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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

CTF HOTEL HOLDINGS, INC., )

Plaintiff, )

v. )

Civil Action No. 02-271-SUR

MARRIOTT INTERNATIONAL, INC., )

a Delaware corporation, )

RENAISSANCE HOTEL OPERATING )

COMPANY, a Delaware corporation, and )

AVENDRA, LLC, a Delaware corporation, )

Defendants. )

JURY TRIAL DEMANDED

COMPLAINT

Plaintiff CTF Hotel Holdings, Inc. ("CTF"), upon knowledge as to itself and upon information and belief as to all other acts, alleges for its Complaint as follows:

NATURE OF ACTION

1. CTF brings this action against Marriott International, Inc. ("Marriott"), Renaissance Hotel Operating Company ("RHOC") (collectively "the Marriott Defendants") and Marriott's affiliate Avendra, LLC ("Avendra") (collectively "Defendants") for their:

- continuing breaches of their fiduciary, contractual, common law and other duties to CTF in connection with the Marriott Defendants' operation and management of hotels owned by CTF;
- violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq. ("RICO"); and
- violations of Section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 12 et seq.

## OVERVIEW OF THE ACTION

2. This action arises out of a management agreement (the "Management Agreement"), pursuant to which CTF engaged RHOC to act as its exclusive agent with control over virtually all aspects of the operations of the entire portfolio of hotels owned by CTF, including their business (the "Hotels"). Following its acquisition of RHOC in 1997, Marriott assumed RHOC's rights and obligations under the Management Agreement, substituted its own performance for that of RHOC and reduced RHOC to a mere shell.

3. As CTF's agent for the Hotels, the Marriott Defendants exercise virtually unfettered discretion and control over virtually every aspect of the management and operation of the Hotels, including purchasing all goods and services, setting prices, marketing, budgeting, accounting and handling funds belonging to the Hotels. As the repository of such broad discretion, the Marriott Defendants have a correspondingly weighty fiduciary obligation to exercise all due care and undivided loyalty to CTF in all their dealings as agent.

4. Unfortunately, despite these heightened fiduciary obligations, in their insatiable quest to maximize Marriott's own profits, the Marriott Defendants have persistently acted adversely to CTF.

5. More specifically, as alleged in detail below, the Marriott Defendants have materially breached their obligations under the Management Agreement and have violated their fiduciary duties to CTF of fair dealing, loyalty, candor and full disclosure by, among other things:

- secretly soliciting, diverting and fraudulently concealing kickbacks from Molloy Corporation, the outside contractor for audiovisual services to the Hotels that Marriott persuaded CTF to retain. Unbeknownst to CTF, to

fund Marriott's kickback scheme, CTF was paying Molloy three times its actual invoices, and Marriott was pocketing approximately two-thirds of these fees, kickbacks Marriott has recently represented total over \$1.7 million dollars for the Hotels;

- abusing their agency authority by directly and through Avendra soliciting hundreds of thousands, and perhaps millions, of dollars in commercial bribes (euphemistically called "Sponsorship Funds") from vendors in exchange for agreeing to execute agreements to purchase the vendors' wares or to grant access to persons capable of making purchases;

- seeking generally to maximize so-called "Restricted Allowances" from vendors – kickbacks which are purportedly designated by the vendors for "specified purposes" and thus according to Defendants need not be allocated to the Hotels. In reality, these Restricted Allowances have been improperly used as slush funds for Defendants to underwrite Defendants' programs, defray Defendants' corporate costs, and even fund millions of dollars in advertising to benefit another company in which Marriott had made a substantial investment;

- improperly delegating core agency functions required under the Management Agreement to Avendra in order to divert to themselves the potential value and rewards of volume purchasing on behalf of the Hotels, impose additional improper charges on the Hotels and mask their receipt of undisclosed kickbacks, rebates and "soft dollar payments";

- systematically pursuing self-interested transactions, including agreements with Avendra, to the direct detriment of CTF, such as Marriott's agreement not to perform any centralized volume purchasing on behalf of the Hotels for three years, except through Avendra;

- arbitrarily forcing CTF to channel all of its purchasing through Avendra, in order to satisfy Marriott's minimum purchasing obligations and to increase Marriott's percentage ownership interests in Avendra;

- seeking to coerce CTF into paying improper charges for procurement imposed by Avendra, including charges that (i) are wholly unauthorized under the parties' agreements which limit Marriott's ability to charge a fee for procurement to nine discrete categories of hotel supplies and (ii) significantly exceed the actual admitted cost to Avendra of providing purchasing;

- falsely representing to CTF, in order to induce its participation in Marriott

programs, that all material terms of such programs had been disclosed, while concealing material facts about the actual cost of such programs and secret kickbacks to the Marriott Defendants;

- falsely certifying to CTF that all charges imposed on CTF for Marriott programs were proper and permitted under the Management Agreement, when, in truth and in fact, Marriott was imposing improper charges and concealing secret kickbacks;
- issuing false and misleading statements and financial reports to CTF, which failed to disclose and otherwise concealed, inter alia, the extent or amount of Defendants' (i) profits from affiliated transactions, and (ii) receipt of kickbacks, rebates and other indirect payments in connection with transactions entered into on behalf of the Hotels;
- violating their disclosure obligations to CTF and materially breaching the Management Agreement with CTF by, inter alia, refusing to respond to information requests, persistently blocking CTF's request for an audit as mandated by the Management Agreement and 1999 Agreement (as detailed below); and
- improperly imposing conditions, such as new confidentiality agreements, to prevent or impede CTF's access to information about Marriott's and its affiliates' transactions on behalf of CTF.

6. Marriott has persisted in this misconduct despite CTF's prior threat to terminate the Management Agreement in 1999 after discovering a chronic pattern of undisclosed kickbacks, secret affiliated deals and misrepresentations by Marriott. Marriott avoided termination by entering into a 1999 settlement agreement (the "1999 Agreement") which heightened Marriott's disclosure duties, circumscribed Marriott's ability to impose charges and inflict "programs" on CTF, established certain profit guarantees to CTF and reaffirmed Marriott's agency status. Barely was the ink dry, however, before Marriott started to break its promises in the 1999 Agreement.

7. Despite CTF's unequivocal rights under the Management Agreement, the

1999 Agreement and the law of agency to inspect, review and audit Defendants' books concerning CTF, Defendants have refused to respond adequately to CTF's disclosure requests and audit demands. Nonetheless, the limited information that CTF has been able to obtain in spite of this "stonewalling" reveals a pervasive and endemic pattern by Defendants of retaining undisclosed kickbacks and other payments from vendors, "sweetheart" deals with affiliates and other disloyal conduct adverse to CTF.

8. As the monies received by Defendants in this fashion are entirely unearned, and are paid solely to reward Defendants for acting as intermediary between CTF (as purchaser) and the ultimate vendors of goods for the Hotels, these kickbacks constitute commercial bribery in violation of section 2(c) of the Robinson-Patman Act. More broadly, the overall scheme of illegal payments and kickbacks to Defendants, furthered by deceptive and fraudulent concealment in the many letters, contracts and periodic financial reports to CTF by Marriott, reflects a pattern of continuing criminal activity through a criminal enterprise by Defendants, a result of Defendants' endemic business practices.

9. CTF's claims as alleged herein are based on the limited information it has been able to obtain from the Defendants. Accordingly, CTF reserves the right to amend and supplement this Complaint and/or name additional defendants once it obtains access to the information that is being wilfully withheld by Defendants.

#### THE PARTIES

10. Plaintiff CTF Hotel Holdings, Inc. ("CTF") is a Delaware corporation which owns and leases twenty hotels and resorts throughout the United States.

11. Defendant Marriott International, Inc. ("Marriott") is a Delaware corpora-

tion and well-known worldwide operator and franchiser of hotels which owns, operates and franchises hotels under several brands, including Marriott, Renaissance, Courtyard by Marriott, Residence Inn, Fairfield Inns and Suites, Towne Place Suites and Marriott Vacation Club.

12. Renaissance Hotel Operating Company ("RHOC") is a Delaware corporation and is a wholly-owned subsidiary of Marriott. At all relevant times since March 29, 1997, RHOC has been dominated and controlled by Marriott.

