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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

JOHN J. FLATLEY and GREGORY  
STOYLE, as trustees for the CROWN  
HOTEL NOMINEE TRUST and THE 1993  
FLATLEY FAMILY TRUST,

Plaintiffs,

v.

MARRIOTT INTERNATIONAL, INC.,  
a Delaware corporation,  
MARRIOTT HOTEL SERVICES, INC.,  
a Delaware corporation,  
MARRIOTT INTERNATIONAL DESIGN  
& CONSTRUCTION SERVICES, INC.,  
a Delaware corporation, and  
AVENDRA, LLC,  
a Delaware limited liability company,

Defendants.

**02 CV 11577 RCL**

CIVIL ACTION NO.

RECEIPT # 40955  
AMOUNT \$ 15.00  
SUMMONS ISSUED yes  
LOCAL RULE 4.1         
WAIVER FORM         
MCF ISSUED         
BY DPTY. CLK. SES  
DATE 8/6/02

**COMPLAINT**

1. Plaintiffs John J. Flatley and Gregory Stoye, as trustees for the Crown Hotel Nominee Trust and The 1993 Flatley Family Trust (collectively, the "Owner" or "Flatley"), by their undersigned attorneys, Dwyer & Collora, LLP and Milbank, Tweed, Hadley & McCloy LLP, bring this action against defendants Marriott International, Inc. ("Marriott International"), Marriott Hotel Services, Inc. ("Marriott Hotel Services"), Marriott International Design & Construction Services, Inc. ("Marriott Design & Construction") (jointly, the "Manager" or "Marriott"), and Avendra, LLC ("Avendra") (jointly, with Marriott, the "Defendants"), and complain and allege as follows:

(1)

## THE PARTIES

2. Plaintiffs John J. Flatley and Gregory Stoye are trustees for the Crown Hotel Nominee Trust and The 1993 Flatley Family Trust, two legal trusts organized under the laws of the Commonwealth of Massachusetts. Messrs. Flatley and Stoye manage the affairs of the Crown Hotel Nominee Trust and The 1993 Flatley Family Trust from their offices in Braintree, Massachusetts.

3. Defendant Marriott International is a Delaware corporation with its principal place of business in Bethesda, Maryland. Marriott International is a worldwide hospitality company that owns, manages, and franchises hotel properties.

4. Defendant Marriott Hotel Services is a Delaware corporation with its principal place of business in Bethesda, Maryland, and is a wholly-owned and controlled subsidiary of Marriott International.

5. Defendant Marriott Design & Construction is a Delaware corporation with its principal place of business in Bethesda, Maryland, and is a wholly-owned and controlled subsidiary of Marriott International.

6. Avendra is a Delaware limited liability company with its principal place of business in Rockville, Maryland. Avendra is owned and controlled by Marriott. Certain other hotel competitors, including Hyatt Hotels Corporation and Bass (together with Marriott, the "Founders"), also own lesser interests in Avendra. Joseph Ryan, the Executive Vice President and General Counsel of Marriott International, also serves as the Chairman of the Board of Avendra. Avendra's management includes many other former Marriott officials:

- (a) Dennis M. Baker, Avendra's President and Chief Operating Officer, had been employed by Marriott for the previous thirteen years and was responsible for, among other things, procurement; Baker was formerly the Executive Vice President and General Manager of a Marriott affiliate known as MarketPlace by Marriott ("MarketPlace");

- (b) Jane Marie Dunigan, Avendra's Chief Information Officer, was formerly employed by Marriott in various technical positions;
- (c) Scott Hollis, Avendra's Senior Vice President, was formerly with Marriott since 1985 in various positions within the procurement organizations that led to the formation of Marketplace;
- (d) Michael A. Pusateri, Avendra's Senior Vice President of Sales and Customer Management, was formerly vice president of interactive sales and marketing as well as vice president of business travel sales for Marriott; and
- (e) Hetz Wochholz, Avendra's Vice President of Founder Relations, formerly worked with Marriott for over 20 years.

### **JURISDICTION AND VENUE**

7. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a) because the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different states. This Court has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the action arises under the laws of the United States, specifically, 15 U.S.C. §§ 13(c) and 15(a) (Robinson-Patman Act).

8. Venue is proper in this District under 28 U.S.C. §§ 1391(a)(1), (a)(3) and (b)(1) because a substantial part of the events and/or omissions giving rise to Flatley's claims in this action occurred in this District and all Defendants are subject to personal jurisdiction in this District. In addition, venue is proper in this District under 15 U.S.C. § 22 because all Defendants transact business and can be found in this District. Marriott has specifically agreed to the jurisdiction of this court.

### **NATURE OF THE CONTROVERSY**

9. This Complaint arises out of the unlawful acts of Defendants, acting in concert, in connection with their management and mismanagement of the Boston Marriott Quincy Hotel (the

“Hotel”). The Hotel is a first-class hotel located in Quincy, Massachusetts, that was developed by The 1993 Flatley Family Trust, a predecessor-in-interest (in connection with the Hotel) to the Crown Hotel Nominee Trust, and was opened for business on May 15, 2001.

10. The 1993 Flatley Family Trust entered into a Management Agreement with Marriott dated as of January 28, 2000, a true and correct copy of which is attached hereto as Exhibit B and incorporated herein by reference.

11. The 1993 Flatley Family Trust also entered into a Procurement Agreement with Marriott dated as of November 1, 2000, a true and correct copy of which is attached hereto as Exhibit C and incorporated herein by reference.

12. Pursuant to the Management Agreement and the Procurement Agreement, Marriott agreed to manage the Hotel for the account of Flatley. These agreements conferred upon Marriott discretion and control over management of the Hotel, including purchasing all goods and services provided at the Hotel, setting prices, marketing, budgeting, accounting, and handling funds belonging to Flatley.

