

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION**

BIRD HOTEL CORPORATION, and all
others similarly situated,

Plaintiffs,

vs.

SUPER 8 MOTELS, INC.,

Defendant.

Civ. #06-4073

**PLAINTIFFS' BRIEF
IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT**

Plaintiff Bird Hotel Corporation, on behalf of the certified class, respectfully submits this brief in support of its motion for summary judgment. For ease of reference, all of the exhibits to which this brief refers (EXHIBITS A - Z & AA - HH) are appended to the affidavit of counsel filed in support of this motion. The final list of 160 class members is attached as EXHIBIT B, and a new CD-Rom has been filed containing all of their franchise agreements in the same order as in EXHIBIT B. (Doc. 98). The standard Super 8 Motel franchise agreement that is the subject of this class action is attached as EXHIBIT C. This motion is further supported by a statement of undisputed material facts pursuant to D.S.D. Local Rule 56.1.

INTRODUCTION

This class action stems from a clear violation of the standard Super 8 Motel Franchise Agreement executed between Defendant Super 8 Motel, Inc. and 160 of its individual franchisees comprising the certified class, including Bird Hotel Corporation, from approximately 1984 to 1991. These franchise agreements executed by the class members are identical in all material respects and have a fixed term of twenty (20) years. The agreements provide for the class members to pay the defendant a monthly royalty fee of four percent (4%) of gross room

sales and an additional fee of two percent (2%) of gross room sales designated for advertising, reservations, and the Super 8 V.I.P Club. The franchise agreements authorize the imposition of no other recurring fees during their term of twenty years.

The class members allege that the defendant breached their standard franchise agreements by compelling them to pay an additional mandatory monthly fee of five percent (5%) of gross room sales for customers registered with the defendant's TripRewards program¹ during the term of their franchise agreements, which do not authorize such a fee. The class members accordingly seek reimbursement of these unauthorized fees extracted by the defendant as a condition of receiving the benefits of their franchise agreements.

FACTUAL BACKGROUND

The certified class

The class members are Super 8 Motel franchisees in the United States and Canada that are or have been parties to a standard 20-year Super 8 Motel Franchise Agreement executed from approximately 1984 to 1991. On October 16, 2007, this Court granted class certification pursuant to Federal Rule of Civil Procedure 23(b)(3). (Doc. 51). The order certified a class of 226 franchisees that are or have been parties to the standard Super 8 Motel Franchise Agreement attached to the plaintiff's complaint and were subject to Super 8's requirement instituted in December of 2003 that franchisees must pay an additional mandatory five percent fee on all gross room sales for customers enrolled in its TripRewards program. (Doc. 51 at 7).

On September 25, 2008, this Court entered its order approving the process for providing notice and the opportunity to opt out to the class. (Doc. 75). The plaintiff provided notice

¹ After Wyndham Hotel Group succeeded Cendant Corporation as the parent corporation of Super 8 Motels, Inc. during the pendency of this litigation, this program became known as "Wyndham Rewards." (Ex. G at 80-81). For the sake of consistency, however, this brief will refer to the program as TripRewards.

according to the prescribed procedure, resulting in 28 franchisees opting out of the class. (Docs. 78, 81). On July 13, 2009, the parties filed a joint motion regarding class composition recognizing that 10 additional franchisees, owned by entities that had opted out, should also be removed. (Doc. 91). That same day, the parties filed a joint motion to redefine the class to exclude those who had previously executed releases of all potential claims against the defendant. (Doc. 92). On August 27, 2009, this Court entered its order granting the motions. (Doc. 97).

As a result, the final composition of the class has 160 members. The updated class list is contained in EXHIBIT B, along with the TripRewards fees each class member has paid through June of 2009.² In addition, a new CD-Rom has been provided containing the franchise agreements of all 160 class members in the same numerical order. (Doc. 98).

All of the class members have franchise agreements with finite 20-year terms. More than two-thirds of those agreements have already expired. (Ex. B; Doc. 98). With each passing month, additional agreements will expire. The last of these standard agreements held by the class members is scheduled to expire in 2011. The substantial majority of Super 8's 2000 franchisees in the United States and Canada are not members of the class because they are not or never have been a party to the standard agreement at issue in this litigation. Rather, they are parties to revised standard agreements executed after 1991 that expressly provide for the imposition of additional fees. (Ex. AA at 4; Ex. CC, Schedule C, ¶ II(A) at page 35).

