

IN THE CIRCUIT COURT OF THE 15TH
JUDICIAL CIRCUIT, IN AND FOR PALM
BEACH COUNTY, FLORIDA

CASE NO: 50 2011CA010071XXXXMB AB

RC/PB, INC.,

Plaintiff,

v.

THE RITZ-CARLTON HOTEL
COMPANY, L.L.C., MARRIOTT
INTERNATIONAL, INC., and
AVENDRA L.L.C.,

Defendants.

AMENDED COMPLAINT

Plaintiff RC/PB, Inc., through counsel and pursuant to the applicable rules of the Florida Rules of Civil Procedure, files this, its Amended Complaint for damages against Defendants, The Ritz-Carlton Hotel Company, L.L.C., Marriott International, Inc., and Avendra L.L.C. (collectively, the "Defendants"), and states as follows:

I. NATURE OF THE ACTION

1. This Complaint arises out of the utter disregard of fiduciary, contractual and statutory obligations by the Ritz-Carlton Hotel Company, L.L.C. ("Ritz-Carlton" or "Operator"), Marriott International, Inc. ("Marriott") and Avendra, L.L.C. ("Avendra"), in connection with Ritz-Carlton's management of Plaintiff RC/PB, Inc.'s ("RC/PB's" or "Owner's") hotel business located in Manalapan, Florida and known as The Ritz-Carlton Palm Beach Hotel (the "Hotel").

2. While Ritz-Carlton's name may be on the Hotel, it does not own it; it is the operating agent, entrusted to manage the Hotel for the benefit of RC/PB, the Owner, for which it gets paid a very substantial management fee. Ritz-Carlton profits from this management fee, as all of the costs associated with operating the Hotel – including all of the wages and benefits for the multitude of Ritz-Carlton employees at the Hotel, all of the food and beverage costs, operating supplies and the substantial costs to repair and maintain the Hotel – are covered by RC/PB, the Owner. Owner also pays a substantial “Group Service Fee” to Ritz-Carlton to fund all benefits, services and facilities provided to the Hotel in common with the other hotels operated by Ritz-Carlton, including, among other things, sales and marketing promotions, and all institutional advertising. This Group Service Fee is capped under Owner's agreement with Ritz-Carlton at 1% of gross revenues per annum.

3. Ritz-Carlton cannot charge these fees with impunity. It must earn them, and must account for them to Owner. Additionally, because Ritz-Carlton undertook to operate and manage the Hotel solely for the account of RC/PB, Ritz-Carlton acts as Owner's agent, and owes various fiduciary duties to the Owner. If Ritz-Carlton fails to comply with its contractual obligations and the agency, fiduciary and common law duties that arise from its agreement with Owner, it not only forfeits its claims for payment of these fees, but also puts at risk its right to continue to manage the Hotel as Owner's operating agent.

4. For RC/PB, Ritz-Carlton's public reputation as a standard-bearer for excellent customer service has not translated into excellent Owner service. As detailed in this Complaint, Ritz-Carlton has failed to honor its fiduciary and contractual obligations and, instead of operating the Hotel for the benefit of Owner, has effectively converted the Hotel into a cash cow for Ritz-Carlton, its parent company, Marriott, and its related purchasing enterprise, Avendra.

5. Having induced Owner to purchase the Hotel and to invest in a major renovation which, according to Ritz-Carlton executives, transformed the Hotel into "the best Ritz-Carlton in Florida" and, indeed, "the best Ritz-Carlton in [the] system," Ritz-Carlton has failed to comply with its contractual and fiduciary obligations to Owner, and instead operated the Hotel to maximize the financial benefits to itself, its controlling affiliate, Marriott, and its related purchasing agent, Avendra. In addition to the millions of dollars in management fees and group service fees Owner agreed to pay, and in fact has paid, even when Ritz-Carlton failed to come close to achieving its own projections and budgets, Ritz-Carlton – in concert with the other Defendants – has fleeced the Owner out of almost \$30 million on top of the contractually allowed fees over the past five years alone.

6. For example, Ritz-Carlton has systematically and fraudulently charged the Hotel for Group Services in excess of the 1% cap by separately charging the Hotel for benefits, services and facilities provided to the Hotel in common with the other hotels that should have been covered by the Group Service Fee. Further, Ritz-Carlton has

imposed a multitude of corporate charges for programs and services that are not necessary to operate the Hotel, contain improperly charged corporate overhead and general and administrative expenses, and which inure primarily to the benefit of the Defendants. Through these improper charges, Ritz-Carlton has more than quadrupled the payments Owner knew and understood it would be paying to Ritz-Carlton as consideration for its management services, using Owner's funds to cover Ritz-Carlton and Marriott corporate overhead and generate profits for Ritz-Carlton and Marriott.

7. Further manifesting its failures as a fiduciary, Ritz-Carlton intransigently refused to explain, document and reduce these unnecessary expenses, even as Owner faced an indeterminate period of declining revenues during the recent and ongoing economic challenges. Now Ritz-Carlton has abandoned all pretexts about its professed obligation to operate the Hotel for Owner's account and has further eroded Owner's returns by diverting substantial revenues to fund Ritz-Carlton's brand-building initiatives, including its recently announced frequent traveler and credit card marketing programs, over Owner's objection.

8. Owner has been engaged in a multi-year effort to improve Ritz-Carlton's performance, to no avail. Questions have gone unanswered, or otherwise have been the subject of false or otherwise misleading "responses." Reasonable efforts by Owner to access the Hotel to inspect books and records, as permitted by the parties' contractual agreement, have been stymied by imposing security guards to physically block Owner's access to the Hotel's offices.

9. This situation did not happen overnight. It has been building up over a period of years, to the point where Owner can no longer trust Ritz-Carlton to operate the Hotel in accordance with its contractual and fiduciary duties. Furthermore, the financial harm sustained by Owner attributable to the Defendants' malfeasance, including the diminished operating returns and the loss in value of the Hotel, now exceeds seventy-five million dollars (\$75 million). Paying Ritz-Carlton for the "benefit" of having Ritz-Carlton destroy Owner's substantial investment in the Hotel while it continues to promote its brand interests is certainly not the essence of the bargain struck by the parties. Accordingly, Owner must now seek judicial relief to confirm Owner's right to terminate Ritz-Carlton as operator of the Hotel and to recover the damages caused by the improper conduct of Ritz-Carlton, Marriott and Avendra.

10. RC/PB timely served Ritz-Carlton with a Notice of Default dated February 11, 2011 ("Default Notice"), incorporated herein by reference. The Default Notice detailed numerous Events of Default, as defined under the Operating Agreement, which remain uncured and, individually and collectively, constitute breaches of Ritz-Carlton's contractual and fiduciary duties to Owner and manifest a failure of the essential purpose behind the Operating Agreement.

11. All conditions precedent to the filing of this Complaint have been met, waived or otherwise satisfied.

12. As alleged in Counts I - III, defendants Ritz-Carlton, Marriott and Avendra individually and collectively have breached their respective contractual and fiduciary

duties and their implied duties of good faith and fair dealing to RC/PB by imposing excessive, hidden and improper fees, charges and assessments, the effect of which has been to convert Owner's Hotel revenues into hidden and unauthorized sources of income for the Defendants. To hide these improper fees, charges and assessments, Ritz-Carlton went so far as to physically block Owner's access to certain areas of the Hotel, using security guards -- presumably paid for by Owner -- to prevent Owner from inspecting the Hotel's books and records.

13. In Count IV, RC/PB alleges that Ritz-Carlton fraudulently induced Owner to entrust Ritz-Carlton with the operation of a renovated Hotel by falsely representing that it would cap its fees and would generate substantial returns on Owner's investment, knowing full well that it had no present intention to honor those representations.

14. In Counts V- VII and IX, RC/PB alleges that defendants Marriott and Avendra, through and in connection with this scheme to convert Owner's revenues from the Hotel into hidden and unauthorized sources of income for themselves, have engaged in fraud, negligent misrepresentation, and negligence by making false and grossly misleading statements in an attempt to cover up the fact and extent of their malfeasance and conversion of Owner's funds to their own accounts. This tortious conduct, which arises separate and apart from any contractual duties, extends to Marriott and Avendra's individual and collective efforts to mislead RC/PB with respect to the identity, amount, putative "benefit," costs and allocation of costs for fees, charges and assessments imposed on RC/PB. This scheme to defraud RC/PB also

encompasses the amount of fees charged by Avendra to RC/PB; the terms and competitiveness of contracts negotiated with vendors supplying goods and services to the Hotel on Owner's account; the prices negotiated with vendors and ultimately charged to the Owner; and the amount of rebates, allowances and other kickbacks received by vendors, Marriott, Ritz-Carlton and/or Avendra in connection with purchases made by the Hotel.

15. As alleged in Count VIII, in connection with this same scheme to extract hidden and unauthorized payments from Owner's hotel business, the Defendants have engaged in statutory violations of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201, *et seq.*

16. In short, Ritz-Carlton, Marriott and Avendra, acting individually and collectively, have bilked the Owner out of millions of dollars to maximize their own returns, without regard for the financial harm to Owner and to Owner's investment in the Hotel. As a remedy for the Defendants' misconduct, RC/PB seeks monetary and equitable relief, including an order directing Ritz-Carlton to provide to RC/PB an accounting of its operations relating to the Hotel (Count XI) and a declaratory judgment that RC/PB has the right to terminate the Operating Agreement without further payment to Ritz-Carlton (Count XII).

II. THE PARTIES

17. Plaintiff RC/PB is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business located in Sacramento,

California. RC/PB holds the lease for the Hotel and is Owner pursuant to the Operating Agreement.

18. Defendant Ritz-Carlton is a limited liability company duly organized and existing under the laws of the State of Delaware, with its principal place of business located in Chevy Chase, Maryland.

19. Defendant Marriott is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business located in Bethesda, Maryland. Marriott is the parent of Ritz-Carlton.

20. Defendant Avendra is a limited liability company duly organized and existing under the laws of the State of Delaware, with its principal place of business located in Rockville, Maryland.

**Ritz-Carlton, Marriott and Avendra Are
Engaged in a Single Business Enterprise**

21. Defendants Ritz-Carlton, Marriott and Avendra are engaged in a single business enterprise with respect to hotel operations generally and the operation of the Hotel in particular.

**The Single Business Enterprise Relationship
Between Ritz-Carlton and Marriott**

22. In 1995, Marriott acquired a 49% beneficial ownership interest in Ritz-Carlton. On or around March 19, 1998, Marriott increased its ownership interest in Ritz-Carlton to 99%.

23. Ritz-Carlton is registered as a domestic subsidiary of Marriott.

24. While Marriott has created a corporate entity to represent the Ritz-Carlton interests, in reality Ritz-Carlton is treated as a mere corporate division and brand of Marriott.

25. For example, Marriott holds out Ritz-Carlton as being an integral component of the Marriott family of hotels, and identifies Ritz-Carlton as one of its luxury brands in dealing with the general public, investors and developers.

26. At its corporate website, Marriott describes The Ritz-Carlton Hotel Company, L.L.C. as one of the “brands” operated by Marriott Lodging. (See <http://www.marriott.com/corporateinfo/glance.mi>.)