13. This arrangement between Marriott and Flatley, by its very nature and judged by the course of conduct thereunder, created a fiduciary relationship, with Flatley holding Marriott in (and Marriott assuming) a position of trust and confidence in connection with Marriott’s management of the Hotel.

14. Marriott, acting together with its wholly-owned and controlled subsidiaries, including Marriott Distribution Services and MarketPlace, and with Avendra, flagrantly abused this position of trust, repeatedly breaching the contractual and fiduciary duties owed to Flatley. Completely ignoring its duty to manage the Hotel for the benefit of Flatley and to put Flatley’s interests ahead of its own, Marriott, acting in concert with its wholly-owned and controlled subsidiaries, including Marriott

Distribution Services and MarketPlace, and with Avendra, has used its control, superior knowledge, and assumed fiduciary duties to enrich itself and secure improper and unjustified profits for its own account at Flatley's expense.

15. Beyond these contractual and fiduciary breaches, Marriott, in connection with its role as the manager of the Hotel, and Avendra, Marriott's supplier of goods and services in various transactions conducted supposedly on Flatley's behalf, engaged in a pattern of fraudulent conduct, intentionally misrepresenting to Flatley the financial status of the Hotel and reaping millions of dollars in illegal profits through secret kickback schemes, undisclosed self-dealing transactions, and a variety of other improper maneuvers.

16. As set forth more fully herein, Marriott, solely or acting in concert with its wholly-owned and controlled subsidiaries, including Marriott Distribution Services and MarketPlace, and with Avendra, materially breached the Management Agreement and/or the Procurement Agreement and breached its assumed duties as an agent and fiduciary of Flatley and, in certain instances, defrauded Flatley by, among other things:

- (a) failing to employ the requisite duty of care in screening and hiring employees, some of whom were known convicted drug traffickers, who have been charged with and/or convicted of, among other things, domestic assault, assault with intent to rape, and assault with a deadly weapon, and who admitted to keeping a gun and illegal drugs in the men's locker room at the Hotel's health club, failing to notify Flatley of this dangerous situation for over three weeks, and failing to take appropriate action when specifically advised of these problems;
- (b) engaging and acquiescing in and/or condoning accounting irregularities, nondisclosures, and concealment in violation of its duties and obligations to Flatley;
- (c) failing to maintain accurate and complete books, records, and financial statements for the Hotel;

- (d) operating the Hotel, an \$80 million property, with an unapproved budget and misrepresenting to Flatley projected revenues for the Hotel;
- (e) intentionally failing to disclose and/or account for and remit to Flatley all monies collected by Marriott, its affiliates, and/or related parties;
- (f) obtaining secret kickbacks for its own account, and not the account of Flatley, from undisclosed vendors and from Avendra that provided goods and/or services to the Hotel;
- (g) engaging in undisclosed self-dealing transactions with its affiliates and/or related parties, including Avendra;
- (h) unlawfully allocating its corporate, affiliate, and/or related-party overhead to the Hotel; and
- (i) failing to provide a proper accounting of fees, allowances, charges, commissions, bonuses, discounts, rebates, profits and/or kickbacks paid to Marriott, its affiliates, and/or related parties, including Avendra.

17. Defendants' improper conduct was committed knowingly, intentionally, recklessly, willfully, and in conscious disregard of the rights of Flatley.

18. As noted, by its conduct, Marriott is in default under the Management Agreement, having failed, in a myriad of ways, to "keep, fulfill or perform covenants, undertakings, obligations or conditions set forth in the Agreement." Management Agreement § 9.01.E, at 30 (Exh. B). Accordingly, on August 5, 2002, Flatley served Marriott with a Notice of Defaults, a true and correct copy of which is attached hereto as Exhibit A and incorporated herein by reference.

19. Upon information and belief, in connection with the management of the Hotel, Marriott Hotel Services and Marriott Design & Construction have been completely dominated and controlled by Marriott International, their corporate parent. Similarly, upon information and belief, Avendra has been completely dominated and controlled by Marriott International. All Defendants

have acted in concert to the detriment of Flatley, in breach of their contractual and fiduciary duties, and in a fraudulent and otherwise tortious manner.

### **FACTUAL BACKGROUND**

#### **A. Marriott's Duties And Breaches Thereof**

20. In entering the Management Agreement and the Procurement Agreement, Marriott agreed expressly and by direct implication to manage the Hotel as the agent of Flatley and to operate the Hotel for the account of Flatley.

21. The Procurement Agreement explicitly states that Marriott is Flatley's agent in fulfilling Marriott's duties and obligations: "Marriott, acting as agent for Owner, shall complete and place all purchase orders and perform all other procurement services." Procurement Agreement § 2.1 (Exh. C); see also id. § 2.3(e) ("In performing the Work, Marriott will: . . . (e) As agent for Owner, use commercially reasonable efforts to cause vendor to ship all Goods"); id. § 11.5 ("Agency. In performing the services hereunder, Marriott is acting solely as Owner's agent.").

22. Although the Management Agreement does not contain comparable express provisions, and, indeed, in Section 11.03 purports to disclaim Marriott's agency status, Marriott, by the substantive provisions of the Management Agreement and by its acts and representations, both independently and in concert with its wholly-owned and controlled subsidiaries, including Marriott Distribution Services and MarketPlace, and with Avendra, assumed the duties of an agent for Flatley in all relevant respects and thereby committed itself to be bound by the standards governing fiduciary relationships.

23. Section 1.02.B of the Management Agreement provides that Marriott "shall manage the Hotel for the benefit of the Owner in accordance with commercially reasonable practices of a prudent manager of first-class hotels and in accordance with the System Standards," which are

defined as standards “generally prevailing or in the process of being implemented at other hotels in the Marriott System.”