The class representative

Plaintiff Bird Hotel Corporation ("Bird Hotel") is the representative for the certified class. Bird Hotel is a Canadian corporation having its principal place of business in Winnipeg,

² EXHIBIT U contains the most recent itemized spreadsheet provided by the defendants (August 14, 2009). EXHIBIT V contains the same information as of June 17, 2009. EXHIBIT W provides the same information as of January 11, 2008. The reason that the total of TripRewards charges has *decreased* over time is the exclusion or removal of numerous class members.

Manitoba in Canada. (Ex. E [Kostas dep.] at 9). Its owner is Polychronis (“Paul”) Emmanuel Kostas. (Ex. E at 5, 11). Originally from Rhodes, Greece, Kostas legally immigrated to Canada in 1962. (Ex. E at 7). From 1986 to 2006, Bird Hotel was a Super 8 franchisee, owning and operating a Super 8 Motel in Winnipeg under the standard 20-year franchise agreement that is the subject of this action. (Ex. E at 9). Although Bird Hotel’s franchise agreement was still in operation when this action was commenced, it has since expired, as have the substantial majority of class member agreements. Bird Hotel’s franchise agreement is attached as EXHIBIT D.

The defendant

The first Super 8 motel opened in Aberdeen, South Dakota in October of 1974, offering rooms for \$8.88 per night. (Ex. X at 1-2; Ex. F [Foy dep.] at 28). Defendant Super 8 Motels, Inc. (“Super 8”) now has more than 2,000 operating properties throughout North America. (Ex. J at 18; Ex. X at 1-2). Super 8 is considered primarily a “walk-in” lodging brand, meaning that the substantial majority of its customers (75 to 80 percent) do not reserve their stays in advance, on the internet or otherwise, but simply “walk in.” (Ex. K at 36). As explained by James Darby, Super 8’s former Vice-President of Franchise Administration and current Vice-President of Operations, “walk-in” business “means you’re driving down the highway and you see a Super 8 and you pull in.” (Ex. K at 36-37, 13-15).

Q: For example, if someone’s choosing a Super 8, it seems they’re probably doing it because they saw the sign and they happened to be driving by, and they need a place to stay. Is that what you mean by walk-in business?

A: Yes. There’s 2100 Super 8s. Driving down the road, it’s like McDonalds. They are everywhere.

(Ex. K at 37). Thus, as Darby testified, Super 8 franchisees’ “walk-in” business relies primarily upon the location of the motel. (Ex. K at 37).

In 1993, Super 8 was acquired by HFS, which then merged with Cendant Corporation, headquartered in Parsippany, New Jersey. (EX. X at 4). Cendant later split into multiple operating companies under the Wyndham name. (EX. Z at 8). Super 8 Motels, Inc. is now a wholly-owned subsidiary of Wyndham Hotel Group, one of three principal components of Wyndham Worldwide Corporation, encompassing nearly 7,000 hotels representing more than 588,000 rooms in 66 countries on six continents under the Wyndham, Ramada, Days Inn, Super 8, Wingate by Wyndham, Baymont Inn & Suites, Microtel Inns and Suites, Hawthorn Suites, Howard Johnson, Travelodge, and Knights Inn brands. (EX. J at 20; EX. X at 3-4). Super 8 Motels, Inc. does not have a Chief Executive Officer or board of directors nor does it own any assets. (EX. I at 14-16, 18). Its president, John Valetta, reports directly to the Chief Operating Officer of Wyndham Hotel Group. (EX. I at 16). Super 8 and its parent corporation continue to do business in South Dakota through its local franchisees, as well as a small operations office and customer call center that remain in Aberdeen. (EX. G at 17; EX. I at 12-13, 46-48).

