenture, and the indemnification of Mortgagee and any Registered Owner in connection therewith, (b) active waste knowingly committed by Mortgagor with respect to the Trust Estate, (c) misappropriation or misapplication by Mortgagor (i.e., application in a manner contrary to this Mortgage, the Indenture, the Assignments or any other Loan Documents) of any insurance proceeds or condemnation award paid or delivered (other than by Mortgagee) to Mortgagor, (d) any security deposits or any escrows or amounts owed by Tenant under the CTYD III Lease with respect to the Account (as defined therein) in each case only to the extent paid by Tenant to Mortgagor and not turned over to Mortgagee, (e) any rents or other income received by Mortgagor from Tenant or the Trust Estate (as distinguished from rents or other income received by Mortgagor from Mortgagee), that are not turned over to Mortgagee, (f) at such time as a Lease Event of Default shall have occurred and be continuing, any liability (including attorneys' fees and damages) under

Section 2.9, and at all times to the extent that there exists any liability under Section 2.9 that is not an obligation of Marriott or Tenant or (g) any intentional misrepresentation by Mortgagor in the Indenture, the Note Agreements or any other Loan Document, or fraud on the part of Mortgagor; or (v) affect or in any way limit Mortgagee's rights and remedies hereunder with respect to the Trust Estate or to obtain a judgment against Mortgagor (provided that no deficiency judgment or other money judgment shall be enforced against Mortgagor except to the extent of Mortgagor's interest in the Trust Estate or to the extent Mortgagor may be personally liable as otherwise contemplated in this Section). Further, the exculpation of Mortgagor (but not of any Exculpated Person) shall be nullified if (1) the Trust Estate or any portion thereof shall become an asset in a voluntary bankruptcy, reorganization or liquidation proceeding under the Bankruptcy Code or an involuntary bankruptcy, reorganization or liquidation proceeding under the Bankruptcy Code and, in the latter case, such proceeding is not dismissed within ninety (90) days after its filing (or such sooner time as may be required for Mortgagor to file a claim in such proceeding if filing in the absence of such nullification would avoid the effectiveness of the foregoing) after its filing; provided, however, that in any such proceeding under Chapter 7 of the Bankruptcy Code, Mortgagee shall have recourse only to the assets of Mortgagor, and not to any assets of any of the general partners of Mortgagor (including any such assets which a trustee in bankruptcy may recover under the Bankruptcy Code); or (2) Mortgagor conveys, or grants any mortgage or deed of trust, encumbrance or similar type security interest with respect to, the Property or any material portion thereof in violation of the provisions of Section 2.21(b)(1) hereof.

Section 7.2. Security Agreement and Financing Statement. (a) From the date of its recording, this Mortgage shall be effective as a security agreement and financing statement by and between Mortgagor, as debtor, and Mortgagee, as secured parties, filed as a security agreement and financing statement pursuant to the Uniform Commercial Code in each of the States in which the Property is located with respect to all goods constituting part of the Trust Estate which are or are to become fixtures related to the real estate described herein. For this purpose, the address of the debtor is the address of Mortgagor set forth above, and the address of the secured party is the address of Mortgagee set forth above. This Mortgage covers goods which are or are to become fixtures but in all events shall exclude such items as are expressly excluded hereinabove in the definition of Personal Property.

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

1 1 3 3

(b) Mortgagor hereby grants Mortgagee a security interest in such portions of the Trust Estate, including all items of personalty referred to in the Granting Clauses, which may be subject to a security interest under Article 9 of the Uniform Commercial Code, as enacted in the jurisdiction in which the Property is located, and in all additions thereto, substitutions therefor and proceeds thereof (other than such items as are expressly excluded hereinabove in the definition of Personal Property), for the purpose of securing all indebtedness now or hereafter secured by this Mortgage. Mortgagor agrees to execute and deliver financing and continuation statements covering such Property from time to time and in such form as Mortgagee may require to perfect and continue the perfection of Mortgagee's lien or security interest with respect to the Property. Upon the occurrence of any Event of Default hereunder, Mortgagee shall have the rights and remedies of a secured party under the Uniform Commercial Code, as enacted in the jurisdiction in which the Property is located, as well as all other rights and remedies available at law or in equity, and, at Mortgagee's option, Mortgagee may also invoke the remedies provided elsewhere in this Mortgage as to such Property, subject to the terms hereof.