13. Avendra, LLC ("Avendra"), is a Delaware limited liability company with its principal place of business in Rockville, Maryland. Avendra represents itself to be a procurement services company serving the large North American hospitality market and related industries (worth over \$80 billion annually). According to Marriott's representations, Avendra is owned by Marriott and certain other hotel corporations, including Hyatt Hotels Corporation ("Hyatt") (collectively the "Founders"). In the aggregate, the Founders manage or franchise more than 5,500 properties worldwide with a collective annual purchasing power of over \$10 billion. Avendra is reportedly now the world's largest Internet-enabled business-to-business hospitality procurement company.

#### **JURISDICTION AND VENUE**

14. This Court has subject matter jurisdiction over this action pursuant to (1) 28 U.S.C. § § 1331 (federal question); (2) 18 U.S.C. § 1961 (the Racketeer Influenced and Corrupt Organizations Act ("RICO")); (3) 15 U.S.C. § 22 (Robinson-Patman Act); and (4) 28 U.S.C. § 1367, which provides supplemental and ancillary jurisdiction over the state and common law claims alleged herein, which are so related to the federal claims as to form part of the same case or controversy within the meaning of Article III. Venue is proper in this District

under 28 U.S.C. § 1391(b) and 18 U.S.C. § 1965(a). All Defendants either reside in or are subject to personal jurisdiction in the District of Delaware.

### **FACTUAL BACKGROUND**

#### **Management Agreement between CTF and RHOC**

15. This action arises out of the abuses of the trust, confidence and authority entrusted to RHOC and Marriott pursuant to a management agreement, dated August 5, 1993 (the "Management Agreement") (Ex. A hereto) and a settlement agreement dated April 23, 1999 ("the 1999 Agreement") (Ex. B hereto) (collectively the "Agreements"). The parties to the Management Agreement are CTF (then known as Stouffer Hotel Holdings, Inc.) and RHOC (then known as Ramada Hotel Operating Company). Pursuant to the Management Agreement, CTF (as "Owner") engaged RHOC (as "Manager" or "Operator") to act as CTF's exclusive agent, manager and operator, with full and complete management authority over the Hotels (of which there are now twenty). Following its Marriott acquisition of the Renaissance group (the "Marriott Acquisition"), Marriott succeeded to RHOC's management rights under the Management Agreement and has since jointly acted with RHOC as Manager of the Hotels. Accordingly, unless necessary to indicate separate conduct or corporate identity, following the Marriott Acquisition, Marriott and RHOC are referred to collectively as "Marriott".

#### **Agency Conferred by the Management Agreement**

16. The Management Agreement created an exclusive agency relationship between the Manager and the Owner, thereby imposing on Marriott all the duties and responsibilities of an agent, including fiduciary obligations, toward CTF.

17. The agency relationship created by the Management Agreement is

extremely extensive and discretionary. The Management Agreement confers on the Manager full agency powers with respect to the Hotels. The Manager's corresponding fiduciary duties arising by reason of this role are therefore extensive.

18. Moreover, the Management Agreement explicitly acknowledges that CTF "desires to engage [the Manager] as [CTF's] agent to provide management services with respect to the Hotels." (Emphasis added). In this vein, the Management Agreement "appoints, authorizes and engages [the Manager] as the exclusive operator of the Business of [CTF] during the term of [the] Agreement." The "Business" of CTF was broadly defined and encompassed "all the properties, activities and entities that collectively generate" CTF's revenues.

19. Evidencing this broad grant of agency authority, the Management Agreement empowers Marriott as Manager to perform the full panoply of functions and responsibilities with respect to the management and operation of the Hotels "on behalf of [the] Owner" and "in the name of [the] Owner." This authority includes: (1) employing, training, paying and discharging all personnel; (2) setting prices for rooms and services; (3) purchasing all food, beverages, inventories held for sale, and furnishings and equipment used in the Hotels; (4) negotiating and entering into service contracts; (5) obtaining and granting concessions; (6) negotiating and arranging for all leases, licenses and concession for commercial space "in [the] Owner's name" and "executed by Operator as the agent of Owner"; (7) establishing all credit policies and entering into agreements with credit companies; (8) applying for and maintaining "in the name of Owner or Operator" all required licences and permits; (9) instituting "in the name of Operator or Owner" legal proceedings; (10) establishing sales, marketing and advertising programs; (11) effecting repairs; and (12) engaging specialists.



20. Further reflecting the high degree of trust and confidence vested in the Manager, the Management Agreement entrusts to the Manager full operational control over revenues and expenditures. It confides to the Manager the power to collect all revenues from Hotel operations from any source and to deposit such revenues into accounts "as agent for Owner." This trust is even more pronounced as the Manager is given responsibility to perform all budgeting functions for the Hotels, subject to the Owner's approval, and to supervise and maintain "on account of [the] Owner" full and adequate books of account reflecting the results of the Hotels.

21. Prior to the 1999 Agreement, the Management Agreement had also entrusted CTF's entire corporate function to the Manager, including maintaining CTF's owner-level corporate books, performing owner-level corporate oversight and filing CTF tax returns. Following CTF's detection in 1998 of serious transgressions by Marriott, in order to improve CTF's ability to monitor Marriott's activities as its agent, these corporate functions for CTF were relinquished to CTF under the 1999 Agreement. At the same time, the 1999 Agreement reaffirmed that Marriott's other hotel management responsibilities conferred under the Management Agreement, and thus Marriott's broad management authority as agent operating the Hotels, remained unchanged.

**Special Relationship of Confidence Created by Management Agreement**

22. By Marriott's agreement to act in the above-described role, a special relationship of confidence was created between Marriott and CTF, and thus Marriott assumed all of the fiduciary obligations of agency, including the agent's duties of loyalty, good faith, fair dealing, due care and candor with respect to all matters within the scope of its agency.

23. Reflecting and supplementing Marriott's agency obligations to use best efforts to maximize CTF's interests as principal, the Management Agreement emphasizes Marriott's paramount duty to seek to maximize returns to CTF in managing the Hotels. Section 3.1 of the Management Agreement stipulates that "[Marriott] shall operate the business of Owner" as part of the Renaissance hotel operating system "for the purpose of promoting the profitability thereof . . . and, to the extent possible, in accordance with the [procedures employed by Marriott elsewhere]." (Emphasis added). Unfortunately, Marriott has subordinated the profitability and interests of CTF to its own insatiable quest to maximize returns for itself.

24. The Management Agreement also provides additional contractual safeguards to protect CTF's interests, including: (1) rigid restrictions on self-interested transactions by Marriott as Manager, and (2) strict reporting obligations on the part of Marriott as Manager. Further, the Management Agreement expressly limits the types of reimbursable expenses to prevent the Manager from passing on its general, administrative and corporate costs.

**The Manager's Compensation under the Management Agreement**

25. The fee structure created by the Management Agreement was intended to align the interests of Owner and Manager by rewarding Marriott for maximizing the returns to CTF. In short, this incentive-based fee structure reflected a mutual understanding that in return for promoting the profitability of the Hotels, the Manager would share in a percentage of the profits. Accordingly, the Management Agreement entitles the Manager to a base fee (the "Base Fee"), equal to three percent (3%) of gross revenue of the Hotels in the aggregate for each fiscal year, after setting aside approximately \$50 million for the Owner to satisfy debt obligations on the Hotels ("Owner's Priority Return"), and setting aside scheduled amounts for maintaining

fixtures, furnishings and equipment (the "FF&E Reserve").

26. In addition, the Management Agreement entitles Marriott to share in a percentage of net cash flow after the payment of Hotel expenses. Specifically, the Management Agreement provides for the payment of an incentive fee to the Manager ("Incentive Fee"), based on the excess net cash flow remaining after setting aside amounts due for expenses of operation, the Owner's Priority Return, the Manager's Base Fee, the FF&E Reserve and the Owner's preferential return of approximately \$10 million ("Residual Cash Flow"). The Manager's Incentive Fee is equal to fifteen percent (15%) of the Residual Cash Flow.