The franchise agreement

In approximately 1984, the defendant began offering the standard Super 8 Motels Franchise Agreement (EXHIBIT C) at issue in this class action to its franchisees in the United States and Canada. (EX. E at 58). The defendant continued to offer this standard agreement to Super 8 Motel franchisees until at least 1991. The agreements were for a fixed duration of twenty years. (EX. C, § 1 at page 4). On February 5, 1986, Plaintiff Bird Hotel and the defendant entered into this standard agreement for the operation of a Super 8 Motel franchise in Winnipeg, Manitoba in Canada. (EX. C; EX. E at 22). All of the class members entered into the same 20-year standard agreement between the years of 1984 to 1991. (Doc. 98, CD-Rom). The

standard agreement was drafted by the defendant and presented to all prospective franchisees with the same terms. (Ex. I at 19-20; Ex. K at 29 [“They were form documents that we used”]).

South Dakota choice of law and forum selection clause

Regarding choice of law and forum, the standard franchise agreement held by all class members provides that:

It is stipulated that this Agreement has been negotiated in part within the State of South Dakota and shall be construed according to the laws of that State and the United States. The language in all parts of this Franchise Agreement shall in all cases be construed as a whole according to its fair meaning and neither strictly for nor against either Franchisor or Franchisee.

(Ex. C, ¶14 at page 17-18; Doc. 98, CD-Rom). Thus, all class members agreed to the defendant’s requirement that South Dakota law would govern the construction of their agreements and that there were significant contacts with South Dakota – the defendant’s principal place of business during the relevant time period – when entering into their agreements. In addition, all class members agreed to the forum selection clause requiring any dispute to be litigated in South Dakota. (Ex. C, ¶15 at page 18; Doc. 98, CD-Rom; Doc. 45, ¶11).

The contractual fees

In Section Three, entitled “Consideration; Royalty and Advertising fees,” the standard agreement executed by all class members provides for the payment of four separate fees during its 20-year term. (Ex. C, ¶3(B) at page 5). These four authorized fees are: (1) an initial franchise fee of \$20,000, plus an additional \$100 per room in excess of 120 rentable guest units; (2) an ongoing monthly “franchise fee” of four percent (4%) of all gross room sales; (3) an additional monthly “Advertising and Reservation Fund” fee of two percent (2%) of all gross room sales; and (4) an “additional franchise fee” equal to any excise, sales, or privilege tax imposed upon the defendant as a result of the franchise agreement. (Ex. C, ¶3(B) at page 5).

Two of the aforementioned fees permitted by the contract are monthly assessments on a franchisee's gross room sales. First, the agreement provides for the payment "As a franchise fee under this franchise, an amount equal to four percent (4%) of gross room sales" to be paid by the franchisee to Super 8 Motels on a monthly basis. (EX. C, § 3(B)(2)(a) at page 5). In addition, the agreement provides for an additional fee "equal to two percent (2%) of gross room sales" by the franchisee to Super 8 Motels on a monthly basis, and that such funds shall be deposited in the "Super 8 Advertising and Reservation Fund" to be used exclusively for the advertising and promoting of Super 8 Motels, funding and administering the Super 8 Motel Reservation System, and operating the Super 8 V.I.P. Club. (EX. C, § 3(B)(2)(b) at page 5; EX. E at 33-35).

As a result, the standard franchise agreement held by the class members authorizes a total recurring monthly fee of six percent (6%) of gross room sales. With the exception of the initial \$20,000 fee and a provision allowing the defendant to pass on certain taxes, the agreements held by the class members do not authorize the imposition of any other fees or mandatory payments for the duration of the contracts, regardless of whether they are labeled as a "franchise fee" or characterized as some other kind of new mandatory fee.

TripRewards

In 2003, Cendant Corporation established the TripRewards Program for customers of all of its numerous hotel and motel franchises, then including Amerihost Inn, Days Inn, Howard Johnson, Knights Inn, Ramada, Travelodge, Villager, Wingate Inn, and Super 8. (EX. E at 33, 35-39, 41-42, 77, 122; EX. L; EX. N; EX. O;). TripRewards is a points-based, multi-brand loyalty program intended to encourage customers to stay at all of the hotels and motels affiliated with the parent corporation's various franchised lodging brands. (EX. N). TripRewards members earn "points" for staying at all member hotels, including Super 8 franchisees. (EX. N).