27. In Marriott’s 2010 Annual Report (Form 10-K), it describes Ritz-Carlton as “a leading global luxury lifestyle brand of hotels and resorts....”

28. Substantially all of Ritz-Carlton’s business is by virtue of its status as a Marriott brand.

29. Consistent with its single business enterprise with Ritz-Carlton, in which Marriott treats Ritz-Carlton as merely one of its brands or divisions, Marriott controls which properties are operated for owners by Ritz-Carlton and assigns Marriott personnel to supervise owner relations.

30. As with other hotels operated by Ritz-Carlton and/or Marriott, Defendants, by and through Operator, act as a single operational enterprise with respect to the Hotel.

31. Defendants' single operational enterprise, as directed to RC/PB and to other owners of hotels operated by Marriott and its various brands, includes:

- a. the Marriott reservations system ("MARSHA");
 - b. the Marriott Rewards frequent traveler program;
 - c. the selection, training and relocation of key management level employees at the Hotel and other Marriott-branded hotels;
 - d. Marriott's company-wide employee stock option and other bonus payment plans;
 - e. the development of new Marriott services and programs, the development costs of which are charged to owners, including RC/PB;
 - f. collectively entering into contracts and similar arrangements for their common benefit, including with an affiliated vendor of goods and services, Avendra;
 - g. insurance programs charged to hotels throughout the Marriott system;
 - h. centralized accounting functions through Marriott's facility in Tennessee (formerly referred to as Project Mercury);
 - i. corporate-controlled sales and marketing for all Marriott brands;
 - j. the promotion of Marriott's various timeshare businesses;
 - k. the allocation of Defendants' corporate overhead to RC/PB and other owners;
 - l. Marriott's assertion of control over records relating to the operation of the Hotel (and other properties ostensibly managed by Marriott entities, including the Operator);
 - m. utilizing and charging owners for information technology and telecommunications services, including the use of Marriott's e-mail system;
 - n. Marriott's commingling of funds from RC/PB and other owners and use of such funds for the promotion of Defendants' interests; and
 - o. the use of off-shore affiliates for tax purposes for the benefit of Marriott.
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32. Additionally, Marriott controls the marketing of Ritz-Carlton's hotel management services and decides which properties are operated by Ritz-Carlton.

33. In furtherance of this single business enterprise, Ritz-Carlton has outsourced many of its obligations in connection with the operation of the Hotel to Marriott. Key decisions, policies and procedures applicable to the Hotel are made by Marriott personnel at their respective corporate headquarters. For example, on information and belief:

- a. the Hotel's website is maintained by Marriott, and all sales and marketing scripts for regional and national sales offices for the Hotel and other Ritz-Carlton branded hotel are vetted by Marriott;
- b. all major decisions with respect to responding to Owner information requests, including access to Hotel books and records, are made by or with the approval of Marriott's Vice President of Global Asset Management;
- c. budgets, revisions to budgets, cash flow forecasts, capital expenditure plans, and marketing plans are all submitted by the Hotel to Marriott and Ritz-Carlton for review, revision and approval before being sent to RC/PB;
- d. Marriott personnel direct the disbursement of certain Hotel operating proceeds to affiliates, including to Marriott and Ritz-Carlton;
- e. Marriott controls the marketing funds which RC/PB and other Ritz-Carlton owners pay each year; and, importantly,
- f. Marriott determines corporate overhead the Defendants are going to charge to RC/PB, and the method of allocation.

34. Many of Ritz-Carlton's executive-level personnel are appointed by or receive direction from Marriott.

35. Further, Ritz-Carlton and Marriott share common management and

officers. For example, Ritz-Carlton's previous Chief Operating Officer, Simon Cooper, is also President and Managing Director of Marriott's Asia Pacific Division. Peter Cole, Chief Financial Officer of Ritz-Carlton, is also the Chief Financial Officer for Marriott's East Region.

**The Single Business Enterprise Relationship
Between Ritz-Carlton, Marriott and Avendra**

36. Marriott uses the Ritz-Carlton brand, and in particular Ritz-Carlton's position as Operator of the Hotel, to require that the Hotel procure goods and services through Avendra. As described herein, Marriott receives rebates or kickbacks from vendors with whom Avendra contracts to provide goods to the Hotel. Marriott, acting through Ritz-Carlton, then conceals the existence of such kickbacks from RC/PB.

37. Marriott launched Avendra in 2001 as a joint venture with Hyatt. Essentially a spin-off of Marriott's purchasing department, Avendra was created for the limited purpose of providing centralized procurement services for Marriott and Hyatt hotels. Avendra's sole function is to secure contracts with vendors to provide goods and services to participating hotels, many of which are within the Marriott system.

38. Avendra is a Ritz-Carlton affiliate. Marriott is Avendra's largest shareholder and the former employer of a majority of Avendra's executives. Until 2009, Marriott held a greater than 50% interest in Avendra.

39. Upon information and belief, without any contractual authority to do so, Marriott and Ritz-Carlton have outsourced to Avendra the purchase of goods and services for the Hotel.

40. Upon information and belief, Marriott, Ritz-Carlton and Avendra have entered into contracts memorializing this business relationship in which Marriott and Ritz-Carlton purport to appoint Avendra as their exclusive agent to perform all purchasing services on behalf of the Hotel. RC/PB is an intended third party beneficiary of these contracts.

41. To enable Avendra to effectuate Marriott's and Ritz-Carlton's purposes, Marriott and Ritz-Carlton purported to vest Avendra with broad agency authority, including without limitation, the authority to: (1) investigate, qualify and select vendors and distributors, (2) negotiate and execute contracts with vendors and distributors, (3) negotiate the amount of any kickbacks, known as "rebates" or "Sponsorship Funds"; (4) collect, account for and distribute the kickbacks from vendors and distributors, (5) account for kickbacks received and deduct Avendra's costs and fees, and (6) maintain custody of copies of all contracts with vendors and distributors, as well as invoices and related documentation.

42. Upon information and belief, Marriott's standard—and, indeed, mandated—practice is to use Avendra to conduct purchasing for the majority of hotels within the Marriott system, in addition to the Hotel.

43. Despite RC/PB's repeated requests for the contracts between Ritz-Carlton, Marriott and Avendra and other documentation related to the parties' relationship, Ritz-Carlton has refused to share it with RC/PB.

44. Defendants' conduct, including their representations to the public, confirm that they are engaged in a single business enterprise and sub-agency in connection with the management of hotels, including the Hotel, for which all individually should be held liable when their conduct causes harm to RC/PB.

Marriott and Avendra Have Entered Into an Implied Contract with RC/PB

45. By discharging certain obligations and providing goods and services under the terms of Operating Agreement and accepting payment from RC/PB's accounts in return, Marriott and Avendra have entered into an implied contract with RC/PB for the performance of those obligations and for the provision of those goods and services.

Ritz-Carlton Engages Marriott and Avendra as Subagents to Perform Ritz-Carlton's Obligations Under the Operating Agreement

46. To undertake certain core agency functions, duties, and obligations Operator owed to RC/PB under the Management Agreement, Operator appointed Marriott and Avendra as its subagents. As Ritz-Carlton's subagents, Marriott and Avendra stand in a fiduciary relation to RC/PB, and owe all the duties, and are subject to all the liabilities, of an agent to the principal.

47. Under this arrangement, Marriott and Avendra perform certain functions on behalf of RC/PB, ostensibly to satisfy certain duties and obligations that Operator

owes to RC/PB. For example, Ritz-Carlton has appointed or contracted with Marriott and Avendra to have the Defendants provide goods and services to the Hotel

48. Operator ratifies the acts of Marriott and Avendra by remitting payment or assigning certain rights to Marriott and Avendra. As such, Marriott and Avendra are RC/PB's subagents and owe all the duties and are subject to all the liabilities of Operator to RC/PB.

III. JURISDICTION AND VENUE

49. This Court has subject matter jurisdiction over the current dispute because the amount in controversy, exclusive of interest and costs, exceeds the sum of fifteen thousand dollars (\$15,000.00). Additionally, the Court has subject matter jurisdiction pursuant to Fla. Stat. § 86.011 to declare the rights, status, and other equitable and legal relations of the parties.

50. The Court has specific personal jurisdiction over Defendant Ritz-Carlton under Fla. Stat. §§ 48.193(a) and (b) because Ritz-Carlton operates, conducts, engages in, and carries on business in Florida and committed tortious acts against RC/PB in Florida and/or the effects of which were felt in Florida. In addition, the Court has specific personal jurisdiction over Ritz-Carlton pursuant Fla. Stat. § 48.193(g) because Ritz-Carlton's breaches occurred in Manalapan, Florida. Alternatively, Ritz-Carlton is subject to this Court's general personal jurisdiction under Fla. Stat. § 48.193(2), on

account of its substantial and systematic business activity in Florida. In particular, Ritz-Carlton owns and/or operates ten (10) hotels in the State of Florida.

51. The Court has specific personal jurisdiction over Defendant Marriott under Fla. Stat. §§ 48.193(a) and (b) because Marriott operates, conducts, engages in, and carries on business in Florida and committed tortious acts against RC/PB in Florida and/or the effects of which were felt in Florida. Alternatively, Marriott is subject to this Court's general personal jurisdiction under Fla. Stat. § 48.193(2), on account of its substantial and systematic business activity in Florida. In particular, Marriott, on its own or through affiliates, owns and/or operates 299 hotels in the State of Florida, and twenty-three (23) hotels in this County.

52. The Court has specific personal jurisdiction over Defendant Avendra under Fla. Stat. §§ 48.193(a) and (b) because Avendra operates, conducts, engages in, and carries on business in Florida and committed tortious acts against RC/PB in Florida and/or the effects of which were felt in Florida. Alternatively, Avendra is subject to this Court's general personal jurisdiction under Fla. Stat. § 48.193(2), on account of its substantial and systematic business activity in Florida. In particular, Avendra procures and provides goods and services to the 299 hotels owned and/or operated by Marriott or its subsidiaries in the State of Florida, including the Hotel.

53. Venue is proper in Palm Beach County, pursuant to Fla. Stat. §§ 47.011, 47.041, and 47.051, because RC/PB's causes of action against the Defendants accrued in Palm Beach County, where the Hotel is located.

IV. STATEMENT OF FACTS

RC/PB's Ownership of the Hotel

54. The story of RC/PB's ownership of the Hotel begins with the Lewis Trust Group ("LTG"). LTG traces its roots to two brothers, David and Bernard Lewis, who began a family business after World War II. Through hard work and determination, the Lewis brothers grew and diversified their business into a number of very successful businesses.

55. The Lewis family, through LTG, owns and/or operates numerous businesses and properties in the United States and abroad, including a successful luxury hotel chain in Israel and hotels and other residential and commercial real estate properties.

56. In connection with its diversified real estate investments, LTG established a headquarters location in the United States to expand its business and have local management capabilities, and designated Acorn Asset Management, Inc. ("Acorn," which later changed its name to "Britannia Pacific Properties, Inc.") to oversee LTG's properties in the United States.