(c) This Mortgage constitutes a financing statement filed as a fixture filing under the Uniform Commercial Code as enacted in the jurisdiction in which the Property is located, filed in the real estate records of the county in which the Property is located with respect to any and all fixtures included within the term "Trust Estate" and with respect to any goods or other personal property that may now be or hereafter become such a fixture. PARTS OF THE COLLATERAL ARE, OR ARE TO BECOME, FIXTURES ON THE REAL ESTATE.

(d) Mortgagor and Mortgagee agree that the filing of any such financing statement or statements in the records normally having to do with personal property shall not in any way affect the agreement of Mortgagor and Mortgagee that everything used by Mortgagor, its agents, employees, and contractors and owned by Mortgagor in connection with the production of income from the Property or adapted for use therein or which is described or reflected in this Mortgage, other than, in each instance, Tenant's Proprietary Software, is, and at all times and for all purposes and in all proceedings, legal or equitable, shall be, regarded as part of the real estate conveyed hereby regardless of whether (i) any such item is physically attached to the improvements, (ii) serial numbers are used for the better identification of certain items, or (iii) any such item is referred to or reflected in any such financing statement or

statements so filed at any time. Similarly, the mention in any such financing statement or statements of the rights in and to (i) the proceeds of any fire and/or hazard insurance policy, or (ii) any award in eminent domain proceedings for a taking or for loss of value, or (iii) Mortgagor's interest as lessor in any present or future lease or the rights of Mortgagor to income growing out of the use and/or occupancy of the Property, whether pursuant to lease or otherwise, shall not in any way alter any of the rights of Mortgagee as determined by this Mortgage or affect the priority of Mortgagee's security interest granted hereby or by any other recorded document, it being understood and agreed that such mention in such financing statement or statements is solely for the protection of Mortgagee in the event any court shall at any time hold with respect to the foregoing clauses (i), (ii), or (iii) of this sentence, that notice of Mortgagee's priority of interest, to be effective against a particular class of persons, must be filed in the Uniform Commercial Code Records.

(e) Mortgagor warrants that (i) Mortgagor's (that is, "Debtor's") name, identity or corporate structure and residence or principal place of business are as set forth on page one hereof; and (ii) the location of the tangible personal property subject to the grant in the first sentence of Section 7.2(b) is upon the Land Parcel. Mortgagor covenants and agrees that Mortgagor will furnish Mortgagee with notice of any change in the matters addressed by clauses (i) or (ii) of this Section 7.2(e) within thirty (30) days of the effective date of any such change and Mortgagor, at Mortgagee's request, will promptly execute any financing statements or other instruments reasonably deemed necessary by Mortgagee to prevent any filed financing statement from losing its perfected status.

(f) The information contained in this Section is provided in order that this Mortgage shall comply with the requirements of the Uniform Commercial Code, as enacted in States in which the Property is located, for instruments to be filed as financing statements. The "Debtor" is Mortgagor and the "Secured Party" is Mortgagee, the identity or corporate structure and residence or principal place of business of "Debtor" is set forth above; the mailing address of the "Secured Party" from which information concerning the security interest may be obtained, and the mailing address of "Debtor" are as set forth above; and a statement indicating the types, or describing the terms, of collateral is set forth in the Granting Clauses above. The maturity date of the Primary Notes is in the Primary Notes.

UNOFFICIAL COPY

7 1 2 9 3 3

Section 7.3. Modifications; Waiver; Notices.

This Mortgage may not be modified except by an instrument in writing executed by Mortgagor and Mortgagee (and with respect to Mortgagee, authorized pursuant to the Indenture). No requirement hereof may be waived at any time except by a writing signed by the party against whom such waiver is sought to be enforced nor shall any waiver be deemed a waiver of any subsequent breach or default. All notices, offers, acceptances, rejections, consents, requests and other communications hereunder shall be in writing and shall be deemed to have been given (i) when delivered by hand, (ii) five Business Days after being sent by first class registered or certified mail, postage prepaid, return receipt requested, (iii) when delivered by facsimile to the numbers specified below by 2:00 P.M. local time and concurrently sent by first class registered or certified mail, postage prepaid, return receipt requested, or (iv) two Business Days after being sent by a nationally recognized overnight courier, in each case addressed as follows:

If to Mortgagor: W.P. Carey & Co., Inc.
620 Fifth Avenue
New York, NY 10020
Attn: Property Management
FAX: (212) 977-3022

and: Trammell Crow Realty Advisors, Inc.
3500 Trammell Crow Center
2001 Ross Avenue
Dallas, TX 75201
Attn: Director of Asset Management
FAX: (214) 979-5481

cc: Reed Smith Shaw & McClay
2500 One Liberty Place
1650 Market Street
Philadelphia, PA 19103
Attn: Chairman, Real Estate
Department
FAX: (215) 851-1420

and: Kaye, Scholer, Fierman, Hays &
Handler
425 Park Avenue
New York, NY 10022
Attn: Eugene A. Pinover, Esq.
FAX: (212) 836-7156

COOK COUNTY CLERK'S OFFICE

UNOFFICIAL COPY

1 0 9 3 3

If to Mortgagee: First Fidelity Bank, National
Association, New Jersey
765 Broad Street
Newark, New Jersey 07101
Attn: Corporate Trust Office
FAX: (201) 430-4281

or to such other person or address as any such party shall furnish to the other parties in writing.

Section 7.4. Illegal Provision. If for any reason or to any extent any provision herein or in the Primary Notes or any other Loan Document, or its application to any person or situation, shall be found by a court of competent jurisdiction to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision hereof, or the applicability of such provision to other persons or situations in which the same shall be valid, legal and enforceable.

Section 7.5. Maximum Interest Payable. Neither this Mortgage nor the Primary Notes nor any other document shall require the payment or permit the collection of interest in excess of the maximum amount not prohibited by law. If herein or in the Primary Notes any excess of interest in such respect is provided for or shall be adjudicated to be so provided for, neither Mortgagor nor its successors or assigns shall be obligated to pay such interest in excess of the maximum amount not prohibited by law, and the right to demand the payment of any such excess shall be and hereby is waived and any excess shall be promptly refunded; and this provision shall control any other provision of this Mortgage or the Primary Notes.

Section 7.6. Satisfaction. If and when the Primary Notes shall have become due and payable (whether by lapse of time or by acceleration or by the exercise of the privilege of prepayment), and Mortgagor shall have paid or caused to be paid the full amount of the aggregate principal, interest and Make Whole Payment, if any, on the Primary Notes and shall have paid or caused to be paid all other sums payable by Mortgagor under this Mortgage, the Indenture and the other Loan Documents, then and in that case this Mortgage shall be released, all at the cost of Mortgagor.

Section 7.7. Binding Effect. The covenants, conditions and agreements herein contained shall bind, and the benefits and advantages shall inure to, the respective

heirs, executors, administrators, successors and assigns of the parties hereto.

Section 7.8. Table of Contents; Headings. The table of contents contained herein and the headings of the various Articles, Sections and Schedules herein have been inserted for reference only and shall not to any extent have the effect of modifying or amending the express terms and provisions hereof.

Section 7.9. Governing Law. THE VALIDITY, INTERPRETATION, CONSTRUCTION AND PERFORMANCE OF THIS MORTGAGE SHALL BE GOVERNED BY THE LAWS OF THE STATE OF NEW JERSEY APPLICABLE TO AGREEMENTS EXECUTED, DELIVERED AND TO BE PERFORMED IN SAID STATE.

Section 7.10 Choice of Forum. As a specifically bargained inducement for Mortgagee to accept this Mortgage and to extend credit to Mortgagor in accordance with the Primary Notes, Mortgagor agrees that any action, suit or proceeding in respect of or arising out of the Primary Notes, this Mortgage or any other security documents executed in connection therewith shall be initiated and prosecuted exclusively in the state or federal courts located in Essex County, State of New Jersey, or at such other place as Mortgagee may elect; provided, however, that a foreclosure or similar action or proceeding shall be pursued in the jurisdiction in which the Property is situate. Mortgagor consents to and submits to the exercise of personal jurisdiction by any such court, waives personal service of any and all process upon it and consents that all such service of process be made by registered mail directed to Mortgagor at its address as set forth in Section 7.3 hereof. Mortgagor waives any objection based on forum non conveniens or improper venue, and any objection to venue of any action instituted hereunder, and consents to the granting of such legal or equitable relief as is deemed appropriate by the court.

Section 7.11. Exhibits and Schedules. Immediately following are Exhibit A and Schedules A, B and C referred to in this Mortgage which Exhibit and Schedules are hereby incorporated by reference herein.

Section 7.12. No Third Party Beneficiaries. No provision of this Mortgage is intended or shall be construed to benefit any person other Mortgagee, the Registered Owners and Mortgagor.