Accumulated points can then be redeemed for “Rewards,” such as magazine subscriptions, theme park tickets, gift certificates, gasoline cards, and a free night’s stay at any of the parent corporation’s lodging franchises, including Super 8. (EX. N).

In December of 2003, TripRewards was launched for Super 8 Motels and all other lodging brands then owned by Cendant. (EX. O; EX. Q). At the same time, the defendant permanently discontinued the Super 8 V.I.P. Club, its extremely successful customer loyalty program that provided for guaranteed reservations and a ten percent discount on a franchisee’s standard room rate, set by each franchisee pursuant to its undisputed “ultimate flexibility” to establish its own rates. (EX. E at 33, 35-39, 41-42, 77, 122; EX. F at 38-39; EX. G at 23-24, 81; EX. I at 21-22; EX. N; EX. O). Jill Noblett, Senior Vice President of Loyalty and Direct Marketing for Wyndham Hotel Group, testified that it was important to eliminate the V.I.P. Club “[b]ecause the brand can’t have two loyalty programs.” (EX. H at 31-32, 39). However, the Wyndham brand has been allowed to retain its own unique loyalty program for its customers, “Wyndham ByRequest,” long after the implementation of TripRewards. (EX. J at 62-64, 70-74).

Even though the Super 8 V.I.P. Club was terminated, franchisees were nonetheless advised by the defendant to instruct their customers regarding how to obtain a ten percent discount on the room rate through other means, such as through AAA, AARP, government rates, military rates, trucker rates, and preferred corporate rates, and were informed that they could (and perhaps should) voluntarily offer the ten percent discount if their customers expected it. (EX. G at 63-64, 69-70; EX. I at 26-27; EX. N; EX. O at 2; EX. Y). As Noblett further testified:

Q: Why couldn’t you have just made the VIP benefits a part of TripRewards as it related to Super 8? Why would that have been confusing?

A: I believe the board, I don’t think, wanted to have the franchisees to have to do a ten percent discount, plus the 5 percent for points. That would have been 15 percent, and that was deemed untenable for the franchisees.

Q: Yet anyone with a AAA card or AARP or truckers rate or government rate would get a 10 percent discount. Right?

A: Yes.

Q: So that would be untenable or unfair to the franchisee?

A: I didn't – that's my recollection of what the reason was.

(Ex. H at 33-34). Noblett testified that she was the individual most involved in the development and launching of the TripRewards program. (Ex. H at 45, 48-52). Super 8's president, John Valetta, testified that he played no role in the development of the program. (Ex. I at 20). At the time that the program was being developed, Noblett understood that there was a concern about imposing the additional five percent TripRewards fee on top of the fees that franchisees were already paying, but was not aware of any concern that it might violate the specific provisions of any particular franchise agreements among the parent company's various brands. (Ex. H at 48-52). Valetta, similarly, recalls no internal discussion about whether the additional five percent mandatory fee would violate any existing Super 8 franchise agreements. (Ex. I at 31-34).

In conjunction with the roll-out, the defendant automatically converted all active Super 8 V.I.P Club members into TripRewards members. (Ex. G at 59-60; Ex. N; Ex. O). Almost two million members of loyalty programs previously in force at lodging franchises owned by the parent corporation were automatically enrolled in TripRewards. (Ex. E at 33-39, 41-42, 77, 122; Ex. H at 35-36; Ex. N; Ex. O). In addition, any customer thereafter reserving a room on the Internet with Super 8 or any of Wyndham's eleven lodging brands has been automatically enrolled in TripRewards unless they affirmatively "opt out."³ (Ex. J at 61-62).

³ The only exception to this "opt-out" system is the Wyndham Hotel brand, which also retained its own customer loyalty program as a supplement to TripRewards. (Ex. J at 63-64).

Participation in TripRewards is mandatory for all Super 8 franchisees, including the class members, and the failure to fully comply results in the denial of franchise rights. (Ex. I at 23-25; Ex. E at 33, 35-39, 41-42, 77, 122; Ex. L at 8; Ex. N; Ex. O; Ex. Y). As explained by Valetta to the franchisees, “TripRewards will be a compulsory marketing program for which there will be zero tolerance for non-compliance with program rules.” (Ex. N).