57. In 2003, Acorn was approached by investors seeking to purchase the Hotel. Eventually, Acorn decided to pursue a potential acquisition on its own. On June 13, 2003, Acorn offered to purchase the Hotel from the owner at the time, Manalapan Hotel Partners, LLC ("MHP"), which was marketing the property as "unencumbered,"

meaning that the new owner would not be under any contractual commitment to retain Ritz-Carlton as the operator.

58. MHP was able to market the Hotel unencumbered because Ritz-Carlton had failed to make guarantee payments. Under the original operating agreement that went into effect when the Hotel first opened in 1991 (the "1989 Agreement"), Ritz-Carlton guaranteed that it would generate \$9.6 million in Net Operating Income ("NOI") each year. NOI is the income available after payment of the Hotel's fixed and variable expenses. If Ritz-Carlton failed to meet the NOI threshold, it was required to pay the difference between the actual NOI and the guaranteed \$9.6 million, subject to some adjustments for increases in insurance and property taxes. Between 1989 and 2002, Ritz-Carlton was required to make guarantee payments in three separate years in order to remain as operator. In early 2003, when Ritz-Carlton again failed to meet the NOI threshold, MHP demanded the guarantee payment, but Ritz-Carlton refused. Consequently, both MHP and Acorn initially discussed an acquisition that did not necessarily entail Ritz-Carlton management of the Hotel.

59. Faced with the threat of losing management of the Hotel if Acorn were to proceed with the acquisition, Ritz-Carlton reversed course and paid the NOI guarantee to MHP to avoid termination.

60. Ritz-Carlton and Marriott then began courting Acorn, enticing Acorn to proceed with the acquisition of the Hotel by representing that Ritz-Carlton had the

requisite expertise to operate the Hotel, and by blaming the Hotel's past poor performance on a need to renovate the property.

61. Ritz-Carlton and Marriott represented to Acorn that, with the appropriate renovations, the Hotel should generate upwards of \$11 million in NOI on an annual basis.

62. Relying on Ritz-Carlton's and Marriott's false representations, and with the limited comfort provided by the NOI guarantee in the original operating agreement, Acorn entered into a Purchase Agreement on August 6, 2003, by which Acorn acquired MHP's fee interest and leasehold interest in the Hotel.

63. On November 21, 2003, Acorn assigned the Purchase Agreement to six LTG-affiliated entities, Evergreen/Britannia O13, Evergreen/Britannia O25, Evergreen/Zinfandel 77, ZH 75, Inc., and Evergreen/Folsom Corporate Center 2 (collectively, the "Purchasing Entities"), which hold the Hotel as tenants in common. On August 6, 2010, ZH 75 Inc. merged into a related company, Zinfandel Holdings, Inc., which succeeded to ZH 75's tenancy in common interest.

64. RC/PB was formed on November 3, 2003 as a special-purpose entity to lease the Hotel from the Purchasing Entities, and to assume the obligations of the Owner under the 1989 Agreement. On November 21, 2003, the Purchasing Entities closed on the acquisition of the Hotel. Contemporaneously, RC/PB was assigned the existing hotel lease, and assumed the rights of Owner under the original operating agreement.

Owner and Ritz-Carlton Begin Discussing a New Operating Agreement

65. In November 2003, Acorn and Ritz-Carlton agreed to a non-binding term sheet for amending the original operating agreement and for implementing a \$15 million Property Improvement Plan ("PIP") to renovate the Hotel. The renovations were to be funded entirely by RC/PB as the new Owner, partly in reliance on Ritz-Carlton's representation that it should generate \$11 million in NOI annually.

66. The PIP involved upgrades to several features of the Hotel, including replacement of carpeting, painting, and wall coverings in guest rooms, corridors, meeting rooms, and the club lounge; upgrades to the floors, vanities, and showers in guest bathrooms; replacement of furniture in the Hotel's restaurant and on the balcony; replacement or waterproofing of guest and exterior doors and windows; replacement of the cooling tower for the air conditioning system; and removal of existing walls in the lobby lounge.

67. As RC/PB and Ritz-Carlton began to negotiate the revised operating agreement and implementation of the PIP, Ritz-Carlton dragged its feet in the negotiations. Ritz-Carlton insisted on changes to the operating agreement that were not included in the non-binding term sheet.

68. At the same time, Ritz-Carlton continued to perform poorly at the Hotel. Ritz-Carlton again failed to meet the NOI threshold for 2003 by \$2.4 million, and continued to substantially underperform in 2004.

69. Ritz-Carlton's intransigence with respect to the operating agreement negotiations and its performance failures resulted in RC/PB requiring Ritz-Carlton to enter into a revised Term Sheet which, among other things, required Ritz-Carlton's management fees to be restructured to lower Ritz-Carlton's base fees (which are paid out of the Hotel's Gross Revenues), and to increase incentive fees (which are only paid out of Gross Operating Profits, meaning the Hotel has to be profitable). The intention behind this new fee arrangement was to better align Ritz-Carlton's interests with those of the Owner.

70. While the operating agreement negotiations continued, the Hotel endured two hurricanes in late 2004: Frances and Jeanne. The hurricanes caused over \$10 million in damage to the property, including loss of the Hotel's roof and portions of its façade, as well as the flooding of 150 of the Hotel's 270 guest rooms. As a result of the severe damage, the Hotel was closed for three months.

71. The Hotel participates in Marriott-sponsored insurance programs. RC/PB made property damage and business interruption claims to Marriott's captive insurance company in September 2004. Between September 2004 and midyear 2005, Marriott's insurance company refused to pay on RC/PB's claims. The process was made more difficult because Marriott denied RC/PB access to the insurance policies and barred RC/PB from communicating directly with the insurance company.

72. RC/PB had still not managed to recover all payments under the Marriott insurance program when, in October 2005, Hurricane Wilma hit the Hotel and caused approximately \$5 million in additional damage and business interruption.

73. Marriott refused to pay on RC/PB's new insurance claims until May 2007, when it finally relinquished the funds. RC/PB immediately used the funds to begin implementing the PIP to renovate and restore the Hotel after the hurricane damage.

The Operating Agreement

74. Also in spring 2006, RC/PB and Ritz-Carlton finally reached agreement on the terms of the Operating Agreement, almost three years after acquisition of the Hotel. The Operating Agreement, dated June 30, 2006, was executed on July 1, 2006. This Operating Agreement was then amended on April 3, 2008 by RC/PB and Ritz-Carlton. (See June 30, 2006 Second Amended and Restated Operating Agreement and April 3, 2008 First Amendment to Second Amended and Restated Operating Agreement, collectively the "Operating Agreement," attached hereto at **Exhibit "A"**)

75. The Operating Agreement memorializes Ritz-Carlton's status as merely an operating agent on behalf of RC/PB, providing day to day management of RC/PB's hotel business in consideration for payment of management fees, and without any ownership in interest in RC/PB's hotel and hotel business at the property.

76. The Operating Agreement entrusts Ritz-Carlton with the responsibility for the operational performance and financial success of the Hotel. Pursuant to the Operating Agreement, Owner engaged Ritz-Carlton to supervise and direct the

management and operation of the Hotel. Significantly, the Operating Agreement imposes on Ritz-Carlton the duty to operate the Hotel “for the account of Owner” and the responsibility to “use its expertise in the management of hotels of the standard and quality of the Hotel to cause the Hotel to be managed in accordance with the highest standards for the management of hotels of the standard and quality of the Hotel and to manage the Hotel in the most efficient manner with a view to giving the highest possible return to Owner consistent with the physical condition of the Hotel and its standards of service.” (Ex. A. § 2.1).

77. Ritz-Carlton further agreed to limit its charges for “the group benefits, services and facilities to be furnished by Operator to the Hotel in common with other hotels operated under the RITZ-CARLTON Rights, relating to marketing, business promotions, sales promotions, publicity and public relations, and all other group benefits services and facilities, including institutional advertising programs, if any, which services shall be made available to the Hotel on an equitable basis with all other hotels operated under the RITZ-CARLTON Rights” to 1% of Gross Revenues (Ex. A. § 1.1, at 7 & Fee and Reserve Addendum).

78. On information and belief, these provisions are not found in Ritz-Carlton’s standard form operating agreements and manifests a higher standard of operating performance and care than Ritz-Carlton undertakes on behalf of other owners of Ritz-Carlton hotels and the agreement by Ritz-Carlton to control group costs.

79. In this new Operating Agreement, RC/PB negotiated for additional rights of direction and oversight over several key elements of the Hotel's operation, including increased control over:

- a. the Annual Operating Projection (Ex. A § 4.2);
- b. any deviations from the Annual Operating Projection, including unbudgeted expenses and decreased Net Operating Income (*id.*);
- c. Ritz-Carlton's selection of a General Manager, a Director of Finance, and a Director of Sales (*id.* § 2.2(b));
- d. institution or defense of certain legal proceedings (*id.* § 2.3);
- e. leases and licenses for the use of Hotel space (*id.*);
- f. Ritz-Carlton's purchase of goods from itself or an Affiliate at noncompetitive prices (*id.*); and
- g. liens recorded against the Hotel (*id.*).

80. In the Operating Agreement, Ritz-Carlton also undertook "fiduciary" duties to Owner, both express and by virtue of the inherent agency powers accorded to Ritz-Carlton thereunder. The Operating Agreement requires Ritz-Carlton to perform agency-related, revenue-generating services by soliciting and booking business for the Hotel on behalf of Owner. (Ex. A § 2.1). The Operating Agreement also subjects Ritz-Carlton to fiduciary duties by authorizing and empowering Ritz-Carlton to enter into various contracts on behalf of Owner and Owner's Hotel -- for example, to procure goods, supplies and equipment utilizing Owner's funds -- and to otherwise bind Owner in commercial transactions. (Ex. A § 2.1). All revenues generating through these sales

and booking services are held in trust by Ritz-Carlton for the account of Owner. Ritz-Carlton's receipt, handling, expenditure and accounting for Owner's funds (including the revenues generated by the Hotel operations and expenditures made on Owner's account) are all subject to fiduciary duties, including the duties of disclosure and loyalty.

81. As a result of its explicit undertaking of fiduciary duties to Owner and its acceptance and exercise of a variety of agency powers, Ritz-Carlton entered into an agency relationship with Owner as its principal with respect to such matters. By virtue of that principal-agent relationship, Ritz-Carlton undertook fiduciary duties to Owner of the utmost good faith, loyalty, honesty, fair dealing, and full disclosure under Florida law (in addition to its contractual obligations).

82. At the same time, the parties also entered into a Technical Services Agreement in which Ritz-Carlton agreed to provide expert services regarding the renovations.

Owner's Renovations Create "The Best Ritz-Carlton in [the] System"

83. When RC/PB leased the Hotel in 2003, the Hotel was caught in a downward spiral. Ritz-Carlton had missed the NOI threshold requirement under the 1989 Agreement for three years running and was careening towards another threshold failure in fiscal year 2003.