24. In this regard, Marriott’s duties and obligations under the Management Agreement are all-encompassing, including the following pursuant to Section 1.02.B (in which Marriott is referred to as the “Manager”):

- (a) As appropriate, recruit, employ, supervise, direct and discharge the employees at the Hotel;
- (b) Consistent with the procedures Manager uses at other similarly situated hotels that it manages, establish prices, rates and charges for services provided in the Hotel, including guest room rates;
- (c) Establish and revise, as necessary, administrative policies and procedures, including policies and procedures for the control of revenue and expenditures, for the purchasing of supplies and services, for the control of credit, and for the scheduling of maintenance, and verify that the foregoing procedures are operating in sound manner;
- (d) Make payments on accounts payable and handle collections of accounts receivable;
- (e) Arrange for and supervise public relations and advertising, prepare marketing plans, and make available to the Hotel the benefits of various marketing programs in use in the Marriott System as they may exist from time to time, such as the Marriott Rewards Program;
- (f) Procure all Inventories and replacement Fixed Asset Supplies;
- (g) Prepare and deliver interim accounting, annual accountings, Annual Operating Projections, Building Estimates, FF&E Estimates, and such other information as is required by this Agreement and be available at reasonable times to discuss the above-listed items as well as the operations at the Hotel generally with Owner;
- (h) Plan, execute and supervise repairs, maintenance, and FF&E purchases at the Hotel;
- (i) Provide, or cause to be provided, risk management services relating to the types of insurance required to be obtained by Manager under this Agreement;
- (j) Except as provided in the Addendum, obtain and keep in full force and effect, either in Manager’s name on behalf of Owner or in Owner’s name, as may be required by the Legal Requirements, any and all licenses and permits to the extent same is within the control of



Manager (or, if same is not within the control of Manager, Manager shall use all due diligence and reasonable efforts to obtain and keep same in full force and effect);

- (k) As agent for Owner, negotiate, enter into, and modify leases, subleases, concessions and licenses for shops and other facilities within the Hotel;
- (l) Administer the leases, subleases, licenses and concessions for shops and other facilities within the Hotel;
- (m) Provide, or cause to be provided, services generally provided or available for similar hotels operated by Manager as part of the Marriott System;
- (n) Reasonably cooperate with Owner in the Sale of the Hotel;
- (o) Reasonably cooperate with Owner in matters concerning (i) contest of Impositions or other Legal Requirements and (ii) adjustments of insurance claims and condemnation awards involving the Hotel.

25. Section 1.02.C of the Management Agreement further provides that “[t]he operation of the Hotel shall be under the exclusive supervision and control of Manager which, except as otherwise specifically provided in the Agreement, shall be responsible for the proper and efficient operation of the Hotel. In fulfilling its obligations under this Agreement, Manager shall act as a reasonable and prudent operator of the Hotel, having regard for the status of the Hotel and maintaining the System Standards.”

26. By Marriott’s agreement to manage the Hotel for the benefit of Flatley pursuant to the above provisions, among others, and through Marriott’s acts and representations, a special relationship of trust and confidence was created between Marriott and Flatley. Marriott held itself out as Flatley’s agent and assumed all of the fiduciary obligations of an agent, including duties of loyalty, good faith, fair dealing, due care, and candor with respect to its dealings on behalf of Flatley.

27. Marriott has specialized knowledge of the hotel management industry. By allowing Marriott to manage the Hotel, Flatley relinquished control over the financial and other affairs of the Hotel and conferred upon Marriott wide authority to act on important matters and to make

discretionary judgments. Flatley, in entering into the Management Agreement, demonstrated its readiness to follow Marriott's guidance. Flatley clearly depended and relied upon Marriott's judgment and expertise in the business and property matters relating to the Hotel. Marriott knew that Flatley so depended and relied upon Marriott.

28. Based on its knowledge at the time the Management Agreement and the Procurement Agreement were executed, Flatley reasonably placed its trust in Marriott, which held itself out as having the requisite expertise and trustworthiness to act as Flatley's agent and fiduciary in operating the Hotel. Flatley did not know and reasonably could not have known that Marriott would engage in the malfeasance set forth herein.

29. Marriott has abused its position of trust and confidence and has failed to act as the "reasonable and prudent operator" it committed to be. Marriott, acting in concert with its wholly-owned and controlled subsidiaries, including Marriott Distribution Services and MarketPlace, and with Avendra, has willfully subordinated the interests of Flatley and the Hotel to its own interests and those of Avendra, and has used the Hotel as a vehicle for obtaining kickbacks from suppliers, unlawfully siphoning profits from the Hotel for its own account, and otherwise defrauding Flatley.

30. In addition to breaching its fiduciary duties as Flatley's agent, Marriott has breached numerous provisions of the Management Agreement and Procurement Agreement, including, among others, many of the provisions of Sections 1.02.B and 1.02.C cited above in Paragraphs 24 and 25, as well as the following provisions:

- (a) Section 1.04.A: "No person shall otherwise be given gratuitous accommodations or services without prior joint approval of Owner and Manager, except in accordance with usual practices of the hotel and travel industry."
- (b) Section 1.04.B: "Manager shall provide the Owner with the resume . . . [of] a candidate for general manager or controller" and

shall “provide the Owner with the opportunity to approve the hiring of the general manager and controller of the Hotel”;