Section 7.13. Conflicts among Certain Loan Documents. If there shall be any conflict or inconsistency

UNOFFICIAL COPY 3

between or among the terms of the Indenture, this Mortgage or the Assignment, such documents shall control in the following order of priority: first, the Assignment; second, the Indenture; and third, this Mortgage.

IN WITNESS WHEREOF Mortgagor and Mortgagee have caused this Mortgage to be duly executed and delivered under seal, as of the day and year first above written.

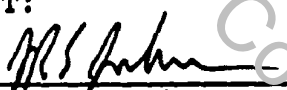
MARCOURT INVESTMENTS INCORPORATED,
a Maryland corporation, as
Mortgagor

By: 

W. Edward Scheetz
Chairman

[SEAL]

ATTEST:



John R.S. Jacobsson
Assistant Secretary

Property of Cook County Clerk's Office

02119983

UNOFFICIAL COPY

EXHIBIT A

Newark, New Jersey
February [DATE]-, 1992

SERIES [SERIES]- [RATE]-% SECURED NOTE DUE 2011

This Note has not been registered under the Securities Act of 1933, as amended, or any state securities law, and is subject to restrictions on transfer and sale.

Registered No.: [NO.]-
Principal Amount: \$[AMOUNT]-
Registered Owner: [LENDER]-

MARCOURT INVESTMENTS INCORPORATED, a corporation organized and existing under the laws of the State of Maryland ("Owner"), for value received, hereby promises to pay to the Registered Owner shown above ("Payee"), or its registered assigns, on or before November [DATE]-, 2011, as herein provided, the principal sum shown above and to pay interest on the unpaid principal amount hereof from the date hereof to maturity at the rate of [RATE]-% per annum computed on the basis of a 360-day year of twelve 30-day months and (to the extent not prohibited by applicable law) to pay interest on any overdue principal, premium, if any, and interest at the Overdue Rate (as defined in the Indenture, as hereinafter defined) on a per diem basis (computed on the basis of a 365-day year).

Such principal, premium, if any, and interest shall be payable upon presentation of this Note (except that upon compliance with the conditions of Section 203 of the Indenture, such payment shall be made by wire transfer to the Registered Owner hereof) at the corporate trust office of First Fidelity Bank, National Association, New Jersey (herein, together with its successors and assigns as trustee under the Indenture, the "Trustee"), located at 755 Broad Street, Newark, New Jersey or such other office as may be designated by the Trustee, as Trustee under the Indenture, dated as of the date hereof (herein, together with all supplements and amendments thereto, the "Indenture"), from Owner, as issuer, to the Trustee, as trustee, or at the office of its successor as such Trustee, in lawful money of the United States of America, in the following manner:

- (i) Twelve (12) quarterly payments of interest only (payable in arrears) each in the amount set forth

0000000000

UNOFFICIAL COPY

Property of Cook County Clerk's Office

UNOFFICIAL COPY

on the attached Schedule I (which is hereby made a part hereof) for periods one through twelve shall be payable on the [DATE]-th day of each May, August, November and February, commencing on May [DATE]-, 1992 and continuing to and including February [DATE]-, 1995; and

- (ii) Sixty-seven (67) quarterly payments of interest (payable in arrears) and principal, each in the amount set forth on the attached Schedule I for periods thirteen through seventy-nine shall be payable on the [DATE]-th day of each May, August, November and February, commencing on May [DATE]-, 1995 and continuing to and including November [DATE]-, 2011; the final payment shall also include all other amounts, if any, then due and owing with respect to this Note or pursuant to the terms of the Indenture; the payments described in this clause and clause (i) are herein called the Installment Payments and the dates upon which such payments are due are herein called the Installment Payment Dates.

Any Installment Payment due and payable on a day which is not a Business Day shall be payable by Owner on the next Business Day.

This Note is one of Owner's Series [SERIES]- [RATE]-% Secured Notes due 2011 (together with Owner's Series [OTHER SERIES]- [OTHER RATE]-% Secured Notes due 2011, the "Notes"), which Notes are equally and ratably secured by and entitled to the benefits of both (i) that certain [MORT/DOIT]-, Security Agreement and Fixture Filing, dated as of the date hereof (herein, together with all supplements and amendments thereto, called the "Primary Mortgage"), from Owner, as grantor, in favor of the Trustee, as [mortgagee/beneficiary]-, encumbering the Courtyard-by-Marriott Hotel located on the real property described in Schedule II (which is hereby made a part hereof) (the "Primary Mortgaged Premises") and (ii) those certain second mortgages or deeds of trust, dated as of the date hereof (herein, together with all supplements and amendments thereto, called the "Secondary Mortgages" and, together with the Primary Mortgage, the "Mortgages"), from Owner, as grantor, in favor of the Trustee, as mortgagee or beneficiary, encumbering the Courtyard-by-Marriott Hotels located on the real property described in Schedule III (which is hereby made a part hereof) (the "Secondary Mortgaged Premises" and, together with the Primary Mortgaged Premises, the "Mortgaged Premises"), which Mortgages, together with the Indenture, contain provisions including,