84. In an effort to justify its lackluster performance, representatives from Ritz-Carlton and Marriott blamed the Hotel's inability to generate revenues on the physical condition of the property. With appropriate upgrades, Ritz-Carlton and Marriott

predicted high revenues and an inevitable surge to the top of the luxury market. Among Ritz-Carlton's and Marriott's particular proposals was a spa which, according to Ritz-Carlton and Marriott, was principally responsible for the recent success of the Breakers, a competitor hotel.

85. Induced by Ritz-Carlton's and Marriott's recommendations, RC/PB embarked on a campaign to transform the Hotel that went well beyond the original PIP, encouraged and supported by Ritz-Carlton and Marriott every step of the way.

86. The Hotel closed on July 10, 2006, and construction began on the first phase of the renovations. In contrast to the original PIP, which contemplated predominantly aesthetic upgrades such as replacement carpeting and furniture and repairs to external features of the Hotel, the new renovations transformed the Hotel into one of the most luxurious in the Ritz-Carlton system.

87. Among other things, the first phase of the renovations included: a second swimming pool; a new terrace off the lobby to overlook the ocean and main swimming pool; relocation and re-conception of the Hotel's café, as well as re-conception of the Hotel's two additional restaurants; a rebuilt *porte cochere*, a completely reconstructed, redesigned, and redecorated lobby; new Lanai terraces added to the ground floor rooms; and cellular, wireless and energy efficient systems.

88. The second phase of the renovations began in October 2007, and was completed by the end of 2008. This second phase included the addition of: a new 24 room oceanfront guest tower; supplementary meeting space; two new one-of-a-kind

Kids' Club and Teen Club spaces; and a brand-new state-of-the-art grand spa designed to cover 40,000 square feet and offer 19 individual treatment rooms, separate relaxation areas for men and women as well as a co-ed area, and multiple saunas and whirlpools in order to accommodate the demands of the Hotel's group guests, transient guests, and local residents.

89. The first phase of renovations was completed in March 2007. At the time, Ken Rehmann, Executive Vice President of Operations for Ritz-Carlton, described the Hotel as "the best Ritz-Carlton in Florida." Later, Ezzat Coutry, Senior Vice President of Ritz-Carlton, went even further, stating that, "actually, this is the best Ritz-Carlton in our system." In describing the Hotel in a 2008 Travel and Leisure article, Simon Cooper, President and Chief Operating Officer of Ritz-Carlton and President and Managing Director of Marriott's Asia Pacific Division, proclaimed: "Let no one ever again be able to claim that Ritz-Carltons are all the same."

90. Amid these glowing endorsements and high expectations, the Hotel was reopened on March 4, 2007.

**Ritz-Carlton and Marriott Ignore Owner Returns
And Divert Hotel Revenues To Their Own Accounts**

91. When the Hotel was reopened in March 2007, RC/PB sought to capitalize on the spectacular renovations and pressed Ritz-Carlton and Marriott to re-launch the Hotel to the market by organizing a grand opening. The objective, with which Ritz-Carlton concurred and in fact encouraged when Owner was contemplating whether to

invest in a renovation, was to develop a Ritz-Carlton that was less stodgy in appearance, and which appealed to a younger customer that would be more inclined to utilize the upgraded spa, food and beverage, and other new revenue-generating facilities.

92. Despite their earlier enthusiasm about the market potential of the renovated property and their empty promises to re-launch the Hotel, Ritz-Carlton and Marriott in fact made no effort to coordinate a grand opening, and squandered many other opportunities to position the property consistently with the Hotel's marketing plan. Further Ritz-Carlton has failed to market and position the Hotel to draw the customers that the renovations were intended to attract, including guests from a wider demographic, younger patrons, and families.

93. For example, Ritz-Carlton unreasonably refused to market the Hotel's enhanced children's program, known as Aquanuts®, and its one-of-a kind teen lounge, known as Coast®, to guests with young families. This effectively diverted families to other properties. When the enhanced children's programs were made available to guests who inquired about the facilities after they showed up at the property, Ritz-Carlton put its brand interests ahead of Owner's reasonable interest in generating a return on its investment, and gave away the services on a complimentary basis.

94. Ritz-Carlton also breached its contractual and fiduciary duties to Owner in connection with the world-class spa that Owner developed as part of the newly renovated Hotel. As contemplated under the Operating Agreement, Owner elected to

bring in another company to run the spa. In response, Ritz-Carlton failed to promote the spa and refused to allow spa employees to distribute amenities cards to Hotel guests or to contact guests to schedule appointments, even though Ritz-Carlton had expressly agreed to “use commercially reasonable efforts to cooperate with the third-party operator of the Spa” and to “promote use of the Spa in a manner generally consistent with how Operator would promote the Spa if Operator managed the Spa.” (Ex. A, First Amendment to Second Amended and Restated Operating Agreement § 4(c)).

95. Even the most obvious and customary ways of attracting customers to the newly renovated Hotel challenged Ritz-Carlton. Sending emails to Owner’s customers who were guests at the Hotel, or even to members of the local community who drive by the Hotel on a daily basis, at first was rejected as being against Ritz-Carlton “policy.” When Owner asked Ritz-Carlton to explain and confirm this “policy,” corporate-level representatives revealed that there is no such policy, and agreed that there was no excuse for the Hotel’s failure to capitalize on this industry standard marketing tool. Although Ritz-Carlton gets paid considerable sums to staff the Hotel with competent sales and marketing professionals, on top of the Group Marketing Expense that Ritz-Carlton pays itself out of Owner’s Hotel bank accounts, Ritz-Carlton newest excuse is that emails can only be sent out from Ritz-Carlton’s corporate headquarters, which charges an exorbitant fee for the “privilege” of emailing Owner’s guests.

96. Even before the Hotel sailed into the headwinds of a general economic decline, serious problems with Ritz-Carlton’s and Marriott’s management were

becoming increasingly evident, manifested perhaps most tellingly by a failure to convert revenues into profitability.

97. In Fiscal Year 2008, the first full year after the Hotel reopened, the property generated \$41 million in revenues, but even before debt service Owner sustained a net operating loss because Ritz-Carlton and Marriott were lining their own pockets with undisclosed, excessive and unnecessary fees, charges and assessments.

98. 2008 was not the only year RC/PB suffered at the hands of Ritz-Carlton and Marriott. Since the Hotel reopened in March 2007 following Owner's extensive renovations, Ritz-Carlton and Marriott have imposed aggregate operating losses on Owner in excess of \$2.9 million, even before considering Owner's debt service obligations. In others words, Ritz-Carlton and Marriott have been unable to generate any positive returns for the Owner, even if the Hotel had been debt-free.

**Ritz-Carlton's and Marriott's Improper Offloading of
Corporate Charges to RC/PB and Failure to Control Expenses**

99. One reason the flow through of revenues to profit has been abysmal is that Operator imposes millions of dollars per year in fees, charges and assessments by Ritz-Carlton and Marriott at the corporate level (that is, above the property level), that are unnecessary, excessive, improper and/or inefficient.

100. For example, Ritz-Carlton and Marriott systematically have imposed on RC/PB corporate-level charges that are prohibited under the terms of the Operating Agreement. Specifically, Ritz-Carlton and Marriott, (1) improperly exceed the

contractual 1% cap for Group Services defined in the Operating Agreement, and (2) charge for corporate programs that include, or are in their own right, corporate overhead and corporate level general or administrative expenses prohibited under the Operating Agreement.

101. By saddling the Hotel with countless impermissible fees and charges and unnecessary expenses, Ritz-Carlton and Marriott breached, among other obligations, their duty to maximize profits to Owner.

102. The full extent of Ritz-Carlton's and Marriott's improper offloading of corporate overhead and expenses and circumvention of the cap on Group Services, however, is masked by its refusal to provide backup information regarding the charges it passes off to the Hotel.

103. RC/PB looks to, and is entirely dependent on, Ritz-Carlton and Marriott to prepare, maintain, and provide to Owner accurate records reflecting or otherwise relating to the Operation of the Hotel, including an accounting of Gross Operating Expenses. (Ex. A. §§4.4 & 4.5.)

104. As such, corporate-level fees, charges and assessments are paid by Ritz-Carlton directly out of RC/PB's bank accounts, without notice to RC/PB, and without review, much less approval, by Ritz-Carlton's property-level Director of Finance or Executive staff.

105. After extracting the cost for corporate-level fees, charges and assessments from RC/PB's account, Ritz-Carlton provides the Hotel with a monthly

“Corporate Invoice,” which purports to provide an explanation of the fees, charges and assessments made by Ritz-Carlton’s and Marriott’s corporate offices. The Corporate Invoices, however, contain only summary information regarding these corporate-level fees, charges and assessments. They do not describe, for example:

- the purpose of corporate level fees, charges and assessments;
- how the charges for these fees, charges and assessments are calculated;
- what components of corporate level general and administrative expenses or overhead are included in these fees, charges and assessments; and
- how these fees, charges and assessments are allocated to the Hotel and other hotels in the Ritz-Carlton or Marriott chains.

106. At the end of each month, Ritz-Carlton also provides a summary of the Hotel’s operations, known as the “Blue Book.” The Blue Books only provide summary information regarding the Hotel’s operations and, like the Corporate Invoices, do not explain the corporate-level fees, charges and assessments.

107. In addition, Ritz-Carlton has never provided RC/PB with an annual accounting as required in Section 4.4(b) of the Operating Agreement. The financial statements Ritz-Carlton has provided do not adequately, much less accurately, detail related party transactions. (Ex. A. § 4.3.)

108. RC/PB repeatedly has demanded information underlying the substantial improper fees, charges and assessments that have contributed to the poor financial

performance at the Hotel. Ritz-Carlton and Marriott, however, have refused to provide such information, which itself is a breach of their contractual and fiduciary duties.

**Corporate Overhead and Corporate Level General
and Administrative Expenses Improperly Passed Off to the Hotel**

109. Marriott and Ritz-Carlton have devised and implemented a system for improperly off-loading on hotel owners, including RC/PB, millions of dollars of corporate costs that should be absorbed by Marriott. The effect of this scheme is to siphon off hotel profits that otherwise would be available to owners, like RC/PB, to service debt and otherwise to generate a return on investment. In breach of their express and implied duties, Marriott and Ritz-Carlton withhold information and actively mislead owners, including RC/PB, hiding behind a mantra that their system is too complicated to unravel which corporate-level costs are embedded in the fees, charges and assessments being imposed on hotel properties in their system.

110. While Marriott and Ritz-Carlton refuse to disclose what corporate-level costs being foisted onto RC/PB, the intent behind this corporate practice is easily understood by reference to how this "waterfall" of corporate-level charges is generated. To begin with, Marriott's corporate structure includes numerous business units and disciplines. A particular unit or sponsor may develop an idea and place to provide a particular service to be used by some or all hotels. Marriott determines the "fully-loaded" cost of providing that service, and seeks to recover those costs from the hotels. The fully-loaded cost includes the "direct" costs incurred by the sponsoring unit,

including labor, materials, contract services, and “other.” It may also include costs “allocated in” from other business units and disciplines that may have been involved in developing, implementing and providing the service.