- (c) Section 1.05: “Owner and its agents shall have access to the Hotel at any and all reasonable times for the purpose of inspection . . . or for any other reasonable purpose”;
- (d) Section 1.06: “Manager shall consult with and advise Owner regarding the conduct of business at the Hotel, as reasonably requested by Owner”;
- (e) Section 3.01: Manager’s fees for managing the Hotel are limited to a Base Management Fee and an Incentive Management Fee;
- (f) Section 4.02: “Books of control and account pertaining to operations at the Hotel shall be kept on the accrual basis and in all material respects in accordance with the Uniform System of Accounts [for the Lodging Industry] and generally accepted accounting principles (“GAAP”), as applicable”;
- (g) Section 4.02: “Owner may at reasonable intervals during Manager’s normal business hours examine” the books and records maintained by Manager;
- (h) Section 4.04: “Manager shall deliver to Owner for its review and approval, at least forty-five days (45) prior to the beginning of each Fiscal Year . . . a preliminary draft of a business plan showing the estimated Gross Revenues, departmental profits, Deductions, and Operating Profit for the forthcoming Fiscal Year, in comparison to the forecasted Gross Revenues, departmental profits, Deductions, and Operating Profit for the current Fiscal Year.”
- (i) Section 4.04: “In the event that Owner and Manager fail to mutually agree on the Business Plan within forty-five (45) days after the submission to Owner of the preliminary draft of such Business Plan, all matters shall be determined by [an] Expert in accordance with the provisions of Section 11.21”; and
- (j) Section 12.01: “Competitive Set shall consist of: the Braintree Massachusetts Sheraton Hotel, the Dedham Massachusetts Hilton Hotel, and the Newton Massachusetts Marriott Hotel.” “Owner and Manager agree to mutually, reasonably and in good faith, discuss appropriate changes to the foregoing list of the hotels in the Competitive Set.”

**B. Defendants' Concealment of the Hotel's Accounts**

31. As noted above, the Management Agreement and the Procurement Agreement require that Marriott perform all duties in connection with managing the Hotel for the account of Flatley.

32. Section 4.03.A of the Management Agreement grants Marriott the power to manage and maintain the accounts into which all funds generated by Hotel operations are to be deposited. Specifically, Section 4.30.A states that “[a]ll funds derived from the operation of the Hotel shall be deposited by Manager in Hotel bank accounts (the “Operating Accounts”) in a bank or banks designated in writing by Owner, subject to Manager’s reasonable approval.” All of the Hotel accounts that Marriott maintains and manages, the funds in those accounts, and the funds generated by the Hotel are held in trust by Marriott for the account of Flatley.

33. Marriott has been and continues to be in possession and control of the accounting system for the Hotel and directly controls the generation and transmission of monthly financial statements and the annual certified financial statements for the Hotel. Pursuant to Section 4.02 of the Management Agreement, Marriott is required to maintain “[b]ooks of control and account pertaining to operations at the Hotel . . . on the accrual basis and in all material respects in accordance with the Uniform System of Accounts [for the Lodging Industry] and generally accepted accounting principles (“GAAP”), as applicable.”

34. Pursuant to Section 4.02 of the Management Agreement and Marriott’s fiduciary duties to Flatley, Flatley is entitled to a full and fair accounting of Marriott’s operation of the Hotel, including disclosure of certain costs charged by Marriott in operating the Hotel as part of the Marriott chain of hotels and the Hotel’s pro rata fair and equitable share of those costs for which Marriott is entitled to reimburse itself out of the Hotel’s accounts. Moreover, Flatley is entitled to

inspect the books and records maintained by Marriott and its affiliates and/or related parties to the Hotel.

35. As set forth in the Notice of Defaults (Exh. A), Marriott has breached the Management Agreement by, among other things:

- (a) failing to permit Flatley to examine the books and records of the Hotel and withholding information about the finances and accounting of the Hotel;
- (b) failing to ensure that all books and accounts are kept on an accrual basis in accordance with the Uniform System of Accounts and Generally Accepted Accounting Principles; and
- (c) failing to provide requested back-up documentation regarding expense reports, despite repeated requests by Flatley.

**C. Defendants' Extraction Of Unlawful Profits From the Hotel**

36. Pursuant to Section 5.1 of the Procurement Agreement, Marriott's compensation under the Procurement Agreement is limited to a fixed "procurement fee" for its "Work."

37. Pursuant to Section 3.01 of the Management Agreement, Marriott's fees under the Management Agreement are limited to a "Base Management Fee" and an "Incentive Management Fee." The Base Management Fee is defined as "an amount payable to Manager as a deduction from Gross Revenues equal to three percent (3%) of Gross Revenues for each Fiscal Year or portion thereof." Management Agreement § 12.01, at 47 (Exh. B). The Incentive Management Fee is defined as "an amount payable to Manager that is equal to twenty percent (20%) of Available Cash Flow in any Fiscal Year (or portion thereof)." Management Agreement § 12.01, at 53 (Exh. B).

38. In addition, Section 1.03 of the Management Agreement provides that Marriott is to receive payment for so-called "Chain Services," defined as services

that are furnished generally on a central, regional or other group basis to other hotels in the Marriott System and which benefit such hotels as: (i) national sales offices services; central training services; career development and

relocation of management personnel; central advertising and promotion (including direct and image media and advertising administration; the Marriott national reservations system services and the Marriott computer payroll and accounting services; benefits administration; gift shop merchandise handling; and (ii) such additional central, regional or other group services as are or may be, from time to time, furnished for the benefit of hotels in the Marriott System or in substitution for services now performed at individual hotels which may be more efficiently performed on a group basis.

39. Pursuant to Section 1.03 of the Management Agreement, Marriott may reimburse itself for Chain Services as follows:

The charges for Chain Services shall include, as applicable, allocation of salaries, wages, and overhead related to the employees of Manager, Marriott, or any Affiliate involved in providing any of the Chain Services and shall be allocated on a fair and equitable basis among all hotels receiving such services; provided, however, in no event will the total charge for all the Chain Services which are described in clause (i) of this Section 1.03 (exclusive of reservations) for any given Fiscal Year, exceed two and three tenths percent (2.3%) of Gross Revenues (the "Chain Services Cap").