The additional mandatory fee

As a condition of the program, all class members have been required to accept, process, and report TripRewards registration and member stay information on a daily basis. (Ex. E at 33-42, 77, 122; Ex. F). To do this, class members were required to purchase new technology and facilitate the conversion of their guests into TripRewards members. As a further mandate, all class members have been required to pay an additional recurring fee, described as a “Mandatory Marketing Program Charge,” of five percent (5%) of all gross room sales for customers registered with TripRewards. (Ex. AA at 4; Ex. E at 33-42, 77, 122; Ex. F at 47-48). Thanks to the tracking software, the new five percent fee is assessed whether or not a hotel guest presents a membership card, and even if the guest, many of whom were automatically enrolled, is not even aware of the program. (Ex. CC, Schedule C, ¶ II(A) at page 35). Super 8 has invoiced and collected this additional fee from the class members on a monthly basis as a condition of remaining a franchisee. (Ex. AA at 4; Ex. E at 33-42, 77, 122; Ex. F at 47-48). The class members respectfully contend that the defendant’s unilateral imposition of this new recurring fee during the 20-year term of their contracts is a breach of the standard franchise agreement.

STANDARD OF REVIEW

Summary judgment is appropriate where an examination of the evidence in a light most favorable to the nonmoving party reveals no genuine issue of material fact and the moving party

is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Lynn v. Deaconess Medical Center-West Campus*, 160 F.3d 484, 486 (8th Cir. 1998). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *See id.* “[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Pursuant to the contractual choice of law provision in the franchise agreements, South Dakota law is controlling and governs the resolution of this case. (Ex. C, ¶14 at pages 17-18).

ARGUMENT

I. THE CLASS MEMBERS’ MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE SUPER 8 MOTELS BREACHED THEIR FRANCHISE AGREEMENTS BY IMPOSING AN UNAUTHORIZED, MANDATORY FEE.

A. The defendant’s requirement of an additional mandatory fee as a condition of remaining a Super 8 franchisee violates the franchise agreement.

This is a breach of contract case brought under South Dakota law. As detailed in the complaint, the controlling legal question is whether the defendant breached the standard franchise agreement held by the class members by requiring them, beginning in 2003, to pay an additional fee of five percent (5%) of gross room sales for all customers registered with its mandatory TripRewards program. The members of the certified class respectfully contend that they are entitled to summary judgment on their breach of contract claim.

Franchise agreements are construed and enforced according to basic contract law so that each party may understand in advance the conditions to which it has agreed to be bound, and so that it may enforce those terms against the other party. *See, e.g., Bores v. Domino’s Pizza, LLC*, 530 F.3d 671, 674-76 (8th Cir. 2008) (construing franchise agreement according to state contract law principles and holding on appeal that franchisor was entitled to summary judgment on franchisees’ breach of contract claim). In South Dakota, “[t]he rights and obligations of parties

to a contract are determined solely by the contract language, which must be construed according to the plain meaning of its terms.” *Yarcheski v. Reiner*, 669 N.W.2d 487, 495 (S.D. 2003); *Biegler v. American Family Mut. Ins. Co.*, 621 N.W.2d 592, 598-99 (S.D. 2003). Courts are to enforce and give effect to the unambiguous language and terms of a contract. *See Cotton v. Manning*, 600 N.W.2d 585, 588 (S.D. 1999). The elements of a breach of contract are: (1) an enforceable promise; (2) a breach of the promise; and (3) resulting damages. *See Weitzel v. Sioux Valley Heart Partners*, 714 N.W.2d 884, (S.D. 2006) (quoting *Guthmiller v. Deloitte & Touche, LLP*, 699 N.W.2d 493, 498 (S.D. 2005)). There is no dispute that the standard franchise agreements entered between the defendant and the class members are valid and enforceable contracts. The class members contend that the imposition of an additional mandatory fee of five percent (5%) of gross room sales for customers registered with Super 8’s mandatory TripRewards program violates an enforceable contractual promise by the defendant regarding the fees that will be owed as consideration for being permitted to do business as a Super 8 Motel franchisee during the term of the agreement.