111. In essence, the object of Marriott’s cost accounting systems is to offload on hotel owners the internal operating costs of developing and running Marriott as a branded chain hotel management company.

112. As of early 2006, Marriott formed an internal “Program and Services Approval Committee” (“PSAC”) to review and approve proposed methods and metrics for off-loading corporate-level costs among hotel owners, ostensibly in accordance with the various management and franchise agreements Marriott has with its hotels.

113. RC/PB repeatedly has asked Ritz-Carlton to provide documents reflecting: (a) all programs and services provided to the Hotel by Marriott, Ritz-Carlton or other affiliates; (b) the fees, charges and/or assessments for each such program and services provided to the Hotel; (c) what costs are included in those fees, charges and/or assessments; (d) how those costs are allocated to the Hotel and the methodology used in making that allocation; and (e) how the Hotel came to be enrolled in each program and service.

114. Ritz-Carlton and Marriott have refused to provide this information.

115. In addition, RC/PB repeatedly has asked Ritz-Carlton and Marriott for information explaining these charges, including information relating to the corporate programs and services which have been charged to the Hotel in addition to the Group

Service Fee; the expenses and costs captured by, or rolled up into, the fees for each of the corporate programs and services; the allocation methodologies used in determining the amounts charged to the Hotel for each of the corporate programs and services; and how the Hotel came to be enrolled in each of the corporate programs and services.

116. To date, Ritz-Carlton and Marriott have refused to provide this information, rendering RC/PB unable to fully understand the extent to which Ritz-Carlton has been improperly charging corporate programs and services and corporate overhead and general and administrative expenses to the Hotel, and the total amount of these impermissible charges.

117. The information requested by RC/PB, and withheld by Ritz-Carlton and Marriott, is material to the rights, duties and obligations of the parties to the Operating Agreement, which by its express terms prohibits Ritz-Carlton from charging the Hotel in excess of 1% of Gross Revenues for Group Services and prohibits Ritz-Carlton from charging the Hotel for any corporate overhead or any corporate level administrative or general expense unless it is associated with the Group Service Fee. (Ex. A § 1.1 at 6 (definition of Gross Operating Expenses).)

118. Despite this prohibition, and Ritz-Carlton's and Marriott's failure to disclose in breach of their contractual and fiduciary duties, the limited information Ritz-Carlton has provided demonstrates that Ritz-Carlton and Marriott have systematically and improperly charged the Hotel for corporate overhead and general and administrative expenses.

119. For example, Ritz-Carlton and Marriott pass off all of their developmental, recording and storage expenses related to their corporate level “4myhr.com” Human Resource Management system. 4myhr.com records and stores information at the corporate level related to its employees’ life cycle, including performance reviews, career planning and accomplishments. These expenses relate to Ritz-Carlton and Marriott corporate employees, not hotel-level employees.

120. Similarly, Ritz-Carlton passes off to the Hotel corporate general and administrative expenses for corporate training, including charges for “RC Brand podcasts,” Rosetta Stone® language training, leadership orientation programs, college recruiting, and something described only as “Harvard mentor management.”

121. These examples do not even scratch the surface of charges that, upon information and belief, are corporate overhead or general and administrative expenses, or that contain some component of overhead or corporate level administrative expenses.

**Ritz-Carlton and Marriott Improperly
Exceed the 1% Cap on Group Service Fee**

122. Even with the summary and incomplete information provided by Operator regarding corporate-level charges imposed on the Owner by Ritz-Carlton and Marriott, it is clear that Ritz-Carlton and Marriott also are impermissibly imposing fees, charges and assessments in excess of the 1% cap on Group Service Fees imposed by the Operating Agreement.

123. The Operating Agreement provides that Ritz-Carlton may charge the Hotel a Group Service Fee, not to exceed 1% of Gross Revenues, for Group Services (defined as “the group benefits, services and facilities to be furnished by Operator to the Hotel in common with other hotels operated under the RITZ-CARLTON Rights, relating to marketing, business promotions, sales promotions, publicity and public relations, and all other group benefits services and facilities, including institutional advertising programs, if any, which services shall be made available to the Hotel on an equitable basis with all other hotels operated under the RITZ-CARLTON Rights.” (Ex. A. § 1.1, at 7)). The Operating Agreement further provides that Ritz-Carlton must account for these Group Services within ninety (90) days of the end of each fiscal year. (*Id.* § 4.2(b)).

124. Ritz-Carlton and Marriott have systematically exceeded this 1% cap by separately charging the Hotel for fees, charges and assessments that should be covered by the Group Service Fee. For example, in late 2010, Ritz-Carlton informed RC/PB that it was implementing the Ritz-Carlton Rewards program. According to Ritz-Carlton, Ritz-Carlton Rewards is program that offers business and leisure travelers rewards for frequent stays at participating hotels in order to promote brand loyalty. This program is administered by Marriott essentially as a re-branded partner program to the Marriott Rewards program. In connection with this corporate-level marketing program, Ritz-Carlton informed RC/PB that it intended to impose additional fees, charges and assessments on the Hotel (and thus on Owner).

125. Prior to announcing the plan, Ritz-Carlton consistently took the position that "loyalty" programs were not appropriate for the Ritz-Carlton brand, because Ritz-Carlton customers already were loyal to the brand.

126. RC/PB objected to the Hotel being enrolled in the program. RC/PB also advised Ritz-Carlton that charges for Ritz-Carlton Rewards are not an appropriate Gross Operating Expense and are not reasonably necessary for the proper and efficient operation of the Hotel. Ritz-Carlton Rewards, at best, is a corporate level promotion or marketing tool, shared in common with other hotels, the charges for which should be included in the Group Service Fee and subject to the 1% cap on charges for Group Services.

127. Ignoring RC/PB's objection, Ritz-Carlton enrolled the Hotel in Ritz-Carlton Rewards, imposed on Owner additional fees for the program, and paid itself out of RC/PB's bank accounts for the Hotel.

128. Ritz-Carlton also has charged the Hotel for the "Chairman's Circle" service. Upon information and belief, this program is designed to recognize sales managers on a corporate-wide basis. It is a brand level program that is provided in common with other hotels in the Ritz-Carlton chain, and relates to marketing. As such, it is properly considered a Group Service, the cost for which is covered by the Group Service Fee, which is capped at 1% of the Hotel's Gross Revenue.

129. Another example of Ritz-Carlton's shell game is Project Mystique. According to Ritz-Carlton, Project Mystique is intended to benefit the Ritz-Carlton brand

by tracking individual guest preferences across all Ritz-Carlton hotels, so that Ritz-Carlton can “wow” its guests. The program is not reasonably necessary for the proper and efficient operation of the Hotel, and therefore is not a permissible Gross Operating Expense. The Hotel can properly and efficiently run without knowing whether guests prefer Coke® or Pepsi®. At best, Project Mystique is a brand initiative that is provided in common with other hotels in the chain, and relates to brand level marketing and public relations. As such, to the extent the Hotel can be charged anything for its forced participation in Project Mystique, those charges should be covered by the Group Service Fee.

130. Due to Ritz-Carlton’s and Marriott’s refusal to provide backup information regarding the charges reflected in its Corporate Invoices and Blue Books, RC/PB cannot at this time fully and accurately catalog the myriad of charges that Ritz-Carlton and Marriott separately pass off to the Hotel as Gross Operating Expenses, but which are either Group Services that must be combined and capped at 1% of Gross Revenues, or are otherwise impermissible. RC/PB also cannot determine if these charges are equitably distributed among the hotels under the Ritz-Carlton brand. Accordingly, Ritz-Carlton and Marriott, which have unique access to the information needed to compute and identify corporate-level fees, charges and assessments, have a contractual and fiduciary duty to account for them.

Ritz-Carlton's Non-Competitive and Harmful Purchasing and Procurement Practices

131. As RC/PB's purchasing agent, Ritz-Carlton is required to engage in competitive bidding practices. (Ex. A §§ 2.3(c) & (m); 2.5.) This obligation exists regardless of whether Ritz-Carlton is procuring goods, supplies, and services from itself, a related party, or a third party. (*Id.*)

132. This obligation is material to the parties' respective rights, duties and obligations under the Operating Agreement, because RC/PB pays for all operating expenses, including for purchases of all goods and services Ritz-Carlton makes for RC/PB's account. Reducing expenses also is material to Ritz-Carlton's compliance with its contractual and fiduciary duties to maximize profits to Owner.

133. Ritz-Carlton has not engaged in competitive bidding for the goods, supplies, and services procured for the Hotel. Instead, Ritz-Carlton has outsourced most of the purchasing function to a related party, Defendant Avendra.

134. Marriott launched Avendra in 2001 as a joint venture with Hyatt. Essentially a spin-off of Marriott's purchasing department, Avendra was created for the limited purpose of providing centralized procurement services for Marriott and Hyatt hotels and was expanded to include other hotel management companies soon after its inception. Avendra's sole function is to secure contracts with vendors to provide goods and services to participating hotels.

135. Avendra is a Ritz-Carlton and Marriott affiliate. Marriott is Avendra's largest shareholder and the former employer of a majority of Avendra's executives. Until 2009, Marriott held a greater than 50% interest in Avendra.

136. Upon information and belief, Ritz-Carlton instructs Hotel staff that there is no need to competitively bid, or otherwise to test the competitiveness of goods and services purchased from Avendra. Further, upon information and belief, Hotel staff is instructed to purchase from Avendra whenever possible, with a "goal" that 80% of all goods and services must be purchased from Avendra. Ritz-Carlton managers who do not meet this "goal" are subject to lower performance ratings, reduced bonuses, and diminished career prospects within the Marriott organization (including within Ritz-Carlton).

137. In breach of its contractual and fiduciary duties, Ritz-Carlton has procured goods and services for the Hotel through Avendra since the time the Operating Agreement was signed in 2006, without ever seeking RC/PB's approval. Further, Ritz-Carlton has made no effort to engage in competitive bidding.

138. Upon information and belief, RC/PB has been forced to incur unnecessary and excessive expenses for goods and services procured through Avendra, which has materially and detrimentally impacted Owner's returns.

**The Ritz-Carlton, Marriott
and Avendra Illegal Kickback Scheme**

139. Ritz-Carlton, in concert with Marriott and Avendra, collaborated in a purchasing scheme designed to perpetrate a fraud against RC/PB.

140. By leveraging the collective purchasing power of the participating hotels, Avendra claims to negotiate significant price discounts from vendors. These discounts, to the extent they exist, do not get passed on to the Hotel in the form of lower purchasing costs. Instead, Avendra-approved vendors invoice the participating properties directly and remit to Avendra a kickback. Avendra calls these kickbacks “rebates” or “marketing allowances.”

141. Pursuant to a Procurement Services Agreement between Marriott and Avendra, Avendra retains the kickbacks as a “commission” on purchases made by participating hotels, and remits some of those kickbacks to Marriott. The Procurement Services Agreement has not been disclosed to Owner.