27. This compensation formula has been extremely lucrative to Marriott. For example, in fiscal year 2000, Marriott earned a Base Fee of \$18,451,000 and an Incentive Fee of \$7,975,000. But another prime source of remuneration for Marriott is its "reimbursement" to itself from the Hotels of significant amounts in purported expenses and costs for Marriott programs, charges and other fees. In fiscal year 2000 alone, Marriott's charges and program allocations to the Hotels were approximately \$48 million.

28. Marriott's direct or indirect allocation of its general, administrative and corporate overhead costs and expenses to CTF is at odds with the Management Agreement. Among such restrictions, Section 5.3 of the Management Agreement provides that

[e]xcept as expressly provided to the contrary above, Reimbursable Costs shall not include (i) [Marriott's] corporate expenses, administrative expenses, general overhead, and (ii) payroll and employment related costs of [Marriott's] employees not employed in the Business of Owner on a regular basis.

Thus, any attempt to increase Marriott's compensation beyond that for which it has already bargained, e.g., by imposing additional fees and hidden charges beyond those specifically

authorized, violates the Management Agreement. Notwithstanding the revisions to the compensation structure under the 1999 Agreement (see infra ¶¶ 42-61), the rule against unauthorized fees remains a cornerstone principle of the agency relationship between CTF and Marriott.

29. In derogation of these express prohibitions, Marriott has persistently sought to devise ways to skim off a profit element from the "costs" incurred by the Hotels. As further described below, evidently dissatisfied with the generous compensation package already available to it, Marriott has persistently conjured up new ways of repackaging the Manager's basic management functions as "new programs" or "third party" fees in order to pass these costs onto the Hotels. Marriott has also used its vast purchasing power on behalf of the Hotels, representing tens of millions of dollars annually, to create a virtual slush fund of off-the-books rebates from vendors which Marriott has applied to defray its own costs and to pursue its own interests without seeking CTF's consent.

30. Most recently, Marriott has sought to increase its returns to itself by channeling all procurement for the Hotels through Avendra, then seeking to impose additional, unauthorized fees for such procurement on the Hotels. (See infra ¶¶ 62-95.) These schemes enable Marriott to garner increased profits for itself regardless of the actual performance of the Hotels.

#### **Marriott's Acquisition of RHOC**

31. On March 29, 1997, Marriott completed the Marriott Acquisition, acquiring substantially all of the outstanding common stock of Renaissance Hotel Group N.V. ("RHG"), a Netherlands corporation which now exists solely as a holding company and owns all of the issued stock in RHOC. As part of the Marriott Acquisition, Marriott thus acquired RHOC,

including the latter's rights and duties under the Management Agreement "as is." Marriott then proceeded to directly exercise these rights in place of RHOC.

#### **Marriott's Self-Interested Strategy**

32. As Manager, Marriott has singularly pursued its own self-interest at the expense of the Hotels and disregarded its duty to maximize the profitability of the Hotels. Marriott has relentlessly and selfishly attempted to insulate itself from the risks of hotel performance and the economy and to maximize its own profits, even at the expense of the profitability of CTF as Owner.

33. In aid of this rapacious objective, Marriott has implemented a set of programs and procedures relating both to traditional manager functions and outside vendor roles, thereby enabling Marriott, through its affiliates, to directly profit from these transactions, regardless of the costs thereby imposed on the Hotels.

#### **CTF First Suffers the Adverse Effects of Marriott's Abusive Practices**

34. In 1998, CTF began experiencing the adverse effects of Marriott's improper secret charges and uncompetitive affiliated transactions by Marriott, which deprived CTF of additional profits. CTF found that only a small fraction of increased revenues actually "trickled down" as profits for CTF. Meanwhile, in 1998 alone, Marriott received hefty management fees from CTF of more than \$20 million, as well as "reimbursement" for alleged costs, expenses and allocations of approximately \$40 million.

#### **CTF Uncovers Marriott's Pattern of Deceptive and Disloyal Conduct Before April 1999**

35. Deeply disturbed by the results from Marriott's first year of managing the Hotels, CTF sought information from Marriott to determine the source of these problems.

Despite Marriott's persistent obstruction, by November 1998 CTF compiled irrefutable evidence that the Marriott Defendants had repeatedly and flagrantly breached their duties and responsibilities as CTF's agent. Among other things, they had:

- extracted undisclosed kickbacks, rebates, discounts and "soft-dollar" payments for themselves and their affiliates from vendors providing goods, supplies and services to the Hotels;
- engaged in a series of undisclosed, self-interested and affiliated transactions purportedly on behalf of the Hotels, without seeking CTF's consent or making any effort to ensure the competitiveness of such transactions;
- imposed a series of secret charges, costs and allocations on the Hotels in direct violation of the terms of the Management Agreement and in derogation of the established course of dealing by the parties;
- imposed a series of mandatory programs on the Hotels, the primary objective of which was to impose additional fees, costs and expenses on the Hotels and to benefit Marriott;
- manipulated accounting practices to artificially inflate revenues used to calculate the Base Fee payable to the Manager and to accelerate CTF's payment of Marriott's fees;
- issued false and misleading financial statements and reports to CTF, which failed to disclose and otherwise concealed, *inter alia*, the extent or amount of Marriott's (i) accounting manipulations, (ii) improper hidden charges and allocations, (iii) profits from affiliated transactions, and (iv) receipt of kickbacks, rebates and other payments in connection with transactions entered into on behalf of the Hotels;
- violated the record-keeping and reporting obligations of the Management Agreement by, *inter alia*, failing to maintain accurate and complete books of account and failing to provide the requisite detailed financial reports; and
- persistently refused to provide information requested by CTF contrary to Marriott's contractual disclosure obligations and fiduciary duties of candor. In particular, Marriott ignored CTF's repeated requests for detailed information concerning (i) affiliated transactions, charges and fees allocated by Marriott to the Hotels and (ii) the description and value of

rebates, refunds and other consideration paid to Marriott or its affiliates related in any manner to transactions entered into on behalf of the Hotels.

36. Moreover, CTF demonstrated Marriott's pattern of making false promises of growth and profits to induce CTF to participate in additional Marriott programs, only later to directly break those promises through the imposition of extra hidden charges and fees. For example, CTF discovered that Marriott had improperly imposed a 3% procurement fee not only on purchases effected through the Marriott procurement program then in effect, but also on items that merely could have been purchased through Marriott procurement (but were purchased through normal channels), as well as to the procurement of fixtures, furnishings and equipment, which were outside of that program.

**CTF Notifies Marriott of Its Improper Conduct and Issues a Notice of Default**

37. On or about November 2, 1998, CTF notified Marriott in writing of Marriott's serious breaches of the Management Agreement and its fiduciary duties to CTF through, inter alia, Marriott's imposition of improper undisclosed charges and allocations, self-dealing and affiliated transactions, accounting manipulation and refusal to provide information explaining these matters (the "1998 Default Notice"). CTF reminded Marriott of its heightened duties of loyalty and candor as CTF's agent and requested that Marriott take corrective action or suffer the termination of the Management Agreement. Marriott failed to do so. Accordingly, on April 21, 1999, CTF issued a final notice of default based on the improper conduct outlined in the 1998 Default Notice.

**The April 1999 Agreement**

38. To forestall termination of the Management Agreement based on the 1998

Default Notice, Marriott and CTF entered into settlement negotiations. The 1999 Agreement, executed on April 23, 1999, arose out of those talks and represented the parties' attempt to redress the misconduct identified in the 1998 Default Notice.

**Agency Relationship Reaffirmed by 1999 Agreement**

39. Acutely conscious of the dire consequences of its failure to abide by its fiduciary duties to CTF as its agent, during the negotiations for the 1999 Agreement, Marriott unsuccessfully sought to amend the Management Agreement specifically to negate its agency status and thereby to eliminate its fiduciary duties. Marriott also sought an amendment to the Management Agreement to allow it to engage freely in affiliated transactions, without obtaining CTF's consent or demonstrating the competitiveness of such transactions. CTF categorically rejected these proposed amendments and thus the 1999 Agreement reaffirmed the Management Agreement and left unchanged Marriott's fiduciary status.