40. Thus, Marriott's sole reimbursement for the provision of Chain Services consists of payments based upon the Hotel's "fair and equitable" share of the cost of providing Chain Services to the Hotel.

41. Marriott is not entitled to any compensation under the Management Agreement other than the Base Management Fee and the Hotel's fair and equitable share of the cost of Chain Services, and is entitled to a share in the Hotel's profits only in the form of the Incentive Management Fee.

42. The fee structure created by the Management Agreement was intended to align the interests of Flatley and Marriott by rewarding Marriott for maximizing the returns to Flatley. This arrangement has proved lucrative for Marriott. In the Hotel's first year of operation, Marriott received a Base Management Fee of \$561,249 through May 17, 2002.

43. However, not content with this return, in the first year of the Hotel's operation, Marriott exploited the discretionary nature of the Management Agreement's compensation system, padding its "reimbursement" for Chain Services with a variety of purported expenses and costs for chain-based programs that are, in fact, not fairly attributed to the Hotel. This scheme to inflate its Chain Services "reimbursement" resulted in Marriott paying itself a total of \$939,800 through May 17, 2002. This fee is over-billed and fraudulent, the result of Marriott's over-allocation of various general, administrative, and corporate overhead costs and expenses to Flatley in violation of the Management Agreement and Marriott's duties, fiduciary and otherwise, toward Flatley. Because of Marriott's refusal to make the relevant books and records available to Flatley, Flatley has been unable to determine precisely how widespread such over-allocation has been.

44. Beyond its abuse of the Chain Services provisions of the Management Agreement, Marriott has persistently sought to devise other ways to skim a profit by passing on bogus "costs" to the Hotel. As further described below, evidently dissatisfied with the generous compensation package already available to it, Marriott, acting in concert with its wholly-owned and controlled subsidiaries, including Marriott Distribution Services and MarketPlace, and with Avendra, has persistently conjured up new ways of repackaging the Manager's basic management functions as "new programs" or "third party" fees to pass these costs onto the Hotel. Upon information and belief, Marriott has also used its vast purchasing power on behalf of the Hotel, representing tens of millions of dollars annually, to create a virtual slush fund of off-the-books rebates from vendors that Marriott has retained without seeking Flatley's consent.

45. Most recently, Marriott has sought to ratchet up its profits and squeeze more out of the Hotel by channeling all procurement for the Hotel through Avendra, then seeking to impose

additional, unauthorized fees for such procurement on the Hotel. These schemes enable Marriott to garner increased profits for itself regardless of the actual performance of the Hotel.

**D. Marriott's Self-Interested Strategy: Illegal Purchasing And Kickback Schemes**

46. As manager of the Hotel, Marriott has ruthlessly pursued its own self-interest at the expense of the Hotel and willfully disregarded its duties to the Hotel. 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 Flatley as Owner.

47. In aid of this rapacious objective, Marriott has implemented a set of programs and procedures relating both to traditional managerial functions and outside vendor roles, enabling Marriott, through its affiliates, to directly profit from these transactions, regardless of the increased and non-competitive costs thereby imposed on the Hotel.

48. As stated above, in the Hotel's first year of operation, Marriott, through May 17, 2002, earned a Base Management Fee of \$561,249 and made charges and program allocations to the Hotel of \$939,800 for what it claimed to be Chain Services. Marriott unlawfully obtained and retained additional hidden compensation and/or profits from the operation of the Hotel in violation of Marriott's duties and obligations to Flatley.

49. Marriott, in its capacity as fiduciary and agent of Flatley, entered into contracts with vendors for the purchase of goods and services that were negotiated by Marriott, its affiliates, and/or related parties, including Avendra. In connection with these contracts, Marriott received and retained, and in some instances, Avendra paid to Marriott, kickback or rebate payments which served to increase Flatley's costs for these goods and services, to Marriott's benefit.

50. In early 2001, Marriott launched Avendra, a centralized online purchasing company, as a joint venture with a number of other hotel management competitors. Upon information and



belief, Marriott has entered into a three-year contract with Avendra that requires the Hotel to make purchases through Avendra for the items included in the service agreement between Marriott and Avendra.

51. Before Avendra was created, Marriott arranged for its purchase of goods and services for the Hotel through yet other affiliates and/or related parties: Marriott Distribution Services and MarketPlace. Upon information and belief, just as is currently the case with Avendra, Marriott Distribution Services and MarketPlace received rebates from vendors for goods and services provided to the Hotel.

52. Further, the supplier that Avendra uses to supply goods and services to the Hotel (and, upon information and belief, the same supplier used by Marketplace and by Marriott's own centralized purchasing service before the creation of Avendra) is yet another Marriott affiliate and/or related party, Marriott Distribution Services. Upon information and belief, Marriott Distribution Services also has profited and will continue to profit from the provision of Chain Services to the Hotel. Such profit-taking is in violation of the Management Agreement.

53. Marriott's receipt of unlawful profits and kickbacks from the provision of these Chain Services through Avendra and Marriott's own centralized purchasing services resulted in increased and unnecessary costs to Flatley and a corresponding diversion of Flatley's funds to Marriott and a decrease in Flatley's profits from the Hotel in violation of Marriott's contractual and fiduciary duties to Flatley.

54. In addition to the fees allowed pursuant to the Management Agreement and the Procurement Agreement, Marriott and its affiliates and/or related parties obtained undisclosed kickbacks from vendors to the Hotel. Under the Management Agreement and Procurement Agreement and as Flatley's agent, Marriott, its affiliates, and/or related parties, including Avendra,

had a duty to enter into fair contracts and were prohibited from entering into contracts with vendors to the Hotel that provided kickbacks to Marriott, its affiliates, and/or related parties.