142. Each Marriott hotel participating in the Avendra program is responsible for a certain share of Avendra’s annual “commission,” the amount of which is specified in the Procurement Services Agreement. In the event that the kickbacks do not cover Avendra’s commission, Avendra invoices the hotels directly for the balance at the end of the year. For example, if an individual hotel procures goods from a vendor that does not have a contract with Avendra, and that vendor does not provide kickbacks that Avendra can credit toward its fee, Avendra assesses a penalty to the property to

recover the balance. Upon information and belief, Ritz-Carlton, without Owner's approval, pays those undisclosed penalties out of Owner's bank accounts for the property.

143. Avendra also secures from vendors kickbacks in the form of "Sponsorship Funds," ostensibly as contributions in consideration for the opportunity to provide goods and services to hotels participating in the Avendra program.

144. On information and belief, no portion of such "Sponsorship Funds" was ever received by RC/PB. In fact, Ritz-Carlton concealed the existence of such funds from RC/PB. Upon information and belief, Marriott frequently used "Sponsorship Funds" to implement and fund corporate-level programs.

145. To ensure the individual hotels' participation in the Avendra purchasing system, Avendra and Marriott impose measures designed to make procurement outside of Avendra difficult. For example, Marriott hotels are required to procure a certain percentage of goods from Avendra vendors. This applies regardless of whether a better price could be obtained from an independent vendor.

146. In addition, upon information and belief many of the vendor contracts contain exclusivity provisions that prohibit the vendors from providing goods directly to hotels in the Avendra system. This further limits the hotels' options to secure competitively priced goods.

147. RC/PB repeatedly has requested backup detail on, among other things, Avendra purchasing practices. Specifically, RC/PB has sought to determine the total

rebates that vendors send to Avendra, instead of to the property, in connection with Hotel purchases. RC/PB also has sought proof that it is not being charged for rebates from Avendra vendors as an added amount to the prices which would otherwise be charged by such vendors.

148. RC/PB's requests for information repeatedly have been stonewalled by Ritz-Carlton, despite the fact that Ritz-Carlton has knowledge of and access to Avendra's records. Under the Procurement Services Agreement, Marriott has the right to demand inspection and audit of Avendra's financial statements, including calculations of costs allocated to each individual hotel within the Avendra system. Neither Marriott nor Ritz-Carlton, however, has honored RC/PB's requests for this information relating to the operation of the Hotel.

149. Defendants' roles in this kickback scheme are a breach of their fiduciary and contractual duties to RC/PB and are Events of Default under the Operating Agreement. (Ex. A. §§ 2.1(m), 2.3(c); & 11.2.)

150. As an agent and fiduciary, Ritz-Carlton was required to disclose the material terms of any transactions involving the Hotel that benefited itself or its affiliates. Ritz-Carlton has not disclosed the material terms of any purchasing transactions between Ritz-Carlton, Marriott or Avendra related to the Hotel.

151. Ritz-Carlton has not disclosed the terms of the various transactions with Avendra or other affiliates in the Annual Operating Projection, annual accountings or monthly blue books provided by Ritz-Carlton to RC/PB.

152. The full extent of the material damage caused by this scheme is unknown to RC/PB at this time, because Ritz-Carlton refuses to produce an accounting of these kickbacks despite the contractual obligation to do so.

Ritz-Carlton's Failure to Disclose and Account for its Purchasing Practices

153. RC/PB persistently has sought information detailing Avendra's purchasing practices, including the actual prices that Avendra negotiates with vendors, which Ritz-Carlton refuses to provide.

154. After attempts to get Ritz-Carlton to improve its dismal Food & Beverage (F&B) performance, RC/PB hired a consultant to review the Hotel's purchasing system, initially in 2004. Ritz-Carlton refused to permit the consultant to review Avendra's purchasing scheme, claiming that all Avendra-related information was proprietary material of Ritz-Carlton and Marriott. Ritz-Carlton eventually banned the consultant from the Hotel. RC/PB again attempted to get Ritz-Carlton to focus on improving its F&B performance in 2009 and 2010, and sought to engage the same consultant Ritz-Carlton had banned from the property in 2004. Even though this same consultant had been engaged to evaluate purchasing at other Ritz-Carlton managed hotels, Ritz-Carlton again refused to allow him to do the same with respect to Owner's Hotel. Instead, Ritz-Carlton insisted on bringing in its own "Cobalt Team," which engaged in a useless exercise that yielded no improvements.

155. In subsequent correspondence between the parties regarding Ritz-Carlton's defaults, including Owner's Default Notice, RC/PB reiterated its requests that Ritz-Carlton provide backup detail on the Avendra purchasing scheme. Ritz-Carlton again refused to provide any information. To date, Ritz-Carlton remains unable to demonstrate that the goods purchased through Avendra were procured for the Hotel at competitive prices.

156. These Events of Default have caused material harm to RC/PB, the extent of which RC/PB cannot accurately calculate because Ritz-Carlton refuses to provide the relevant information as required under Sections 4.3 and 4.4 of the Operating Agreement.

Ritz-Carlton's Failure to Maintain Accurate Books and Records of the Hotel and to Make the Books and Records Available to RC/PB for Inspection

157. Throughout the parties' relationship, Ritz-Carlton has resisted making its operation of the Hotel transparent to RC/PB, despite its contractual and fiduciary obligations to do so. More often than not, Ritz-Carlton has refused to respond to RC/PB's reasonable requests. When it did, it only responded with vague summaries of the Hotel's balance sheet and documents omitting significant details, from which RC/PB could glean no additional useful information.

158. For example, of particular interest to RC/PB was Ritz-Carlton's use and allocation of the Group Service Fee, which RC/PB is required to pay under the Operating Agreement. Unable to determine how Ritz-Carlton had calculated the Group

Service Fee, in January 2010 RC/PB requested supporting details for the expense reports. Ritz-Carlton balked at the request. To date, RC/PB has been unable to obtain detailed information regarding the Group Service Fee presumably because it would substantiate RC/PB's claims and Ritz-Carlton's events of default.

159. Similarly, in October 2010, RC/PB requested details of the a number of charges reflected in the Corporate Invoices, including: the Group Service Fee, the Regional Cluster Charges, ARSO billing, Performance Development Charges, AP development Charges, MBS system charges, Delphi support, Tech Support, IR Systems Support, MCN Network charges, Goldkey Concierge Assist, Micros, Mystique Support, Billing and AR Charges, HRMS charges, and Project ROAR charges. To date, Ritz-Carlton has refused to provide the requested information.

160. In its Default Notice, RC/PB again asserted its contractual right to inspect the books and records. In particular, RC/PB requested that Ritz-Carlton make available books and records relating to (1) corporate programs and services funded by the Group Service Fee, (2) corporate programs and services not funded by the Group Service Fee, (3) expenses and costs captured by the fees for each of the corporate programs and services, (4) the allocation methodologies used in determining the amounts charged to the Hotel for each of the corporate programs and services, and (5) how the Hotel came to be enrolled in each of the corporate programs and services. The Notice of Default notified Ritz-Carlton that RC/PB would begin its inspection eighteen days later on February 22, 2011.

161. In response, Ritz-Carlton asserted that it would gather the relevant books and records and eventually agreed to make them available for RC/PB's review at the Hotel on February 22, 2011.

162. When representatives from RC/PB arrived at the Hotel on February 22, they were shepherded to a conference room containing materials that Ritz-Carlton claimed to be responsive to RC/PB's requests for inspection. The materials provided by Ritz-Carlton, however, only contained materials already in RC/PB's possession or summary information that did not provide the level of detail requested by RC/PB.

163. Because the materials provided by Ritz-Carlton did not respond to RC/PB's requests for information, RC/PB informed Ritz-Carlton that it intended to enter Hotel offices to collect the books and records it sought to review. Ritz-Carlton immediately denied RC/PB's access to its own property by posting security guards outside the conference room in which the RC/PB representatives sat, and by blocking entrance to the Hotel's office.

164. Even with respect to the documents it did produce, Ritz-Carlton sought to limit RC/PB's rights to transcribe them. For example, Ritz-Carlton refused to allow RC/PB to transcribe the standard operating procedures ("SOPs") for the Hotel. Ritz-Carlton maintains SOPs for all major disciplines necessary for operating the Hotel and describes them as the "how-to" manual for operating the Hotel. By proscribing Owner's access to these books and records of the Hotel, Ritz-Carlton is effectively frustrating

Owner's ability to better evaluate Ritz-Carlton's compliance with its contractual duties, including its compliance with the operating standards.

165. To date, due to Ritz-Carlton's obstructionist tactics, RC/PB has been unable to fully exercise its right under the Operating Agreement to inspect and transcribe all books and records of the Hotel.

166. Ritz-Carlton's failure to make books and records available for Owner's inspection and its failure to provide an accounting for its corporate charges to the Hotel are Events of Default under the Operating Agreement. (Ex. A §§ 4.3, 4.4(b); 12.1 & 14.8.)

167. Ritz-Carlton's failure to provide access to the Hotel's books and records is a material breach of Ritz-Carlton's contractual and fiduciary duties. To ensure that Ritz-Carlton is living up to its duties, it is critical that RC/PB have access to the Hotel's books and records. This is precisely the reason why Owner bargained for Books and Records and Inspection provision in the Operating Agreement. (Ex. A §§ 4.3 & 14.8.) To bar such access improperly impairs Owner's right to control its asset. By refusing to provide access to these materials, Ritz-Carlton has committed an Event of Default under the Operating Agreement.

COUNT I

**BREACH OF CONTRACT
(Against All Defendants)**

168. RC/PB repeats and reincorporates the allegations in paragraphs 1 through 167, above, as though fully set forth herein.

169. The Operating Agreement between RC/PB and Ritz-Carlton constitutes a valid and binding contract on both parties.

170. Ritz-Carlton contracted under the Operating Agreement to perform certain functions in relation to its operation of the Hotel.

171. Ritz-Carlton engaged Marriott and Avendra as its subagents and partners in a single business enterprise to perform certain of these functions, with RC/PB as the intended beneficiary.

172. In performing these functions on Ritz-Carlton's behalf and for the purported benefit of RC/PB, Marriott and Avendra have entered into implied contracts with RC/PB.

173. Ritz-Carlton, Marriott and Avendra materially breached their contractual duties to RC/PB by, among other acts and omissions, and without limitation:

- a. failing to operate the Hotel so as to drive revenues and achieve the highest possible return for RC/PB (Ex. A §§ 2.1, 2.5);
- b. failing to operate the Hotel efficiently and solely for the account of RC/PB (Ex. A §§ 2.1, 2.5);
- c. passing off to RC/PB impermissible corporate overhead and other general and administrative expenses as Gross Operating Expenses (Ex. A § 1.1, Fee & Reserve Addendum);

- d. charging improper, unapproved or unnecessary fees to RC/PB's account (Ex. A § 2.5);
- e. incurring unbudgeted expenses without RC/PB's prior approval (Ex. A § 4.2(e));
- f. failing to provide information, including allocations and calculations, relating to corporate services and the Group Service Fee (Ex. A § 4.2(b));
- g. charging the Hotel for Group Services in violation of the 1% cap on the Group Service Fee (Ex. A § 4.2(b), Fee and Reserve Addendum);
- h. failing to maintain accurate books and records for the Hotel and to make all books and records available to RC/PB for inspection and transcription (Ex. A § 4.3);
- i. failing to account to Owner the operations of the Hotel (Ex. A. § 4.4)(b))
- j. purchasing unnecessary goods and services on RC/PB's account (Ex. A § 2.1(h));
- k. purchasing for the Hotel through Marriott and Avendra at inflated costs and without ensuring competitive pricing (Ex. A §§ 2.1, 2.3(c), 2.5, 12.4); and
- l. receiving and failing to disclose kickbacks and discounts received from vendors in connection with the procurement of goods and services for the Hotel (Ex. A §§ 2.3(c), 2.5).