**Marriott's Guarantee of Operating Profit**

40. To prevent further erosion of Hotel profits by Marriott's programs and charges, the 1999 Agreement also provided for a "guarantee" by Marriott of certain minimum amounts of gross operating profit after deducting the total charges for permitted Marriott programs and expenses ("GOP") for the Hotels for the years 1999 through 2001. If combined GOP for the CTF's Hotels (plus several hotels owned by its affiliate Hotel Property Investments (B.V.I.) Ltd. ("HPI"), also under Marriott management (the "HPI Portfolio")) fell below the guaranteed annual level, Marriott agreed to pay a deficiency payment up to \$10 million per year. The 1999 Agreement thus fortified Marriott's existing duty to maximize the profitability of the Hotels and of CTF as Owner.



### The Narrow and Limited Release Afforded by the 1999 Agreement

41. The 1999 Agreement provided a compensatory payment by Marriott to CTF and HPI of \$24 million and a mutual, although limited, release of all claims through the date of the 1999 Agreement, including those related to or arising out of matters in the 1998 Default Notice.

42. In light of Marriott's prior misconduct, CTF insisted, as a term of the release, that Marriott affirmatively warrant that it had "disclosed all material terms relating to" Marriott's programs and management, operational and accounting practices as at the effective date, April 23, 1999. The release was explicitly made:

ineffective against CTF . . . with respect to any claim . . . to the extent that Marriott and [RHOC] fraudulently or otherwise willfully failed to disclose material terms to CTF. . . , and such failure prevented CTF . . . from being aware of the basis for such claim prior to the date of [the] Agreement.

43. On March 15, 2002, Pierre Donahue, Esq., Marriott's Assistant General Counsel ("Donahue"), admitted that, despite these express promises, Marriott had not disclosed all material terms concerning the fees charged the Hotels in connection with the audiovisual programs -- namely the substantial kickbacks it was regularly receiving from CTF's audiovisual contractor Molloy Corporation ("Molloy"), as further described below. (See infra ¶¶ 116-131.) Marriott has conceded that it chose not to "volunteer" this highly material information concerning these programs. Because Marriott had a duty to disclose such terms both as a fiduciary and under the explicit terms of its warranty and representation, its failure to do so constituted fraudulent concealment and renders the Release ineffective with respect to such programs. Marriott's continued refusal to comply with CTF's outstanding disclosure and audit requests has

prevented CTF from knowing the full extent to which Marriott has failed to disclose material terms concerning its programs.

#### Controls on Marriott's Retention of Allowances

44. In order to prevent Marriott's further secret solicitation, collection and retention of kickbacks, soft-dollar payments and other commercial bribes, the 1999 Agreement established definitions to identify such payments, created a cap on the amount of such payments that Marriott could retain and established strict reporting duties.

45. First, to ensure strict controls on and accountability for all types of payments or consideration Marriott received in connection with transactions entered into on behalf of the Hotels, the 1999 Agreement established an all encompassing category called "Allowances." Allowances are defined to include:

all marketing, promotional and advertising or other allowances, free goods, rebates, warehousing, quantity discounts, and other payments, benefits, discounts or allowances of any nature whatsoever that are provided to Marriott (including any affiliate) in connection with a purchase or other contractual arrangement between Marriott and a third party in connection with any Hotel(s).

By contrast, acknowledging the practice of certain vendors to provide restricted allowances to market the vendor's wares to hotel guests, such as HBO providing an allowance to put HBO advertising in hotel directories, the 1999 Agreement defined as "Restricted Allowances" those allowances which the "provider has directed be used for marketing or other specified purposes." This definition thus reflected the parties' agreement that this Restricted Allowance category was confined solely to purposes specifically directed by the vendor.

46. Second, the 1999 Agreement strictly circumscribed the programs in which Marriott or its affiliates could retain Allowances to those programs in respect of which CTF had

given its express consent after full disclosure. Thus, Marriott may only retain Allowances in "Return/Allowance Programs," namely, programs "so identified to CTF . . . and agreed by [it] after requisite disclosure, (i) the Program Charges [i.e., the amounts charged by Marriott] for which may include an agreed return and (ii) with respect to which Marriott may retain disclosed Allowances as described herein." (Emphasis added). The 1999 Agreement lists exhaustively the programs which qualify, based on the requisite disclosure, as Return/Allowance Programs. Upon information and belief, Marriott has solicited and retained undisclosed Allowances outside of these designated programs.

47. Third, the 1999 Agreement sets a firm cap on the amount of Allowances that Marriott or its affiliates may retain. Section IV.A.5 unambiguously provides that "Marriott's right to retain . . . Unrestricted Allowances with respect to Return/Allowance Programs (including the [Marriott] Procurement Program . . . ) shall be limited, on an annual aggregated basis for all [CTF] Hotels [plus certain hotels within the HPI Portfolio], to the sum of . . . \$250,000 [plus certain Allowances derived from non-US Hotels]" (the "Allowance Cap"). The 1999 Agreement requires Marriott to refund to the Hotels their pro rata share of any Allowances in excess of the Allowance Cap. In direct violation of this unambiguous provision, Marriott has solicited and retained undisclosed Allowances substantially beyond the Allowance Cap and has failed to remit the excess to CTF.

#### **Restrictions on the Imposition of New Programs and Heightened Disclosure Duties**

48. In light of Marriott's deceptive practices with respect to program costs, charges, programs and allocations, the 1999 Agreement sought to clarify and heighten Marriott's program disclosure obligations in several ways. First, the 1999 Agreement predicated CTF's

participation in Marriott's existing and new programs on Marriott's specific representation that it had fully disclosed all material terms concerning such programs.

49. For example, the 1999 Agreement recites that:

Marriott represents and warrants that it has provided CTF. . . with disclosure of all material terms with respect to all of the Existing Programs [described therein], and will make all further disclosures in a timely manner to keep CTF . . . fully informed of all material terms with respect to Existing Programs in which any of the Hotels participate. CTF . . . hereby consent[s] to participation in such Existing Programs by any of the Hotels so long as the material terms of the Existing Programs remain as described to CTF . . . (including the scope and cost of any such Existing Program) as of the date hereof.

(Emphasis added).

50. Further, in order to curb Marriott's prior practice of forcing the Hotels into costly Marriott programs without CTF's consent and regardless of the actual benefits to the Hotels, the 1999 Agreement specifically required that Marriott seek and obtain CTF's "prior written consent" before instituting any new programs or material changes to existing programs previously accepted by CTF.

51. To enforce these rules, Marriott's specific reporting duties were significantly increased by the 1999 Agreement. For example, Section VII of the 1999 Agreement states that "in addition to the periodic reports required by the terms of the Management Agreements [a term that includes the Management Agreement], which shall include reports for each Accounting Period concerning Marriott's charges and allocations to hotels," Marriott shall provide an annual statement: (1) certifying that all charges comply with the 1999 Agreement and (2) listing and classifying any new Programs or material changes thereto. These supplement Marriott's additional periodic reporting requirements for charges under the Marriott Procurement Program

and its annual obligations concerning Allowances.

52. These reporting obligations are in addition to Marriott's extensive pre-existing record-keeping and disclosure obligations under the Management Agreement and the duty imposed by the law of agency that Marriott disclose to CTF all matters relevant and material to the business of the Hotels.

53. Unfortunately, Marriott has flouted these restrictions. For example, Marriott has diverted Restricted Allowances to fund new Marriott programs without CTF's consent. Rather than trying to increase CTF's returns by getting the lowest price, Marriott has instead sought to maximize Restricted Allowances in order to generate a funding source for Marriott's own programs. In this manner, Marriott has attempted to circumvent the requirement to obtain CTF's prior written consent for new programs and charges.

54. For example, after requesting an audit, CTF recently learned that Marriott had aggregated Restricted Allowances from a group of vendors to pay for a new program purportedly for the development of new restaurant concepts called the "Renaissance Street Restaurant and Bar Program." Even though Marriott never sought CTF's consent to initiate this program, Marriott's reported charges for this program were \$137,000 in 2000 and \$394,000 in 2001, which Marriott claims to have paid out of Restricted Allowances, including payments to itself.