55. Marriott intentionally and willfully failed to disclose to Flatley the existence and amounts of the kickbacks associated with such vendors, in furtherance of a scheme to defraud Flatley.

56. Marriott, acting in concert with its wholly-owned and controlled subsidiaries, including Marriott Distribution Services and MarketPlace, and with Avendra, intended to retain and did retain these vendor kickbacks for its own account and to profit therefrom to the detriment of the Hotel and in breach of its duties and obligations to Flatley.

57. Marriott requires that the Hotel participate in the purchasing programs selected by Marriott, thereby forcing Flatley to be a part of the program from which Marriott has obtained secret kickbacks.

58. Upon information and belief, Marriott has received hundreds of thousands of dollars in kickbacks in the form of rebates and other allowances from many vendors in contravention of relevant law and the provisions of the Management Agreement and the Procurement Agreement.

59. The kickbacks were allowances, charges, commissions, bonuses, discounts, and/or rebates derived from the ownership and operation of the Hotel. Any such items are the sole property of Flatley and are to be held in trust for the account of Flatley.

60. Upon information and belief, Marriott has refunded to other hotel owners such kickbacks involving other hotel properties, including refunding over \$2 million to CTF Hotel Holdings, Inc., on April 8, 2002.

61. In furtherance of its scheme to take illegal profits from the operation of the Hotel and to engage in self-dealing, Marriott failed to disclose and actively concealed material information and

caused to be issued false and misleading reports and certified financial statements which omitted all mention of kickbacks, including but not limited to items such as allowances, commissions, bonuses, discounts, rebates, and profits from vendors. The reports and financial statements also omitted all mention of Marriott and its affiliates and/or related-party transactions with vendors who had agreed to pay kickbacks.

62. Marriott, upon information and belief, knowingly misled financial auditors and misrepresented and/or otherwise withheld information pertaining to illegal kickbacks obtained from vendors, including but not limited to profits received by Marriott, its affiliates, and/or related parties.

63. In furtherance of its scheme to profit illegally from the operation of the Hotel and to engage in self-dealing, Marriott engaged in a persistent, deliberate practice of disseminating incomplete, inconsistent, false, and misleading information to Flatley in its periodic and annual reports and in its updates distributed widely to Marriott owners.

64. Marriott, despite its historic practice of having an annual meeting with all of its hotel owners, did not have an annual meeting in 2001 and has not announced any annual meeting for 2002.

65. Marriott provided misleading descriptions of its programs and initiatives, which were in reality schemes to take illegal profits from the operation of the Hotel, and knowingly and willfully concealed the kickbacks, the amount of kickbacks earned from the Hotel, the identity of the vendors, the amount of rebates paid by each local, regional, and/or national vendor, how the kickbacks were used by Marriott, its affiliates, and/or related parties, and information related to the competitiveness, or lack thereof, of the prices charged by its purchasing services.

66. Despite Marriott's obligations under the Management Agreement, it has failed to supply Flatley with documentation proving that at all relevant times the services rendered and/or goods purchased from any third person, Marriott, or any of its affiliates, and/or related parties, were

fully competitive. Marriott also refused to provide information sufficient for Flatley to analyze the competitiveness of its purchases in response to Flatley's inquiries on the subject.

67. Marriott has violated and continues to violate its duties and obligations to Flatley by failing, at all relevant times, to inform Flatley of the existence and retention of the kickbacks, to obtain Flatley's consent and/or approval to the negotiation of allowances, commissions, bonuses, discounts, rebates, and profits from vendors, and to inform Flatley that Marriott, its affiliates, and/or related parties were deriving a profit from their purchasing activities.

68. Marriott has violated and continues to violate its duties and obligations to Flatley because Marriott, its affiliates, and/or related parties continue to retain kickbacks and have not refunded to Flatley the amount of the kickbacks unlawfully obtained by Marriott, its officers, its affiliates, and/or related parties.

**E. Marriott's Unlawful Allocation Of Corporate Overhead And Wrongful Recovery Of Prohibited Costs**

69. Marriott also has unlawfully siphoned funds from the Hotel through its "Hotel Excellence!" program by, among other things, charging the Hotel ten percent (10%) for travel agent commissions, when the actual cost of travel agent commissions is less than 10%. The difference between what Marriott collects from the Hotel and what it distributes to the travel agents is retained by Marriott in what it calls the "Split Fund." Marriott has refused to produce information to substantiate its use of these funds, which it claims to be using for the benefit of Marriott hotels, including the Hotel. Upon information and belief, Marriott has profited from this diversion of funds at the expense of hotel owners, including Flatley, in breach of Marriott's contractual and fiduciary obligations.

70. In addition to the other schemes, Marriott also embarked on a scheme to offload its corporate overhead and the overhead of its affiliates and/or related parties onto the Hotel, upon information and belief, by, among other things, levying additional "corporate" charges for services covered by the fees allowed in the Management Agreement and by including in the Hotel's central service allocation certain corporate expenses not properly charged as part of cost recovery for a Chain Service. The effect of such offloading has increased and will continue to increase Marriott's profits from the Hotel in violation of the restrictions of the Management Agreement and in violation of Marriott's fiduciary duties to Flatley.

71. Moreover, upon information and belief, Marriott has not apportioned the costs for some of its Chain Services in a fair and equitable manner, and has developed a new scheme to offload corporate accounting functions onto the Hotel, entitled "Project Mercury."

72. Flatley has requested detailed documentation of these corporate and Chain Services charges, but Marriott has refused to produce such information. Marriott's refusal deprives Flatley of information needed to determine whether these charges comply with the Management Agreement, and is yet another violation of Marriott's duties and obligations to Flatley.