UNOFFICIAL COPY

but not limited to, provisions for the acceleration of maturity of this Note and accrual of default interest and late charges upon the happening of certain Events of Default as defined therein, certain events of casualty damage or condemnation or taking of the Mortgaged Premises, closing of the Improvements (as defined in the Mortgages) under certain circumstances and failure to observe certain covenants or certain changes in the laws applicable to the taxation of certain obligations under this Note or the Mortgages. Additionally, reference is hereby made to the Mortgages and to the Indenture for a description of the Trust Estate granted by the Mortgages, the nature and extent of the security for the Notes, the rights of the Registered Owners, the Trustee and Owner in respect of such security and otherwise and a description of the terms upon which the Notes are authenticated and delivered. Owner's obligations under certain of Owner's other secured notes due 2011 are also secured by the Primary Mortgaged Premises pursuant to that certain Second [MORT/DoFT]-, Security Agreement and Fixture Filing, dated as of the date hereof, from Owner, as grantor, in favor of the Trustee, as [mortgagee/beneficiary]-, encumbering the Primary Mortgaged Premises.

This Note is also secured by the Assignments of Leases and Rents, the Assignment of Contracts and Agreements, the Assignment of Agreement to Offer and the Assignment of Guaranty, each dated as of the date hereof (collectively, together with the Indenture and the Mortgages, the "Mortgage Documents"). Capitalized terms not otherwise defined herein have the meanings set forth in any of the Mortgages.

The principal of this Note is subject to redemption in whole or in part at the option of Owner only in the manner, to the extent, and under the circumstances set forth in the Indenture at a price equal to 100% of the principal amount hereof to be prepaid, plus the premium, if any, thereon provided for in the Indenture, together with interest accrued thereon to the date of redemption.

Upon the occurrence of an Event of Default specified in the Mortgages, the principal hereof, the premium hereon, if any, and the interest accrued and unpaid hereon, if any, may be declared to be forthwith due and payable as provided in the Mortgages.

The Notes are issuable only as fully registered Notes. Owner and the Trustee shall deem and treat the person in whose name this Note is registered on the Register (as such term is defined in the Indenture) as the absolute

the Notes, the Mortgages or any other Loan Document that may be given by any Exculpated Person or rights in favor of Payee or any Registered Owner by reason of a misrepresentation or breach of warranty made by any Exculpated Person in the Note Agreement or a certificate to be delivered pursuant thereto; (iv) relieve Owner from personal liability and responsibility for (but only to the extent of the damages arising by reason of): (a) a breach of the ERISA representations made by Owner contained in the Note Agreement and the Indenture, and the indemnification of Mortgagee and any Registered Owner in connection therewith, (b) active waste knowingly committed by Owner with respect to the Trust Estate, (c) misappropriation or misapplication by Owner (i.e., application in a manner contrary to the Mortgages, the Indenture, the Assignments or any other Loan Documents) of any insurance proceeds or condemnation award paid or delivered (other than by the Trustee) to Owner, (d) any security deposits or any escrows or amounts owed by Tenant under the CTYD III Lease with respect to the Account (as defined therein) in each case only to the extent paid by Tenant to Owner and not turned over to Mortgagee, (e) any rents or other income received by Owner from Tenant or the Trust Estate (as distinguished from rents or other income received by Owner from the Trustee), that are not turned over to the Trustee, (f) at such time as a Lease Event of Default shall have occurred and be continuing, any liability (including attorneys' fees and damages) under Section 2.9 of any of the Mortgages, and at all times to the extent that there exists any liability under such Section 2.9 that is not an obligation of Marriott or Tenant or (g) any intentional misrepresentation by Owner in the Indenture, the Note Agreements or any other Loan Document, or fraud on the part of Owner; or (v) affect or in any way limit the Trustee's rights and remedies under the Mortgages with respect to the Trust Estate or to obtain a judgment against Owner (provided that no deficiency judgment or other money judgment shall be enforced against Owner except to the extent of Owner's interest in the Trust Estate or to the extent Owner may be personally liable as otherwise contemplated in this paragraph). Further, the exculpation of Owner (but not of any Exculpated Person) shall be nullified if (1) the Trust Estate or any portion thereof shall become an asset in a voluntary bankruptcy, reorganization or liquidation proceeding under the Bankruptcy Code or an involuntary bankruptcy, reorganization or liquidation proceeding under the Bankruptcy Code and, in the latter case, such proceeding is not dismissed within ninety (90) days after its filing (or such sooner time as may be required for the Trustee to file a claim in such proceeding if filing in the absence of such nullification would avoid the effectiveness of the foregoing); provided,