55. Also, CTF has recently learned that Marriott applied over \$1 million, most of which is attributable to the Hotels, in supposed Restricted Allowances contributed by AT&T to finance an advertising program for STSN, an Internet-services company in which Marriott is a major investor.

56. In its annual program certifications to CTF for 1999 and 2000, Marriott never mentioned its institution of the Street Restaurant program. Nor did Marriott include the allowances expended on this program, which it spent in an unrestricted manner, in its accounting for Allowances.

**Restrictions on Procurement Fees**

57. To redress Marriott's improper practices during 1998 of imposing its 3% procurement fee on purchases outside of its procurement program, CTF demanded, and Marriott accepted, clear restrictions on the program's scope and the potential application of the fee. Thus, under the 1999 Agreement, a 3% fee (the "Procurement Fee") may only be assessed on nine discrete categories of purchases (the "Nine Categories") from Marriott's procurement program (the "Marriott Procurement Program").

58. Specifically, section IV.A(3)(b) of the 1999 Agreement states that:

the Hotels will participate in [the Marriott Procurement Program] for the specification, procurement and distribution of beverages, food, china, glassware, silverware, linen, cleaning supplies, guest supplies and uniforms . . . [i.e., the Nine Categories] through the supply and distribution arrangements existing as of July 1, 1998 or entered into thereafter with local, regional and national vendors and distributors (including Marriott Distribution Services, Inc.), provided that CTF . . . shall have the right to opt out of the [Marriott] Procurement Program for any particular category of purchases if the category can be obtained on better terms for comparable quality.

(Emphasis added).

59. Moreover, this section expressly prohibits Marriott from imposing "a charge to CTF . . . of more than 3% of the cost of all purchases actually made through the [Marriott Procurement] Program."

60. Following the 1999 Agreement and up to January 2001, Marriott claims it

performed its procurement functions either directly or through its division, MarketPlace by Marriott ("MarketPlace"). The total fee charged for all procurement through the Marriott Procurement Program was reportedly a flat 3% on the Nine Categories (excluding any Allowances related to such purchases within the Allowance Cap). This single fee covered all centralized procurement which Marriott undertook to provide on behalf of the Hotels as a core management function. In keeping with this undertaking, Marriott did not initially charge any fee procurement for Non-Nine Categories.

61. True to form, however, Marriott soon tired of collecting only a 3% fee on the Nine Categories, and set out to devise ways to achieve higher returns for itself and to enlarge the Marriott Procurement Program to encompass all purchasing through Marriott. Despite its fiduciary obligations to CTF, Marriott sought to divert to itself the economic benefits of volume purchasing on behalf of the Hotels, which rightfully should have been passed through to CTF. To this end, Marriott created a new purchasing entity called Avendra.

#### The Genesis of Avendra/ Lack of Prior Consent

62. Without seeking CTF's consent, on or about January 26, 2001, Marriott purportedly caused its business MarketPlace to merge with and into Avendra.

63. In violation of its fiduciary duties to CTF, Marriott failed to obtain CTF's consent to this wholesale assignment of vendor and distributor agreements relating to the Hotels. Nor did Marriott compensate CTF for Marriott's diversion to itself of assets derived from its agency.

64. Marriott's failure to obtain CTF's consent was especially egregious given that the main asset that MarketPlace possessed was the purchasing power it enjoyed as agent for

the properties managed by Marriott, including the Hotels. In fact, as an essential part of the merger of MarketPlace (and/or Marriott's centralized purchasing operations and assets) into Avendra, Marriott and MarketPlace assigned pre-existing vendor and distributor agreements to Avendra so as to establish an Avendra procurement program to supplant both the existing operations of MarketPlace and the entire Marriott Procurement Program (the "Avendra Procurement Program").

65. On January 31, 2001, Marriott announced to CTF and other owners of managed properties of the fait accompli of the formation of Avendra. Presenting Avendra as an "independent corporation," Marriott referred to other Founders of Avendra such as Hyatt. CTF has not been able to obtain disclosure from Marriott or Avendra sufficient to determine whether or not it is in fact a truly independent entity, or simply a sham created for Marriott's illicit purposes.

66. The term sheet for the Avendra venture proclaimed three major goals in creating Avendra: (1) "Supply chain excellence," by "improving supply chain efficiencies" and "the competitiveness, quality and pricing of goods and services provided to owners and franchisees"; (2) "Rapid Growth," to become "the leading procurement organization for the hospitality industry (taken at its broadest)"; and (3) "Value Creation and Capture," by "[g]rowing the value of [Avendra] beyond the contribution of the Founders and Strategic Partners [additional participating companies]," "[u]nlocking, through the capital markets the significant value of [Avendra] derived from the combination of: (i) [c]ontributions of Founders and Strategic Partners individually and collectively" and "(ii) [i]mplementation of Avendra's successful growth strategy."



67. In short, the conceded motivation of Marriott was to capitalize on the collective buying power possessed by its managed properties by "investing" that buying power into a separate company that could be taken public. Even though the key asset invested by Marriott in Avendra was the vast captive purchasing power of the businesses it manages, including the Hotels, there was no provision for equity participation by, or profit sharing with, these principals.

68. In contrast to CTF, which receives only illusory benefits (and suffers many serious burdens) from Avendra, Marriott stands to benefit tangibly and handsomely from Avendra. By leveraging its centralized high volume purchasing power, Marriott has received substantial equity participation and stands to share commensurately both in the lucre of a successful public offering and the profits generated by Avendra.

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Thus, Marriott has a powerful incentive to maximize its purchases through Avendra, regardless of the interests of CTF.

69. Moreover, Marriott has used Avendra as a potential vehicle to attempt to escape the heightened scrutiny on Allowances dictated by the 1999 Agreement, to divert, skim and conceal Allowances from CTF and secretly enforce "compliance" with Marriott's programs.

70. Avendra and Marriott's continued refusal -- even in the face of CTF's pending audit request -- to provide any Avendra documents concerning Allowances, vendor agreements, reconciliations of CTF Allowances and cost allocation among participants, among others, suggests that one of Avendra's primary functions is to obfuscate and conceal the true

profit-taking activities of Marriott.

71. In fact, through its agreements with Avendra, Marriott has crafted novel categories to repackage and reclassify traditional rebates and vendor payments, undoubtedly to attempt to evade the all-encompassing definition of Allowances in the 1999 Agreement. For example, Marriott and Avendra have institutionalized a new class of Allowances they call "Sponsorship Funds". The Amended and Restated Procurement Services Agreement by and between Marriott and Avendra effective March 31, 2001 (the "PSA") (Ex. C hereto) provides that:

"Sponsorship Funds" shall mean any money, in-kind item or service received by [Marriott] or one of its Affiliates from a Vendor or Distributor which money, item or service is contributed in exchange for, directly or indirectly, (i) an opportunity to gain access to, or otherwise market to, persons who make purchasing decisions for [Marriott] and or its Accounts [e.g., CTF], (ii) any agreement by [Marriott] and or its Accounts to purchase Products from the Vendor or Distributor; (iii) any promotion . . . relating to the Products of the Vendor . . . ; or (iv) any other action taken any [Marriott] . . . which directly or indirectly benefits the Vendor or Distributor . . . Sponsorship Funds shall not include any Marketing Allowances. . .

72. Marriott did not even disclose the existence of such Sponsorship Funds -- let alone account to CTF for them -- until CTF discovered this new category in reviewing the limited documents concerning Avendra provided by Marriott in November 2001. Since then, CTF has unsuccessfully attempted to get an accounting of these funds from Marriott. On January 23, 2002, Marriott acknowledged its practice of soliciting these Sponsorship Funds which it claims have been capped under the PSA at "pre-Avendra levels." In the PSA, Marriott agrees to an annual CPI-adjusted cap of ~~Redacted~~ of Sponsorship Funds, thus betraying the fact that prior to the formation of Avendra, Marriott had been receiving that level of Sponsorship Funds. Yet Marriott never disclosed this practice -- or reported these payments -- to CTF.