174. RC/PB issued a Default Notice pursuant to the terms of the Operating Agreement. Ritz-Carlton has failed to cure its defaults and cannot do so.

175. Defendants' breaches of the Operating Agreement have injured RC/PB, causing it significant economic harm and adversely affecting the Hotel's profitability, reputation and market value. Consequently, RC/PB has incurred, and will continue to incur, severe damages.

176. As a direct and proximate result of Defendants' breaches of the Operating Agreement, RC/PB has sustained injury for which it seeks equitable relief and monetary relief in an amount to be determined.

COUNT II

**BREACH OF FIDUCIARY DUTIES
(Against All Defendants)**

177. RC/PB repeats and reincorporates the allegations in paragraphs 1 through 167 above, as though fully set forth herein.

178. Pursuant to the Operating Agreement, RC/PB expressly authorized Ritz-Carlton, and Ritz-Carlton agreed, to act on RC/PB's behalf and solely for RC/PB's account in the operation, direction, management, and supervision of the Hotel.

179. Ritz-Carlton has engaged Marriott and Avendra as its subagents and partners in a single business enterprise to perform certain of these functions, with RC/PB as the intended beneficiary.

180. In performing these functions on Ritz-Carlton's behalf and for the purported benefit of RC/PB, Marriott and Avendra have entered into implied contracts with RC/PB to perform these functions.

181. Defendants accordingly owe fiduciary duties to RC/PB, including the duties of utmost good faith, loyalty, honesty, fair dealing, and full disclosure. These duties are separate and discrete from Defendants' contractual duties.

182. As alleged more specifically above, Defendants breached their fiduciary duties to RC/PB by, among other acts and omissions, and without limitation: improperly allocating corporate and other general and administrative charges to RC/PB; charging excessive fees; failing to control costs; failing to operate the Hotel efficiently, and otherwise failing to operate the Hotel for RC/PB's account; and hiding their wrongful conduct by denying RC/PB access to Hotel books and records.

183. Further, Defendants Ritz-Carlton, Marriott and Avendra breached their fiduciary duties to RC/PB by, among other acts and omissions, and without limitation, engaging in a scheme to collect kickbacks from vendors, which the Defendants fraudulently concealed from RC/PB.

184. Defendants unjustly and inequitably benefited from the breach of their duties at RC/PB's expense.

185. Defendants' breaches of their fiduciary duties have injured RC/PB, causing it significant economic harm and adversely affecting the Hotel's profitability, reputation, and market value, for which RC/PB seeks both equitable and monetary relief.

186. As compensation, RC/PB seeks monetary damages in an amount to be determined, and an accounting of all profits earned by Defendants through breach of their duties. The relief and damages sought as a result of these breaches are separate and discrete from the damages resulting from Defendants contractual breaches.

COUNT III

**BREACH OF IMPLIED DUTIES
OF GOOD FAITH AND FAIR DEALING
(Against All Defendants)**

187. RC/PB repeats and reincorporates the allegations in paragraphs 1 through 167, above, as though fully set forth herein.

188. RC/PB and Ritz-Carlton were parties to the Operating Agreement, which imposed express contractual duties on both parties.

189. Ritz-Carlton has engaged Marriott and Avendra as its subagents and partners in a single business enterprise to perform certain of these functions.

190. In performing these functions on Ritz-Carlton's behalf and for the purported benefit of RC/PB, Marriott and Avendra entered into an implied contract with RC/PB to perform these functions, with RC/PB as the intended beneficiary.

191. Accompanying the contractual duties, Defendants owed RC/PB implied duties of good faith and fair dealing. These duties are separate and discrete from Defendants' express contractual duties.

192. As more specifically alleged in Count I above, Defendants materially breached numerous express contractual obligations to RC/PB.

193. By way of their express breaches, Defendants also breached their implied duties of good faith and fair dealing in a way that amounted to a failure to meet the parties' reasonable expectations under the Operating Agreement.

194. RC/PB was injured by Defendants' express and implied breaches and is entitled to recover damages in an amount to be determined. The relief and damages sought as a result of these breaches are separate and discrete from the damages resulting from Defendants' contractual breaches.

COUNT IV

**FRAUD IN THE INDUCEMENT
(Against Ritz-Carlton)**

195. RC/PB repeats and reincorporates the allegations in paragraphs 1 through 167 above, as though fully set forth herein.

196. During negotiation of the Operating Agreement, RC/PB negotiated for and secured various rights of oversight and control over Ritz-Carlton's operation and management of the Hotel.

197. In addition to the increased rights of control, RC/PB negotiated for strict limitations on Ritz-Carlton's right to pass corporate overhead and administrative and general expenses off to the Hotel. Specifically, Ritz-Carlton affirmatively represented and agreed that "[n]o part of Operator's central office overhead or general or administrative expense (as opposed to that of the Hotel) shall be deemed to be a part of Gross Operating Expenses." (Ex. A. § 1.1 at 6.)

198. Given Owner's concern about Ritz-Carlton's ability to generate a return on RC/PB's investment, Ritz-Carlton represented that Owner could reasonably expect to achieve specific annual net operating income levels that would justify Owner's

investment in renovations. Ritz-Carlton also expressly agreed to cap the Group Service Fee at 1% of Gross Revenues. (Ex. A. Fee and Reserve Addendum.)

199. At the time the parties negotiated and entered into the Operating Agreement, Ritz-Carlton knew or should have known that impermissible corporate overhead and general and administrative costs would be passed off to the Hotel as Gross Operating Expenses, in derogation of its express promises and undertakings under the Operating Agreement. Furthermore, Ritz-Carlton knew or should have known that the Hotel would improperly be charged for benefits, services and facilities that were properly considered Group Services well in excess of the 1% cap on Group Services, in violation of the Operating Agreement's Fee and Reserve Addendum, and that it would not be able to achieve the net operating income results it was telling Owner to expect. Ritz-Carlton deliberately omitted to mention to, and affirmatively concealed these facts from, RC/PB during and after negotiation of the Operating Agreement.

200. Ritz-Carlton made the above materially false statements, promises and omissions with the intent that RC/PB would enter into the Operating Agreement in reliance on the false representations.

201. RC/PB reasonably and justifiably relied on Ritz-Carlton's false representations and omissions by entering into the Operating Agreement.

202. As a result of its reliance, RC/PB suffered injury in the form of direct and consequential damages, for which it seeks equitable relief and compensation in an

amount to be determined. The relief sought would not otherwise be available for breach of contract.

COUNT V

**FRAUDULENT AND INTENTIONAL MISREPRESENTATION
(Against Marriott and Avendra)**

203. RC/PB repeats and reincorporates the allegations in paragraphs 1 through 167, above, as though fully set forth herein.

204. Ritz-Carlton has engaged Marriott and Avendra as its subagents and partners in a single business enterprise to provide goods and services and to perform certain functions under the Operating Agreement, whereby Marriott and Avendra undertook certain duties to RC/PB, including the duties of due care, loyalty, honesty, disclosure and fair dealing that are owed by a fiduciary to its principal.

205. In breach of their duties to RC/PB, defendants Marriott and Avendra, in some instances acting through Ritz-Carlton, knowingly, intentionally, and willfully made numerous materially false statements, misrepresentations, and omissions of material facts including, but not limited to, the following:

- a. false representations in the books and records and other accounting documents relating to the financial status of the Hotel;
- b. misleading statements as to Ritz-Carlton's and Marriott's offloading of corporate overhead and other general and administrative expenses;
- c. false assertions that unnecessary and avoidable expenses were reasonable and proper;
- d. misrepresentations that the prices for goods received through Avendra were competitive;

- e. concealment of kickbacks received by Avendra and Marriott through false and incomplete financial statements; and
- f. false and grossly misleading assertions of the annual net operating income Owner could expect to achieve if it invested in renovations.

206. The above statements and representations made by Marriott and Avendra and other statements and representations were made with knowledge of or reckless disregard for their falsity, and with the intent that RC/PB would rely on the false statements and omissions.

207. RC/PB reasonably and justifiably relied on these false representations and omissions, which caused RC/PB direct and consequential damages for which RC/PB seeks equitable relief and compensation, in an amount to be determined, and which would not otherwise be available for breach of contract.

208. RC/PB also seeks punitive damages, in an amount to be determined, because Marriott and Avendra made the false statements and omissions willfully, maliciously, recklessly, and wantonly, and with conscious disregard for RC/PB's rights.

COUNT VI

NEGLIGENT MISREPRESENTATION (Against Marriott and Avendra)

209. RC/PB repeats and reincorporates the allegations in paragraphs 1 through 167, above, as though fully set forth herein.

210. Ritz-Carlton engaged Marriott and Avendra as its subagents and partners in a single business enterprise to provide goods and services and to perform certain

functions under the Operating Agreement, whereby Marriott and Avendra provided goods and services and performed functions for the purported benefit of RC/PB, and in so doing assumed duties to RC/PB, including the duties of good faith, fair dealing, loyalty, honesty and full disclosure that are owed by a fiduciary to its principal.

211. As fully set forth in Counts IV and V above, Marriott and Avendra made, and caused Ritz-Carlton to make, numerous material misstatements and omissions of material fact that were false and misleading when made.

212. To the extent that these misrepresentations and omissions were not intentional, Marriott and Avendra made the misrepresentations and omissions negligently and without due regard for their falsity and/or should have known that the representations were false.

213. Marriott and Avendra intended that RC/PB would rely on the representations, and RC/PB, in fact, did reasonably and justifiably rely on the representations and omissions.

214. As a result of its reliance, RC/PB suffered direct and consequential harm, including a loss of good will, for which it seeks equitable relief and damages in an amount to be determined.

COUNT VII

**NEGLIGENCE
(Against Marriott and Avendra)**

215. RC/PB repeats and reincorporates the allegations in paragraphs 1 through 167, above, as though fully set forth herein.

216. Marriott and Avendra repeatedly breached their duties to RC/PB by, without limitation, directly and through Ritz-Carlton:

- a. providing RC/PB with inaccurate accounting records that concealed, misidentified, or did not reflect certain improper fees and expenses;
- b. failing to ensure that RC/PB received rebates from vendors, to which RC/PB was entitled; and
- c. failing to supervise Avendra in procurement of goods for the Hotel so as to ensure that the prices of such goods were competitive.

217. To the extent that Marriott's and Avendra's actions in breach of their duties to RC/PB were not intentional, Marriott and Avendra acted negligently and without exercising due care as to RC/PB.