UNOFFICIAL COPY

however, that in any such proceeding under Chapter 7 of the Bankruptcy Code, the Trustee shall have recourse only to the assets of Owner, and not to any assets of any of the general partners of Owner (including any such assets which a trustee in bankruptcy may recover under the Bankruptcy Code); or
(2) Owner conveys, or grants any mortgage or deed of trust, encumbrance or similar type security interest with respect to, the Property or any material portion thereof in violation of the provisions of Section 2.21(b)(i) of any of the Mortgages.

This Note shall not be valid until the certificate of authentication hereon shall have been signed by the Trustee.

This Note shall be governed by and construed in accordance with the laws of the State of New Jersey applicable to agreements made and to be performed in such state.

IN WITNESS WHEREOF, Owner has caused this Series [SERIES]- [RATE]- Secured Note due 2011 to be duly executed.

Dated: February [DATE]-, 1992

MARCOUR INVESTMENTS
INCORPORATED

By: _____
W. Edward Scheetz,
Chairman

[SEAL]

Attest:

By: _____
John R.S. Jacobsson,
Assistant Secretary

Trustee's Certificate of Authentication

This Note is one of the Series [SERIES]- [RATE]- $\frac{1}{2}$ Secured Notes due 2011 of Marcourt Investments Incorporated described in the within-mentioned Indenture.

FIRST FIDELITY BANK,
NATIONAL ASSOCIATION, NEW JERSEY
as Trustee pursuant to the
Indenture of even date between
Marcourt Investments Incorporated
and said Trustee

By: _____
Thomas W. Simons,
Vice President

Florida Documentary Stamp Taxes have been affixed to Second Mortgages securing this Note as follows:

- (a) \$17,309.12 on the Second Mortgage encumbering the Orlando Airport Property to secure this Note and the Other Notes except the Note secured by the First Mortgage on said property, with the principal recovery under said Second Mortgage being limited to \$5,409,100.00.
- (b) \$16,029.12 on the Second Mortgage encumbering the Orlando International Drive Property to secure this Note and the Other Notes except the Note secured by the First Mortgage on said property, with the principal recovery under said Second Mortgage being limited to \$5,009,100.00.

28600-1000

UNOFFICIAL COPY

SCHEDULE A

3

Parcel 1:

That part of the South East quarter of Section 33 and the South West quarter of Section 34, Township 41 North, Range 12, East of the Third Principal Meridian, taken as a tract described as follows:

Beginning at the point of intersection of the center line of River Road and a line which is 500 feet North of measured at right angles to and parallel with the North line of Lot 2 in Gerhard Huehl Estate Division in Section 2, Township 40 North, Range 12, East of the Third Principal Meridian, and Section 34, Township 41 North, Range 12, East of the Third Principal Meridian, thence Northwestwardly 978.31 feet along the center of said River Road to a point (said point being 512.98 feet North (as measured along the center line of River Road) of a line 1442.19 feet South of and parallel with the North line of the South East quarter of Section 33, aforesaid and the North line of South West quarter of Section 34 aforesaid) thence West along a line parallel with the North line of the Southwest quarter of Section 34 aforesaid and the North line of the Southeast quarter of Section 33 aforesaid a distance of 622.48 feet to the Easterly right of way line of the Northern Illinois Toll Highway as conveyed by Warranty Deed recorded August 7, 1957 as document 19979223 and recorded September 12, 1957 as document 1721187 and as established by Out Claim Deed recorded March 2, 1962 as document 16114461 thence Southeastwardly along said Easterly right of way line of the Northern Illinois Toll Highway 831.48 feet to a point on a line which is 500 feet North of measured at right angles to and parallel with the North line of aforesaid Lot 2 in Gerhard Huehl Estate Division, thence Easterly along said line just described 735.82 feet to the place of beginning (excepting therefrom that part falling in the Easterly 265.12 feet of that part of the Southwest quarter of Section 34, Township 41 North, Range 12, East of the Third Principal Meridian, described as follows: Beginning at a point in the West line of the Southwest quarter of said Section 34 which is 1166.88 feet South of the Northwest corner of said quarter section, thence Easterly on a line forming an angle of $87^{\circ} 31' 36''$ measured from North to East with the West line of the Southwest quarter of Section 34, aforesaid, 448.37 feet to the center line of River Road, thence Southeastwardly along the center line of River Road, 136.72 feet, thence Westerly parallel with the Northerly line of the tract described 479.88 feet to the West line of the Southwest quarter of Section 34, aforesaid, thence North along said line 126.38 feet to the place of beginning) also (excepting therefrom the Northeastwardly 23 feet thereof as measured at right angles to the center line of River Road), also (excepting that part of the Southeast quarter of Section 33 and the Southwest quarter of Section 34, Township 41 North, Range 12, East of the Third Principal Meridian, described as follows: Beginning at the point of intersection of the centerline of River Road and a line which is 500 feet North of, measured at right angles to and parallel with the North line of Lot 2 in Gerhard Huehl Estate Division in Section 2, Township 40 North and Section 34, Township 41 North, Both in Range 12 East of the Third Principal Meridian, thence Northwestwardly along the centerline of River Road, a distance of 508.79 feet to a point 136.72 feet (as measured along the centerline of said River Road) South of a line which forms an angle of $87^{\circ} 31' 36''$ measured from North to East with the West line of the Southwest quarter of said Section 34 and drawn from a point on the West line of said South West 1/4, which

UNOFFICIAL COPY

201 2 23

point is 1103.00 feet South of the Northwest corner of said Southwest quarter; thence West along a line parallel with said last described line 255.12 feet; thence Northwesterly parallel with the centerline of River Road, a distance of 38.48 feet to a line which forms an angle of $84^{\circ} 56' 41''$ with the extension of the last described line in the Northwest quadrant of their intersection; thence Southwesterly along said last described line a distance of 441.23 feet to the Easterly right of way line of the Illinois Toll Highway as conveyed by Warranty Deed recorded August 7, 1987 as document 16978383 and re-recorded September 18, 1987 as document 17911187 and as established by Quit Claim Deed recorded March 2, 1982 as document 18414481; thence Southeasterly along said right of way line, a distance of 89.63 feet to a point in the South line of the North 1442.18 feet of the Southeast quarter of Section 33 aforesaid which is 148.64 feet West of the East line of said Southeast quarter, thence Southeasterly along a line which makes an angle of $82^{\circ} 08' 22''$ measured from East to South with the South line of the North 1442.18 feet of said Southeast quarter of Section 33, a distance of 348.88 feet; thence Southeasterly along a line which forms an angle of $2^{\circ} 57' 16''$ to the right of the last described line, extended South, a distance of 87.78 feet; thence East along a line which is 588.8 feet North of measured at right angles to and parallel with the North line of aforesaid Lot 2 in Gerhard Huehl Estate Division a distance of 735.82 feet to the place of beginning (excepting from said land the Northeastery 23 feet thereof, measured at right angles to the centerline of River Road) all in Cook County, Illinois.

ALSO EXCEPT:

That part of the East half of the Southeast quarter of Section 33, Township 41 North, Range 12 East of the Third Principal Meridian, in Cook County, Illinois, described as follows:

Commencing at a point on the West line of the East half of the Southeast quarter of Section 33, said point being 1442.18 feet South of the Northwest corner thereof; thence North $87^{\circ} 35.5'$ East along a line and parallel with the North line of the Southeast quarter of said Section 33 and the North line of the Southwest quarter of Section 34, Township 41 North, Range 12 East of the Third Principal Meridian, a distance of 1843.78 feet to the center of River Road in the aforesaid Section 34; thence North $17^{\circ} 33.28'$ West along the center of said road, a distance of 518.92 feet to a point; thence Westerly along a line parallel with the North line of the Southwest quarter of said Section 34 and the North line of the Southeast quarter of said Section 33, a distance of 622.48 feet, more or less, to the Easterly right-of-way line of the Illinois State Toll Highway Authority as conveyed by Warranty Deed recorded August 7, 1987 as document number 16,978,383 for the point of beginning; thence Easterly along the said line parallel with the North line of the Southeast quarter of said Section 33, a distance of 28.88 feet; thence Southerly along a line forming an angle of $85^{\circ} 59' 11''$ to the right of the prolongation of the last described course, a distance of 216.83 feet to a point on the said Easterly right-of-way line of the Illinois State Toll Highway Authority; thence Northwesterly along the said Easterly right-of-way line forming an angle of $173^{\circ} 29' 27''$ to the right of the prolongation of the last described course, a distance of 228.88 feet to the point of beginning.