73. Marriott contends that the "ad hoc practice of sponsorship" merely involves vendors paying for portions of events to market themselves to the Hotels and thus somehow "increases the profitability" of the Hotels. In fact, CTF believes that Sponsorship Funds have been applied freely by Marriott to fund its corporate expenses.

74. Of course, such payments inescapably fall within the broad definition of Allowances that should have been disclosed and returned to CTF under the 1999 Agreement. Nonetheless, Marriott and Avendra have elected to treat them differently and not to disclose or return them to CTF. Because these Sponsorship Funds are obtained as payments from the vendors to gain access to Marriott buyers or to obtain agreements to sell goods to the Hotels, and because Marriott has refused to disclose or return these funds to CTF, they constitute commercial bribes.

**Marriott Improperly Delegates Core Purchasing Functions to Avendra**

75. Nothing in the Agreements permitted Marriott to delegate its core purchasing power to Avendra. The Management Agreement does not contain any provision authorizing the delegation of Marriott's responsibilities. Nor does the Management Agreement permit any partial assignment of the Manager's rights and obligations.

76. On the contrary, the Management Agreement specifically prohibits any partial delegation or assignment of Marriott's rights without CTF's express consent. Section 14.1 unambiguously states:

Consent. Except as otherwise set forth in this Article 14, neither the Owner nor Operator may transfer or assign this Agreement, or any of its rights hereunder, without the other party's written consent.

(Emphasis added). The Management Agreement permits only a complete assignment of the

Manager's rights, but only then to an affiliate which is at least 50% owned by Marriott which agrees to assume Marriott's obligations under the Agreement, and where Marriott also remains liable on the Agreement to the same extent as if there had been no assignment.

77. Because the purchasing agency conferred upon Marriott under the Management Agreement is one of extreme trust and confidence, involving the exercise and application of Marriott's judgment and discretion, the authority is purely personal and nondelegable absent CTF's explicit authorization. The purchasing functions performed by Marriott are replete with highly discretionary elements at each stage, from the identification of, due diligence on and selection of vendors, the solicitation of bids, the negotiating of terms and prices for goods and services, the negotiation of Allowances and other returns to CTF in consideration for such contracts, the execution on behalf of CTF of binding agreements with vendors, the retention of the records of such agreements and the performance and enforcement of these agreements. This function also includes the highly fiduciary responsibility for the collection of and accounting for Allowances, rebates and similar returns. This broad grant of discretionary agency authority is the epitome of a nondelegable agency. CTF's reliance on Marriott's expertise and, above all, loyalty in discharging these core agency duties is the linchpin of the agency relationship.

78. Nonetheless, without any authority under the Management Agreement, or effort to obtain permission from CTF, Marriott entered into a three year contract, purporting to appoint Avendra as its exclusive agent to perform all aspects of purchasing services on behalf of the Hotels. To enable Avendra to effectuate Marriott's purposes, Marriott purported to vest it with broad agency authority.

79. In the PSA, Marriott purports to delegate to Avendra vast and highly discretionary agency authority and responsibility on behalf of the Hotels for, among other things: (1) the investigation, qualification and selection of vendors and distributors; (2) the negotiation and execution of contracts with vendors and distributors; (3) negotiating the amount of any Allowances or "Sponsorship Funds" (the new category of Allowances created by Defendants in a manifest attempt to evade the Allowance Cap) -- with a particular mission to "maximize Sponsorship Funds and . . . Allowances"; (4)

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(5) collecting, accounting for and distributing Allowances and Sponsorship Funds from vendors and distributors; (6) accounting to Sponsors for Allowances received and deducting Avendra's costs and fees; and (7) maintaining custody of copies of all contracts with vendors and distributors, as well as invoices and related documentation (which Avendra and Marriott continue to refuse to provide to CTF).

### **Marriott's Grant to Avendra of Exclusive Purchasing Power Over a Vast Array of Goods and Services**

80. Without even considering CTF's interests, Marriott has agreed to a three-year exclusive-dealing arrangement with Avendra, promising to use Avendra exclusively for purchases of all items on Schedule A-1 of the PSA. This is a breathtaking commitment, given the vast quantity and variety of goods and services listed on Schedule A-1, which not only encompass, but dwarf the Nine Categories outlined in the 1999 Settlement Agreement.

81. Compared to the Nine Categories of basic hotel supplies for which a fee was permitted under the Marriott Procurement Program ("beverages, food, china, glassware,

silverware, linen, cleaning supplies, guest supplies and uniforms": see supra ¶ 58), the list of products and services committed to the Avendra Procurement Program is all-encompassing. It covers eleven mammoth categories: (1) "Branded Foods"; (2) "Commodity Foods"; (3) "Travel, Transportation and Financial Services," including corporate credit cards, rental car and overnight package services; (4) "Professional Services, HR Benefits & Insurance," including advertising, audiovisual equipment, pharmaceuticals; (5) "Retail," including cameras and promotional merchandise; (6) "Decorative Furnishings," from carpets to mirrors to pianos; (7) "Engineering Products & Services Kitchen Equipment," such as appliances, kitchen equipment, plumbing supplies, laundry equipment and infrared scanning equipment, as well as landscaping services, trash removal and pest elimination; (8) "Operating Supplies," including linens, silverware, uniforms and office supplies; (9) "Energy/Electrical Products," from gas to televisions, water heaters and lighting fixtures; (10) "Distribution Programs and Misc. Products," including safes, electronics and security products and services for the distribution of equipment and supplies; and (11) "Technology," including ATM's, digital equipment and personal wireless equipment. (See Ex. C. Schedule A-1.)

82. In further abdication of its duties, Marriott contractually committed not to conduct internal centralized procurement for any location it owns, franchises or manages (including the Hotels) during the entire three year exclusivity period. Section 2.1 of the PSA states that "[Marriott] and its Affiliates shall not provide, directly or indirectly . . . any centralized purchasing services," i.e., any "procurement activity that [Marriott] or any of its Affiliates initiates that seeks to aggregate demand at multiple locations in the Service Area for, and contract with national or regional vendors or distributors for, Products listed on Schedule A for

purchases by . . . any Account . . . ." In this connection, "Accounts" has been defined as "the respective legal entities that, now or in the future, own [Marriott's] Properties," e.g., CTF. Thus, in pursuit of its own self-interest, Marriott has deliberately, and without obtaining CTF's consent, bound itself not to perform a core agency function for CTF -- except through Avendra.

83. In a further move to shore up Avendra's position, Marriott agreed not to effect any centralized procurement activity even "through a third party buying cooperative." Thus, Marriott effectively repudiated its agreement to serve CTF's interests by foreclosing itself from seeking any competitive bids from other centralized procurement services for three years.

84. Marriott has also committed itself to satisfy a minimum volume purchasing obligation to Avendra of at least \$ **Redacted** a year.

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Because the Hotels represent a significant portion of Marriott's captive purchasing volume in the United States, it is critical to Marriott that the Hotels participate fully in Avendra -- regardless of their particular economic interests.

85. These sweeping commitments serve no interest of CTF. In fact, by locking CTF into costly and uncompetitive arrangements, they directly work to CTF's detriment. Marriott's Improper Threat to Impose the Avendra Fee on Non-Nine Procurement

86. Under section 12.1(a) of the PSA, Marriott has agreed to permit Avendra to assess a fee equal to each participant's aggregate purchases purchased through Avendra, multiplied by a Percentage Mark-up, on a sliding scale of **REDACTED** in 2003 (the "Avendra Fee").

87. Initially, to tranquilize CTF, Marriott specifically claimed that CTF's costs for purchases through Avendra would be unchanged. For example, on January 31, 2001, Jürgen Giesbert, Senior Vice President of Marriott's Renaissance North America division ("Giesbert") represented in writing to CTF that "Avendra is contractually required to continue to supply procurement services for [CTF-owned hotels] for the same fee, and on the same terms, as was formerly provided by MarketPlace. There will be no change in our procurement fee structure for CTF. . . ." (Emphasis added). On April 4, 2001, Marriott's Associate General Counsel reiterated this understanding to CTF:

88. By November 2001, Marriott had markedly changed its tune. Marriott had begun to complain that due to its own arrangements with Avendra, which purportedly required Marriott to pay the Avendra Fee even on procurement outside of the Nine Categories ("Non-Nine Procurement"), it was "losing" "tens of thousands of dollars" each month on procurement for CTF. Marriott knew that it was prohibited under the terms of the Agreements from passing these charges onto CTF. However, beginning in November 2001, Marriott began an improper campaign to coerce CTF into paying the Avendra Fee.