218. RC/PB suffered harm as a direct and proximate result of Marriott's and Avendra's breaches of duties to RC/PB, and therefore seeks equitable relief and damages in an amount to be determined.

COUNT VIII

**VIOLATION OF THE FLORIDA DECEPTIVE
AND UNFAIR TRADE PRACTICES ACT
(Against All Defendants)**

219. RC/PB repeats and reincorporates the allegations in paragraphs 1 through 167, above, as though fully set forth herein.

220. The Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201, *et seq.*, makes unlawful “[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.”

221. In the course of operating the Hotel, Ritz-Carlton and Marriott routinely and systematically imposed improper fees and charges on the Hotel and RC/PB in violation of various laws and duties as well as the Operating Agreement.

222. The improper fees and charges included, among other things, assessments for corporate-level Ritz-Carlton and Marriott programs in a wrongful attempt to circumvent the contractual 1% cap on the Group Services Fee.

223. In further derogation of the express terms of the Operating Agreement, Ritz-Carlton and Marriott allocated to the Hotel charges for corporate overhead and general and administrative expenses.

224. Ritz-Carlton and Marriott wrongfully concealed the improper fees in financial information submitted to RC/PB by couching such fees and charges in facially

proper expenses, misrepresenting the nature of such fees, or refusing to provide detailed financial information to RC/PB.

225. Due to Ritz-Carlton's and Marriott's wrongful conduct, RC/PB was forced to shoulder unconscionable fees and expenses over and above contractually permissible charges.

226. Ritz-Carlton's and Marriott's active and willful concealment and misrepresentation of the improper charges in financial documents was intended to ensure that RC/PB would remain ignorant of such charges.

227. Further, Defendants solicited and accepted rebates from particular vendors that, in return, received preferential treatment in supplying goods to Marriott and Ritz-Carlton hotels.

228. The kickback scheme thus unreasonably restricted the Hotels' choice of and access to independent vendors, and inflated the price of goods by eliminating competitive pricing. RC/PB was required to pay a higher price for goods than it would have in the absence of the scheme.

229. Defendants willfully and intentionally failed to disclose and actively concealed such kickbacks from RC/PB.

230. RC/PB seeks a declaratory judgment that the Defendants' conduct in connection with the improper fees and charges scheme and the kickback scheme violated Fla. Stat. § 501.201, *et seq.* In addition, RC/PB was harmed by the

Defendants' conduct by paying for improper fees and charges and paying an inflated price for goods, and seeks damages in an amount to be determined.

COUNT IX

**CIVIL CONSPIRACY
(Against Marriott and Avendra)**

231. RC/PB repeats and reincorporates the allegations in paragraphs 1 through 167, above, as though fully set forth herein.

232. In the course of contracting to purchase goods for the Hotel, Ritz-Carlton, Marriott, and Avendra agreed and acted to solicit and accept kickbacks from vendors, and to conceal such kickbacks from RC/PB. These acts were carried out in willful, wanton and malicious and reckless disregard of the Owner's rights, as well as of the harm Ritz-Carlton, Marriott, and Avendra were causing and were foreseeably likely to cause to Owner.

233. Alternatively, Ritz-Carlton, Marriott, and Avendra possessed a peculiar power of coercion, by virtue of their combination which they could not alone possess, that resulted in a unique amalgamation of economic power which was used to execute the conspiracies against the Hotel. These conspiracies were undertaken with malicious motive and coercion through numbers and/or economic influence.

234. Separate and apart from the conspiracy among Marriott and Avendra, each of the foregoing acts and omissions by the Defendants amounted to an

independent instance of fraud, misrepresentation, breach of the duties of good faith and fair dealing, and/or breach of fiduciary duties, among other wrongs.

235. Marriott's and Avendra's' individual actions support independent claims sounding in tort, fraud, and breach of duties to RC/PB, as well as the independent tort of conspiracy.

236. As a direct result of Marriott's and Avendra's collusion and actions in furtherance of the wrongful agreement, RC/PB incurred numerous improper expenses and charges. Moreover, RC/PB's choice of and access to independent vendors was restricted as a result of Marriott's and Avendra's concerted actions with respect to the rebates, causing RC/PB to pay higher prices for goods than it would have paid in the absence of the kickback scheme.

COUNT X

UNJUST ENRICHMENT (Against all Defendants)

237. RC/PB repeats and reincorporates the allegations in paragraphs 1 through 167, above, as though fully set forth herein.

238. As alleged above, Marriott, through Ritz-Carlton, has engaged in a systematic practice of assessing improper fees and charges to the Hotel for corporate-level and administrative and general expenses expressly prohibited or otherwise not permitted under the Operating Agreement.

239. On Marriott's behalf, Ritz-Carlton extracted funds directly from RC/PB's accounts to cover the improper fees and expenses. The funds extracted by Ritz-Carlton to cover Marriott's improper fees and expenses rightfully belong to RC/PB.

240. By wrongfully charging RC/PB for corporate-level fees, Ritz-Carlton and Marriott knowingly received a benefit from RC/PB and retained the benefit for their own enrichment, which should be disgorged to RC/PB.

241. Ritz-Carlton and Marriott used Owner's fund to purchase goods and supplies for the Hotel through Avendra. By virtue of using Owner's funds to conduct purchasing through Avendra, RC/PB was entitled to receive the benefit of any rebates, profits and other consideration remitted and retained to Avendra, Ritz-Carlton or Marriott.

242. Instead of passing the rebates and profits on to RC/PB, Marriott and Avendra retained such rebates for the benefit of themselves, and thereby deprived RC/PB of access to its lawful property. All benefits diverted from Owner to Ritz-Carlton, Marriott and/or Avendra should be disgorged to RC/PB.

243. Marriott and Avendra engaged in the acts described above for the purpose of, among other thing, enriching themselves at the expense of RC/PB, and have, in fact, been so enriched through the receipt of, among other things: (1) undisclosed rebates, allowances, kickbacks, marketing funds and other consideration from transactions entered into on behalf of RC/PB; (2) profits garnered by Avendra and Marriott at

RC/PB's expense from the promotion and use of Avendra; and (3) improper charges, fees, and allocations levied to the Hotel and paid to Ritz-Carlton from Owner's accounts.

244. Due to the Defendants' wrongful conduct in connection with receiving the foregoing benefits from RC/PB, RC/PB seeks equitable relief, disgorgement and/or an award of damages in an amount to be determined.

COUNT XI

**ACCOUNTING
(Against Ritz-Carlton)**

245. RC/PB repeats and reincorporates the allegations in paragraphs 1 through 167, above, as though fully set forth herein.

246. Ritz-Carlton undertook to operate and manage the Hotel solely for the account of RC/PB, as its agent and fiduciary. In its capacity as RC/PB's agent, Ritz-Carlton owed RC/PB various fiduciary duties.

247. Pursuant to the Operating Agreement, Ritz-Carlton exercised exclusive control and operation of the Hotel, including, without limitation, possession and control of the books and records for the Hotel.

248. Ritz-Carlton also had a duty under the Operating Agreement, and pursuant to its fiduciary duties to RC/PB, to provide an accounting to RC/PB showing the results of the Hotel's operation. Operating Agreement § 4.4.

249. Through improper and undisclosed fees and kickbacks, Ritz-Carlton has received improper and unknown amounts that rightfully belong to RC/PB. Ritz-Carlton's conduct has unjustly enriched Ritz-Carlton, to the detriment of RC/PB.

250. A full accounting is necessary for RC/PB to determine the full extent of Ritz-Carlton's unjust enrichment through such improper fees and amounts.

251. RC/PB has no adequate remedy at law.

252. For these and other reasons, RC/PB requests that this Court order a full accounting of the results of the Hotel's operation, including all financial matters relating to the Hotel.

COUNT XII

DECLARATORY JUDGMENT (Against Ritz-Carlton)

253. RC/PB repeats and reincorporates the allegations in paragraphs 1 through 167, above, as though fully set forth herein.

254. An actual substantive and justiciable controversy currently exists between RC/PB and Ritz-Carlton, who have actual, present, adverse and antagonist interests in the subject matter, concerning the present state of the following facts:

- a. whether Ritz-Carlton breached the Operating Agreement;
- b. whether Ritz-Carlton, as RC/PB's agent and fiduciary, breached its fiduciary duty to RC/PB and its implied duties of good faith and fair dealing;
- c. whether Ritz-Carlton's breaches entitle RC/PB to terminate the Operating Agreement early and for cause; and

- d. whether RC/PB is entitled to terminate Ritz-Carlton without payment of any kind for early termination.

255. RC/PB is in doubt regarding its rights with respect to the foregoing and seeks a declaratory judgment that (1) RC/PB is entitled to terminate the Operating Agreement and (2) no amount shall be payable to Ritz-Carlton upon or by reason of such termination.

256. There is a bona fide, actual, present practical need for the declaration.

257. All interests and parties are before the court by proper process and the relief sought is not a mere request for the giving of legal advice by the courts nor is the request to answer questions propounded from curiosity.

PRAYER FOR RELIEF

WHEREFORE, RC/PB has been damaged by the Defendants' actions, as set forth above, and is entitled to damages in an amount to be determined at trial, as well as interest, costs, attorney's fees, and such other and further relief as this Court deems just and proper. Furthermore, RC/PB reserves the right to seek punitive damages pursuant to Fla. Stat. § 768.72.

WHEREFORE, RC/PB respectfully requests the following relief:

1. An order declaring that RC/PB has the right to terminate the Operating Agreement for cause, and that such termination shall be without payment of any kind for early termination;
2. An order for a full and complete accounting of all financial matters relating to the Hotel, including without limitation, disclosure of all payments, rebates, kickbacks, and other discounts solicited and

- received by the Defendants from vendors pursuant to the Avendra purchasing scheme;
3. An order entering judgment against the Defendants for violations of the Florida Deceptive and Unfair Trade Practices Act, and awarding RC/PB treble damages as a result of the violations, in an amount to be determined at trial;
 4. An order requiring disgorgement to RC/PB of all payments, rebates, and other consideration improperly received or retained by the Defendants as restitution;
 5. Compensatory damages for Defendants' breach of contract and breach of implied duties of good faith and fair dealing;
 6. Compensatory and consequential damages for Defendants' breach of fiduciary duties;
 7. Compensatory and consequential damages for Marriott's and Avendra's fraud and intentional misrepresentation, negligent misrepresentation, negligence, and civil conspiracy, in an amount to be determined at trial;
 8. Punitive damages for Marriott's and Avendra's willful and bad-faith fraudulent conduct and breaches of fiduciary duty;
 9. Damages for Marriott and Ritz-Carlton's negligent management, including but not limited to lost profits;
 10. An order requiring Ritz-Carlton to disgorge all management fees paid by RC/PB;
 11. Prejudgment interest and post-judgment interest from the date of entry until the date of satisfaction, at the highest rates allowed by law;
 12. Costs and reasonable attorney's fees incurred in pursuing this action;
 13. Plaintiff requests a jury trial on all issues so triable by law; and
 14. Such other and further relief as this Court deems just and proper.

DATED this 14th day of July, 2011.

Respectfully Submitted,

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