In South Dakota, the proper interpretation of a contract is a question of law for the courts. *See FB & I Bldg. Products, Inc. v. Superior Truss & Components*, 727 N.W.2d 474, 478 (S.D. 2007); *Pauley v. Simonson*, 720 N.W.2d 665, 667 (S.D. 2006); *Ziegler Furniture and Funeral Home, Inc. v. Cicmanec*, 709 N.W.2d 350, 354 (S.D. 2006); *Farm Credit Services of America v. Dougan*, 704 N.W.2d 24, 27 (S.D. 2005) (explaining that “[c]ontract claims raise questions of law, and therefore, absent any factual disputes, they remain legal questions”). When interpreting a contract, South Dakota courts look “to the language that the parties used in the contract to determine their intention.” *Pauley*, 720 N.W.2d at 667-68. In order to ascertain the terms and conditions of a contract, courts examine the contract as a whole and construe contractual

language according to its “plain and ordinary meaning.” *Canyon Lake Park, L.L.C. v. Loftus Dental, P.C.*, 700 N.W.2d 729, 734 (S.D. 2005). If the intention of the parties is clearly manifested by the language of the contract, then it is the duty of the court to declare and enforce it. *See Pauley*, 720 N.W.2d at 668. If the contractual language is uncertain or ambiguous, however, parol and extrinsic evidence may be used for clarification. *See Pauley*, 720 N.W.2d at 668 (quoting *Jensen v. Pure Plant Food Int’l, Ltd.*, 274 N.W.2d 261, 263-64 (S.D. 1979)). “[A] contract is ambiguous only when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who had examined the context of the entire agreement.” *Pauley*, 720 N.W.2d at 668. When a contract is ambiguous, parol and extrinsic evidence may be used to demonstrate what the parties meant by what they said, “but not to show that the parties meant something other than what they said.” *Pauley*, 720 N.W.2d at 668.

As detailed above, the standard Super 8 Motel Franchise Agreement offered to and accepted by all of the class members requires them to pay four different fees to the defendant, including two separate monthly fees on gross room sales. (Ex. C, ¶3(B) at page 5). Combined, the agreement authorizes a total maximum monthly recurring fee of six percent (6%) of gross room sales. It is undisputed that in 2003, Cendant, as the parent corporation of Super 8 Motels, established the TripRewards Program, for customers of all of Cendant’s numerous hotel and motel brands. In December of 2003, the defendant permanently discontinued the Super 8 V.I.P. Club and automatically converted all active V.I.P. Club members into TripRewards members. In addition, at least two million active members from loyalty programs previously in force at Cendant’s other lodging brands were automatically converted into TripRewards members.

It is undisputed that participation in TripRewards is mandatory for all Super 8 franchisees. As a condition of TripRewards, the plaintiff has been required to pay Super 8 an

additional fee of five percent (5%) of gross room sales for customers registered with the program. This additional fee is invoiced on a monthly basis as a condition of remaining a franchisee. Super 8 has explained that its decision to implement TripRewards “was a group decision based on an evaluation of the desirability of establishing a loyalty program for all of the then-Cendant brands,” and that its unilateral decision to extract an additional five percent fee (as opposed to a higher or lower additional fee) upon all franchisees of its various lodging brands, without regard to the contract terms of their individual franchise agreements, “was determined based on competitive analysis, submission to and approval by the franchisee advisory board, and analysis of the value of the TripRewards program to franchisees.” (EX. BB at 5). Failure to pay the new recurring fees will result in termination and denial of franchise rights.

The imposition of this new fee as a condition of doing business as a Super 8 franchisee violates the class members’ standard franchise agreements and accordingly constitutes a breach of those agreements. The additional fee of five percent (5%) of gross room sales for TripRewards customers means that the class members, instead of paying a monthly fee of four percent (4%) of gross room sales, plus an additional sum of two percent (2%) of gross room sales for the “Super 8 Advertising and Reservation Fund,” have been required to pay a total monthly fee of *eleven percent* (11%) of gross room sales for all customers registered with the TripRewards program. This new mandatory fee invented and imposed by the defendant violates its exceedingly clear and explicit contractual promise made to the class members in their franchise agreements regarding the fees that will be collected during their 20-year terms.