73. Flatley has fully complied with the terms of the Management Agreement and the Procurement Agreement, including but not limited to those terms relating to the Base Management Fees as well as the procurement fee, and Flatley is entitled to a full accounting of all amounts charged, deducted, or otherwise appropriated from the operations and accounts of the Hotel by Marriott.

**F. Marriott's Continuing, Undisclosed Breaches, And Flatley's Damages**

74. Upon information and belief, Marriott has violated and continues to violate its duties and obligations to Flatley by virtue of its mismanagement, breaches, and dissemination of false and misleading information not presently known by Flatley. The mismanagement, breaches, and false and misleading information set forth herein are illustrative of Marriott's wrongful conduct, and Flatley reasonably expects that additional instances of misconduct by Marriott will come to light during discovery.

75. Marriott has failed and continues to fail to maintain accurate and complete books, records, and financial statements for the Hotel, making it impossible for Flatley to determine what Marriott is actually earning by virtue of its management of the Hotel.

76. As a result of Marriott's unlawful activities alleged above, Flatley has lost confidence in Marriott's ability to act as Flatley's agent in connection with the management of the Hotel.

77. As Flatley's fiduciary, Marriott had and continues to have a duty to act fairly, honestly, candidly, and openly with Flatley and owes the highest duty of good faith, fair dealing, and

disclosure to Flatley, particularly since Marriott controlled and continues to control the operating funds of the Hotel and Flatley had bestowed its trust and confidence in Marriott. Flatley has relied exclusively upon Marriott to manage the Hotel in the best interests of Flatley.

78. Flatley placed its trust and confidence in Marriott and entrusted it with its property, under a Management Agreement (and Procurement Agreement) requiring that Marriott would act solely for the benefit of Flatley in managing and operating the Hotel. Flatley justifiably relied upon the representations of Marriott, including its representations regarding its expertise and honesty, and paid Marriott millions of dollars in fees and reimbursements in reliance on these representations.

79. Flatley avers that it is entitled to the disgorgement of the Base Management Fees paid to Marriott (as well as the payment of fees given under the Procurement Agreement) as well as the fees paid for Chain Services; that it has no obligation to pay Marriott any additional fees in any amount; and that it is entitled to the disgorgement of additional monies unlawfully extracted from the Hotel by Marriott International, Marriott Hotel Services, Marriott Design & Construction, and Avendra. Further, Flatley is entitled to the relief set forth herein in the Prayer for Relief.

**G. Events Preceding the Filing of this Action**

80. In a June 26, 2002 telephone call, Flatley put Marriott on notice of its dissatisfaction with Marriott's performance under the Management Agreement and Procurement Agreement and proposed engaging in discussions to resolve Flatley's concerns and avoid litigation. The concerns Flatley expressed during the June 26 call were memorialized (and elaborated upon) in a June 28, 2002 letter from Flatley's counsel to Marriott.

81. In response to the June 28 letter, Flatley and Marriott agreed to a meeting on July 16, 2002 to discuss Flatley's concerns. At this meeting, Marriott indicated that it was willing to explore

an informal, negotiated resolution of Flatley's concerns to avoid the need for Flatley to commence litigation.

82. After the July 16 meeting, Flatley accepted what it considered to be Marriott's good faith representations that the parties would have a follow-up meeting in which to resolve Flatley's concerns. As late as August 1, 2002, Marriott represented that this face-to-face, follow-up meeting would take place on August 6, 2002. Believing that a negotiated settlement was still within reach, and in reliance on Marriott's agreement to meet again on August 6, Flatley deferred filing a lawsuit against Marriott. But for Marriott's – repeated but unfounded – representations that it was still interested in pursuing a negotiated settlement, Flatley would have filed suit against Marriott on or before August 1, 2002.

83. However, contrary to those representations, on August 2, 2002, Marriott commenced an action of its own against Flatley in the United States District Court for the District of Maryland, Southern Division. The lawsuit seeks a declaratory judgment asserting that Marriott is not in breach of the Management Agreement and unspecified compensatory and punitive damages. Upon information and belief, Marriott filed the Maryland action seeking to preempt a suit by Flatley and claim "home court advantage" in connection with a dispute that it knows predominately concerns Flatley's grievances and to which Flatley is the proper plaintiff with the right to determine the appropriate venue, which is the District of Massachusetts.



**COUNT I**  
**BREACH OF CONTRACT**  
**(Against Marriott International, Marriott Hotel Services, and**  
**Marriott Design & Construction)**

84. Flatley repeats and realleges paragraphs 1 to 83, above, as if fully set forth herein, as well as the allegations in subsequent counts.

85. The Management Agreement constitutes a lawful, binding, and enforceable contract between Flatley and Marriott.

86. The Procurement Agreement constitutes a lawful, binding, and enforceable contract between Flatley and Marriott.

87. The acts and omissions of Marriott alleged herein constitute material breaches of Marriott's obligations under the terms of the Management Agreement and the Procurement Agreement. These breaches individually and collectively give rise to Flatley's right to pursue all appropriate remedies and relief, including termination of the Management Agreement and the Procurement Agreement.

88. Flatley has performed all of its obligations under the Management Agreement and the Procurement Agreement, and all conditions precedent have been satisfied.

89. Marriott's breach of its contractual duties and obligations is particularly egregious because it acted with supposed expertise in hotel management on behalf of Flatley, who relied upon Marriott to perform its agreed upon contractual duties and obligations.

90. As a result of Marriott's breaches of the Management Agreement and the Procurement Agreement, Flatley has sustained and will continue to sustain injuries for which it is

entitled to receive compensation in the form of monetary damages, in an amount to be determined at trial by a jury.