89. On November 1, 2001, Giesbert wrote to CTF directly threatening to cease using purchasing arrangements entered into by Marriott on behalf of the Hotels unless CTF acquiesced in the imposition of the Avendra Fee on Non-Nine Procurement. Repudiating its basic obligations to CTF, Marriott threatened that unless CTF agreed to pay the Avendra Fee on all Avendra purchasing — which was the only centralized purchasing vehicle Marriott was permitted to use during the three year exclusivity period — Marriott would be remitted to "doing procurement on a hotel by hotel basis" at a loss to CTF of "millions of dollars per year."



Marriott threatened this action despite the acknowledged substantial cost savings to CTF produced by system-wide centralized purchasing. By its own terms, Marriott's ultimatum expired 7 days later, on November 8, 2001.

90. On November 8, 2001, CTF refused to succumb to Marriott's improper and highly coercive ultimatum. CTF reminded Marriott that under the 1999 Agreement, Marriott's entire compensation for procurement, beyond the Base and Incentive Fees available to Marriott, was limited to the 3% Procurement Fee payable on the Nine Categories. Accordingly, it advised Marriott, any attempt by a fiduciary to coerce additional payments and concessions for itself for Non-Nine Procurement was itself a violation of its obligations.

91. Ignoring these admonitions and the unequivocal terms of the parties' agreements, on November 30, 2001, Marriott notified CTF of Marriott's unilateral decision to channel all CTF purchasing through Avendra, and to impose Avendra Fees on all CTF procurement, including Non-Nine Procurement. Seeking to characterize CTF's coerced participation in Avendra as a "benefit" for CTF, Marriott proclaimed that Marriott would henceforth charge CTF the "same highly competitive rate that Avendra charges its founding members," <sup>Redacted</sup> through March 31, 2002, instead of the "more drastic and mutually harmful course of ceasing to undertake aggregate procurement on behalf of the Hotels."

92. On December 21, 2001, CTF objected to Marriott's unilateral imposition of the Avendra Fee and instructed Marriott to cease retaining any procurement fee or charge for purchasing because, inter alia: (1) Marriott had improperly transferred its procurement responsibilities to Avendra without CTF's consent or authority under the Management Agreement; (2) Non-Nine Procurement was to be provided in consideration for the Procurement, Base and

Incentive Fees; and (3) the continued imposition of the Procurement Fee even on the Nine Categories was improper because, by its own admission, Marriott was no longer providing central purchasing services. CTF notified Marriott that its conduct constituted a default under the Management Agreement. Marriott has not cured this default.

93. On December 21, 2001, CTF also notified Avendra that it lacked authority to act as CTF's agent because CTF had never approved any purported delegation, assignment or transfer of Marriott's procurement role to Avendra. CTF reiterated its outstanding demand to Avendra, initially made in August 2001, for disclosure of information showing, *inter alia*, the charges, fees, costs and expenses Avendra had charged to CTF, Avendra's treatment of rebates, allowances and Sponsorship Funds attributable to the Hotels and copies of all contracts that Avendra executed on behalf of CTF. Avendra has never responded to any of CTF's letters.

94. Cognizant that its unilateral action in forcing CTF over its explicit objection to use Avendra now jeopardized the Management Agreement, on January 23, 2002, Marriott sought to rationalize its action, by advancing the new argument that under the Management Agreement, Marriott was entitled to recover the "costs" of procurement and depicting the Avendra Fee as simply a "cost" that could be passed onto CTF -- even though the extent of "cost" recovery for procurement was subsumed in the 3% Procurement Fee permitted in the 1999 Agreement and the Base and Incentive Fees.

95. Marriott's newly-minted claim that CTF should pay the Avendra Fee as the purported "cost" of procurement not only contradicted its prior representation in January 2001, that Avendra would not result in any "change in [Marriott's] procurement fee structure for CTF," but also was directly inconsistent with Marriott's own admission that its actual pre-

Avendra costs of providing procurement were "substantially" less than the Avendra Fee and that Avendra's costs of providing the service would be substantially less than the Avendra Fee.

Specifically, on August 8, 2001, Donahue had admitted to CTF that Marriott's own pre-Avendra costs of procurement, which Marriott had previously absorbed, "were substantially lower than the <sup>Redacted</sup> cost of goods fee being paid to Avendra." Nonetheless, despite Marriott's prior false assurances, despite the clear terms of the Management Agreement, despite CTF's continuing objection and despite this admission, Marriott has continued to assert the right to impose the Avendra Fees on the Hotels as the purported "cost" of procurement.

#### **Additional Arrangements Contrary to CTF's Interests**

96. Also without consulting CTF or seeking its consent, Marriott purported to assign to Avendra the benefit of most of its existing purchasing contracts, including all Allowances payable on the purchasing contracts it had assigned (without CTF's knowledge) to Avendra. Under section 10.1(c) of the PSA, Marriott agreed to cause all arrangements with vendors and distributors that "are being assumed by Avendra to be amended as necessary . . . to provide that all Allowances payable in connection with such purchases . . . shall be paid directly to Avendra (and not to [Marriott] or any of its Affiliates or Accounts)." This assignment extends even to vendor and distributor arrangements of CTF and to Allowances due to CTF, even though Marriott claims (in a misconceived attempt to assert compliance with the Management Agreement) that Avendra does not retain any CTF Allowances but is required to "remit such monies promptly to Marriott or [CTF]." PSA § 20.14. CTF receives no benefit, and incurs huge potential risks of misallocation or misappropriation of its Allowances through this arrangement. Indeed, the compulsory channeling of Allowances to Avendra has severely impaired CTF's

ability to exercise its right guaranteed under the 1999 Agreement to audit such allowances "on demand" because Avendra has spurned CTF's disclosure requests, and Marriott has declined to "request" relevant information purportedly in Avendra's exclusive possession.

97. Further reflecting its intention that all its purchasing contracts be assigned to Avendra, Marriott has also agreed to incur penalties for the continued collection and receipt of Allowances on vendor and distributor contracts that it cannot assign to Avendra ("Non-Assignable Contracts"). Under section 3.3(c) of the PSA, if Marriott persists in making purchases under Non-Assignable Contracts which would come within the bailiwick of the vast Avendra Procurement Program, Marriott shall

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### **Anti-competitive Agreements with Vendors and Distributors**

98. Upon information and belief, the Marriott Defendants have permitted Avendra to enter into vendor and distributor agreements (which Defendants have refused to produce to CTF) which include exclusive dealing provisions. On several occasions, including in letters dated November 8, 2001, December 3, 2001 and February 18, 2002, CTF expressed its concern to Marriott that Avendra had entered into exclusive dealing arrangements with major vendors of hotel supplies that prohibit these vendors from dealing directly with the Hotels on a system-wide or individual basis outside of Avendra. Marriott has never responded to, much less denied, these assertions.

99. Despite CTF's repeated requests, Marriott and Avendra have refused to

produce copies of any vendor and distributor agreements, or even summaries of their terms.

Self-Dealing with Affiliates

100. Marriott's arrangements with Avendra also violate the Management Agreement's prohibition against self-dealing. Specifically, section 3.3 of the Management Agreement provides that without CTF's written approval in each instance,

[Marriott as Manager] shall have no authority of behalf of [CTF] to . . .

- (c) purchase goods, supplies or services from itself or any [Marriott affiliate] unless (i) expressly authorized in this [Management] Agreement or (ii) the prices and terms thereof are competitive with those obtainable from unrelated vendors for similar quality goods, supplies and services . . . .

101. With respect to Avendra, the requirements in Section 3.3(c) have not been met in several ways. First, the cost to CTF of procurement services ~~Redacted~~ is excessive, even when compared with Marriott's own previous centralized purchasing services (which, Marriott has admitted, provided procurement at a far lower cost to Marriott -- without any additional charge to CTF for Non-Nine categories).