And also described as follows, per the survey prepared by Midwest Technical Consultants, Inc. dated 1/14/92, Job No. 111-160:

UNOFFICIAL COPY

1 0 0 3

That part of the Southwest $\frac{1}{4}$ of Section 34;
Township 41 North, range 12 East of the Third Principal
Meridian described as follows:

Commencing at the point of intersection of
the center line of River Road and a line which is 500 feet
North of, measured at right angles to, and parallel with the
North line of Lot 2 in Gerhard Huehl Estate Division in
Section 3, Township 40 North, and Section 34, Township 41
North, both in Range 12, East of the Third Principal
Meridian; thence Northwesterly along the center line of
River Road, a distance of 596.79 feet to a point 130.72 feet
(as measured along the center line of River Road) South of a
line which forms an angle of 87 degrees 31 minutes 30
seconds measured from North to East with the West line of
the Southwest Quarter of said Section 34 and drawn from a
point on the West line of said Southwest Quarter, which
point is 1186.06 feet South of the Northwest corner of said
Southwest Quarter, thence West along a line parallel with
said last described line 205.12 feet; thence Northwesterly
parallel with the center line of River Road, a distance of
36.40 feet to a line which forms an angle of 84 degrees 50
minutes 41 seconds with the extension of the last described
line in the Northwest Quadrant of their intersection; thence
Southwesterly along said last described line, a distance of
6.04 feet for a point of beginning; thence South 16 degrees
53 minutes 40 seconds East 85.53 feet; thence South 79
degrees 55 minutes 05 seconds East 194.15 feet to a point on
a line 33.0 feet Southwesterly of and parallel with the
center line of River Road; thence South 17 degrees 33
minutes 30 seconds East along said last described parallel
line being 33.0 feet Southwesterly of the centerline of
River Road for a distance of 11.29 feet; thence North 79
degrees 65 minutes 05 seconds West 206.51 feet; thence North
16 degrees 53 minutes 40 seconds West 92.45 feet; thence
North 77 degrees 36 minutes 01 seconds East 10.03 feet to
the place of beginning in Cook County, Illinois.

Permanent Tax Index Number:
09-34-300-033-0000, Volume 096

UNOFFICIAL COPY

SCHEDULE B

PERMITTED EXCEPTIONS - Chicago, Illinois

1. Agreement made by E.A. Petersen with the Sanitary District of Orchard Place, Des Plaines, Illinois, for an easement being the construction of a 12 inch sanitary sewer main over approximately the Easterly 17 feet of the premises therein contained in agreement recorded October 1, 1958 as document number 17334559.
2. Easement for repair, maintain, operate and reconstruct an 8 inch water main as created by agreement with the City of Des Plaines dated September 22, 1964 and recorded October 7, 1964 as document 19267496, along with the Westerly 10 feet of a portion of Parcel 1.
3. Easement for repair, maintain, operate and reconstruct an 8 inch water main as created by agreement with the City of Des Plaines dated September 22, 1964 and recorded April 22, 1965 as document number 19442363.
4. Easement for repair, maintain, operate and reconstruct a 21 inch storm sewer as created by agreement dated March 30, 1965 and recorded June 29, 1965 as document number 19510216 with the City of Des Plaines, over the Easterly 17 feet of the land.
5. Watermain and 15 inch storm sewer as disclosed by Survey No. 111-160 by Midwest Technical Consultants Inc., dated January 14, 1992.
6. Sanitary sewer line and water main through approximately the Easterly 5 feet of the land as depicted on survey aforesaid.
7. Quit Claim Deed recorded December 16, 1989 as document number 89599341, through the Southerly portion of the land and parking area.
8. Ten (10) foot easement for Northern Illinois Toll Highway Parcel No. T-9A-161-001.1 along the Westerly line of Parcel 1.
9. Terms, provisions and conditions relating to the Storm Drainage Easement Agreement dated June 22, 1988 and recorded December 26, 1989 as document number 89621151 by and between Des Plaines Investment Company ("Grantor") and Greer Properties, Inc. ("Grantee"). (Affects Parcel II only.)
10. Parking Easement shown in document number 88-2895231.