**COUNT II**  
**BREACH OF IMPLIED DUTIES OF GOOD FAITH, FAIR DEALING, AND CANDOR**  
**(Against Marriott International, Marriott Hotel Services, and**  
**Marriott Design & Construction)**

91. Flatley repeats and realleges paragraphs 1 to 90, above, as if fully set forth herein, as well as the allegations in subsequent counts.

92. By virtue of the Management Agreement and the Procurement Agreement, there exist implied duties of good faith, fair dealing, and candor. Marriott has materially breached its implied duties of good faith, fair dealing, and candor to Flatley through the acts and omissions described in this Complaint.

93. In committing such breaches, Marriott has directly and proximately deprived Flatley of the contractual benefits to which it is entitled as Owner of the Hotel. Flatley has suffered and will continue to suffer damages for which it seeks monetary damages in an amount to be determined at trial by a jury.

94. In addition, because Marriott's breaches of the implied duties of good faith, fair dealing, and candor were committed knowingly, intentionally, recklessly, in bad faith, and with a conscious disregard to the rights of Flatley, Flatley is entitled to recover punitive damages in addition to the monetary damages sought herein in an amount to be determined at trial by a jury.

**COUNT III**  
**VIOLATION OF MASSACHUSETTS UNFAIR BUSINESS**  
**PRACTICES ACT, MASS. ANN. LAWS, CH. 93A §§ 2 and 11**  
**(Against All Defendants)**

95. Flatley repeats and realleges paragraphs 1 to 94 above, as if fully set forth herein, as well as the allegations in subsequent counts.

96. All Defendants and Flatley are engaged in the conduct of trade or commerce.

97. As detailed above and in Counts IV – X below, Defendants committed a series of deceptive, unfair, fraudulent, and otherwise tortious acts, including but not limited to the following:

- (a) Avendra and Marriott International, as part of a scheme to misappropriate funds belonging to Flatley, intentionally induced Marriott Hotel Services' and Marriott Design & Construction's breaches of the Management Agreement and the Procurement Agreement, respectively, and thereby tortiously interfered with Flatley's rights under those agreements;
- (b) Marriott breached its fiduciary duties to Flatley by, among other things, retaining undisclosed kickbacks through its illegal purchasing activities, by offloading overhead, by recovering non-reimbursable costs, and by engaging in undisclosed and unlawful affiliate and/or related-party transactions, the full nature, amount, and scope of which are not fully known to Flatley because of Marriott's continuing non-disclosure, concealment of information, and continued dissemination of misleading information.
- (c) Avendra and Marriott International aided and abetted the breaches of fiduciary duty committed by Marriott Hotel Services and Marriott Design & Construction by knowingly participating in Marriott Hotel Services' and/or and Marriott Design & Construction's unauthorized delegation of core agency duties, detrimental and uncompetitive agreements, and solicitation and receipt of unlawful kickbacks, rebates, discounts, and other undisclosed consideration.
- (d) Marriott made intentional and/or negligent misrepresentations of material fact and intentionally and/or negligently failed to disclose material facts concerning Marriott's expertise and resources to be devoted to

management of the Hotel; Marriott's commitment to manage the Hotel for the financial benefit of Flatley consistent with the Budgets, the Management Agreement, and the Procurement Agreement; illegal kickbacks from vendor contracts, affiliated and/or related-party transactions, offloading of overhead, and recovery of non-reimbursable costs; and the financial status of the Hotel;

- (e) Defendants illegally converted and otherwise misappropriated funds belonging to Flatley in connection with their scheme to collect and/or pay illegal kickbacks from vendor contracts, conduct affiliated and/or related-party transactions, offload overhead, and recover non-reimbursable costs;
- (f) Defendants engaged in anticompetitive conduct in violation of 15 U.S.C. § 13(c) by soliciting and receiving kickbacks that were not paid for services rendered in connection with the sale or purchase of goods, wares, or merchandise by Defendants on behalf of Flatley.

98. Defendants' deceptive, unfair, fraudulent, and otherwise tortious conduct was knowing, willful, and malicious and occurred primarily and substantially in the Commonwealth of Massachusetts.

99. As a proximate result of Defendants' conduct, Flatley has suffered and continues to suffer damages, including monetary damages.

100. Defendants' conduct constitutes unfair and deceptive trade practices in violation of the Massachusetts Unfair Business Practices Act, Mass. Ann. Laws, Ch. 93A §§ 2 and 11.

**COUNT IV**  
**TORTIOUS INTERFERENCE WITH CONTRACT**  
**(Against Marriott International and Avendra)**

101. Flatley repeats and realleges paragraphs 1 to 100, above, as if fully set forth herein, as well as the allegations in subsequent counts.

102. The Management Agreement constitutes a binding and enforceable contract between Flatley and Marriott Hotel Services.

103. The Procurement Agreement constitutes a binding and enforceable contract between Flatley and Marriott Design & Construction.

104. Avendra and Marriott International knew of the existence of these contractual relationships.

105. Avendra and Marriott International through their intentional actions to illicitly profit from Marriott's management of the Hotel by the acts described above, caused or significantly contributed to Marriott's material breaches of the Management Agreement.

106. Avendra and Marriott International, through their intentional actions to illicitly profit at the expense of Flatley by promoting or causing Marriott Hotel Services' and/or Marriott Design & Construction's violation of their fiduciary duties and contractual obligations to Flatley, acted without legal justification.

107. By virtue of Marriott Hotel Services' material breaches of the Management Agreement and/or Marriott Design & Construction's materials breaches of the Procurement Agreement, caused at the behest of Avendra and Marriott International, Flatley has suffered and will continue to suffer damages in an amount to be determined at trial by a jury.

108. Flatley furthermore seeks punitive damages in an amount to be determined at trial because Avendra and Marriott International's misconduct was willful, malicious, wanton, reckless, and oppressive, and/or was made in conscious disregard for the rights of Flatley.