102. Second, the prices and terms of goods and services through Avendra are not "competitive with those obtainable from unrelated vendors for similar quality goods, supplies and services. . . ." "in each instance" as required under section 3.3 of the Management Agreement. Under section 1.2(d) of the PSA, Avendra offers only to demonstrate its purported cost competitiveness by examining its costs "collectively as a whole and not on an item by item basis." (Emphasis added). This competitiveness test is applied before adding on Avendra's substantial fee (or Marriott's even greater proposed mark-up). In fact, numerous Avendra specified products are available through other purchasing agents on better terms and prices than

through Avendra, and that has been true even without the volume discounts achievable by aggregating purchasing on behalf of all of the Hotels.

**Defendants' Continued Stonewalling on Avendra**

103. Immediately after the creation of Avendra, CTF began a long and still unsuccessful campaign to obtain disclosure from the Marriott Defendants concerning their arrangements with Avendra and its transactions on CTF's behalf. CTF has been rebuffed at every turn.

104. In response to CTF's initial request on February 6, 2001, Marriott offered only a brief summary of Avendra, and refused to produce to CTF any of the underlying documents creating Avendra or related to Marriott's investment in Avendra, claiming that these documents were subject to a confidentiality agreement with Avendra and therefore could not be produced unless CTF agreed to a confidentiality agreement.

105. On or about July 19, 2001, CTF further detailed its request for Avendra information and explained to Marriott, that as its agent with duties of disclosure, it could not properly make access to this information conditional on its principal executing a confidentiality agreement.

106. Defendants refused to abandon their improper demand. On August 8, 2001, Marriott informed CTF that because Avendra refused to waive the condition of confidentiality, Marriott was unable to produce the majority of the requested information without a confidentiality agreement.

107. Unable to get information from Marriott, on August 14, 2001, CTF wrote directly to Avendra, requesting copies of the agreements with Marriott and third parties, the

terms of the relationship between Avendra and Marriott and the material terms of procurement for CTF and fees and charges to CTF arising out of that relationship. To this very day, Avendra has never responded to CTF's request or produced the information sought.

108. Recognizing that Defendants would continue to invoke confidentiality concerns to resist disclosure, on October 29, 2001, CTF reluctantly agreed to a limited confidentiality agreement, based on CTF's understanding that Marriott would provide complete disclosure, and without prejudice to CTF's position that Marriott's disclosure obligations were not contingent on a confidentiality agreement. Marriott has never provided complete disclosure.

109. After nine months of stonewalling, on November 14, 2001, Marriott produced a very limited set of Avendra corporate documents but failed to produce several categories of requested documents that were regularly maintained by Avendra and readily available to Marriott under the terms of the PSA. Disturbingly, Marriott failed to produce documents on the central issue of what benefits Marriott actually reaps from Avendra (including Marriott's current ownership interest or total participation in Avendra), or documents showing the charges being imposed on CTF. In fact, Marriott had wholly ignored – and continues to resist – CTF's request for summaries of: (1) all Avendra related fees, charges, costs, and expenses that had been charged to the Hotels during 2001; (2) all fees, charges, or other economic benefits which Marriott had derived from the implementation of the PSA with Avendra vis-à-vis the Hotels during 2001; (3) how Avendra had treated all rebates attributable to procurement related to the Hotels; and (4) Avendra's cost allocation methodology.

110. Arrogating to itself the right to censor CTF's right to "examin[e]" and "inspect[]" the books and records of the Hotels, Marriott also unilaterally declared that it would

"not be providing internal memoranda or other documents that are not agreements but nonetheless somehow 'relate' to the requested agreements." In short, Marriott refused to provide to CTF anything but the "bare-bones" corporate documents creating Avendra, such as the PSA.

111. On December 3, 2001, CTF wrote to Marriott identifying the serious deficiencies in Avendra production, and itemizing the documents that should have been produced. Despite several follow-up requests by CTF, Marriott and Avendra have produced precious little additional responsive information.

112. On January 23, 2002, Marriott attempted to rationalize its refusal to furnish the Hotels' records for inspection by claiming, incredibly, that the propriety of Marriott's use of Avendra is a "legal question," thereby rendering the information CTF had requested concerning the nature of that relationship "irrelevant." By this meritless argument, Marriott has refused to yield, among other things: (1) any copies of vendor and distributor agreements entered into by Avendra on CTF's behalf; (2) any information about Sponsorships solicited by Avendra on CTF's behalf; and (3) any Avendra invoices to Marriott for services related to CTF.

113. Marriott has also attempted to evade its disclosure obligations on the specious basis that since it has not asked Avendra for the requested information, it has no obligation to produce it. Under this pretext, and ignoring that it had both the power and the duty to demand information of Avendra, Marriott refused to disclose to CTF operational reports generated by Avendra or customer transaction data (i.e., data for each Hotel) generated by Avendra. Marriott has also deliberately refrained from exercising its powers under the PSA to demand that Avendra produce information responsive to CTF's questions about Avendra's treatment of Allowances related to CTF.



114. Finally, Marriott has doggedly refused to produce any copies or even summaries of Avendra's agreements with vendors and distributors, purportedly because there are "thousands" of such of such agreements. Of course, the fact that Avendra has entered into "thousands" of contracts implicating CTF's rights does not excuse, but rather dramatically increases, Marriott's and Avendra's disclosure obligations to CTF. The purported volume of these agreements underscores the breadth of the agency power improperly delegated to Avendra and dictates the highest level of candor and disclosure.

115. Marriott's persistent refusal to respond to CTF's legitimate and reasonable disclosure requests related to the subject matter of the agency directly violates the Agreements and also violates Marriott's fiduciary obligations toward CTF.

**Marriott's Continued Negotiation and Receipt of  
Secret Kickbacks: Molloy Audio-Visual Service**

116. Beginning in or about 1998, Marriott sought to persuade CTF to participate in the Marriott Visual Presentations Program ("MVP") which provided (1) audio-visual services and (2) audio-visual-related equipment to hotels managed by Marriott. The audio-visual services component of the MVP would be provided by a third party, Molloy, through separate contracts between each of the Hotels and Molloy. The second component would be a lease of audiovisual equipment, provided directly by Marriott.

117. At Marriott's direction, the Hotels entered into individual contracts with Molloy. Although Marriott assisted in negotiating and was intimately aware of all of the terms of the Molloy Agreements, and had in fact transmitted each of the separate contracts for eighteen individual Hotels to CTF for execution, it was not a party to any of the Molloy Agreements. The

Molloy Agreements provide that each CTF Hotel engages Molloy to perform certain audiovisual consulting and training services (the "A/V Services"), and that for Molloy's performance of A/V Services, each Hotel shall pay Molloy a fee of 5.8% of the guest invoices for such A/V Services (the "A/V Fee").

118. The Molloy Agreements specifically recite that the A/V Fee is paid to Molloy -- and only Molloy -- for the A/V Services. The Molloy Agreements state that "such fee is market-based and Owner acknowledges that such fee includes a reasonable return." On its face, this provision provides that Molloy would earn a reasonable return. Under the Molloy Agreements, the fee is paid by each Hotel to Molloy "c/o Marriott."

119. Nowhere do the Molloy Agreements disclose, let alone permit, Marriott or Molloy to divert any portion of the A/V Fee to Marriott.

120. The second element of MVP was the lease of equipment provided by Marriott at an 8% interest rate for a five-year term (the "Lease"). CTF understood that as the lessor of the audiovisual equipment, Marriott could make a profit on the Lease to the extent its costs were less than the 8% lease payments. CTF never agreed to Marriott making an additional profit on the Molloy Agreements themselves.

121. By early 2001, CTF began requesting from Marriott information of the amount of Allowances and/or returns Marriott was retaining on its permitted Return/Allowance programs. After several months, Marriott wrote CTF in August 2001 that it was making a "return" on MVP, but evasively failed to identify, or quantify, its kickbacks from Molloy. CTF persisted in trying to get a specific answer.

122. Finally, on February 13, 2002, one week after CTF exercised its right to