If the defendant is permitted unilaterally to rewrite its contracts with the class members to impose additional mandatory fees, a franchise agreement is not worth the paper on which it is

written. A prospective franchisee will have no security that the substantial financial undertaking⁴ committed when it signs on the dotted line and agrees to entrust its livelihood and organize its existence as a Super 8 franchise will be profitable or even viable. That is no way to conduct business, and it certainly does not square with principles of contract law in South Dakota.

If a franchisee were to unilaterally decide to pay *less* than the amount of the contractual fees set forth in the franchise agreement, Super 8 Motels would have a cause of action for violation of that agreement. *See, e.g., Choice Hotels Int'l, Inc. v. S.D. Dep't of Rev. & Reg.*, 711 N.W.2d 926, 927 (S.D. 2006) (explaining that “failure to pay the amount due on the invoice ... constitutes a breach of the franchise agreement”); *Burger King Corporation v. Ashland Equities, Inc.*, 217 F.Supp.2d 1266, 1274 (S.D.Fla. 2002) (holding that fast food franchisees breached franchise agreements by failing to pay requisite fees and granting summary judgment in favor of franchisor); *Butler Machinery Co. v. Morris Construction Co.*, 682 N.W.2d 773, 778 (S.D. 2004) (“As the trial court recognized, this agreement was clear an unambiguous. Morris was to make monthly payments of \$5,547 and its failure to make such monthly payments constituted a default under the terms of that agreement”). In fact, the defendant routinely sues or threatens legal action against franchisees that fail to pay mandatory fees or meet other contractual obligations.⁵

Likewise, the defendant's unilateral attempt to alter the contractual consideration owed by the plaintiff and charge *more* than the requisite fees permitted under the express terms of the franchise agreement constitutes a plain and simple breach of contract. *See Ernie Haire Ford*,

⁴ In 1987, for example, the estimated initial investment for a Super 8 Motel franchise was “\$300,000 to \$2,500,000, amounting to \$10,000 to \$20,000 per room, excluding land costs and may be financed through Franchisee's own funds, mortgage financing, lease or contract for deed.” (Ex. DD, § 7(A) at page 11).

⁵ A quick search of this Court's electronic filing system revealed more than 25 lawsuits filed by Super 8 against its franchisees in the District of South Dakota alone (many versions of the standard agreements executed after 1993 require litigation or arbitration in New Jersey).

Inc. v. Ford Motor Co., 260 F.3d 1285, 1290-91 (11th Cir. 2001) (explaining that when terms of a franchise contract are clear and unambiguous, the contracting parties are bound to those terms and may not rewrite the contract to make it more advantageous or reasonable for one of the contracting parties). Indeed, in Section Twenty, just above the signature line for both parties, the franchise agreement held by the class members expressly precludes either party from changing or modifying any of its terms or conditions unless mutually agreed upon in writing:

This Franchise Agreement contains the entire agreement of the parties, and there are no representations, warranties, covenants, inducements, promises, agreements, arrangements, or undertakings, oral or written, expressed or implied between the parties hereto other than those expressly set forth herein. No agreement of any kind or modification or waiver of any of the terms, covenants, or conditions of this Agreement shall be binding upon either party unless the same has been made in writing and duly executed by both parties.

(Ex. C, § 20 at page 21) (emphasis supplied).

Super 8 Motels has no right during 20-year terms of the class member agreements to change the mandatory fees, much less to almost double them from six to eleven percent of gross room sales for customers belonging to TripRewards. If Super 8 had wanted to negotiate and secure such a contractual right, it was free to attempt to do so when the agreements were presented for the class members' consideration and signature. The defendant was perfectly capable of including contractual language granting it the unilateral power to raise or add fees in its standard agreement at that time. After all, every word in the class members' franchise agreements was carefully selected and drafted by the defendant itself. It chose not to do so, and cannot now simply gift itself additional contract rights. Because the standard agreement unambiguously established the mandatory fees to be assessed for a 20-year term, and because it further prohibit any modification of terms or conditions without the express consent of the other party, the class members are entitled to summary judgment on their breach of contract claim.

B. Generic contractual language in the standard agreement recognizing that the defendant may alter its “system” or “rules of operation” does not grant a unilateral contractual right to extract an additional fee of its choosing from the class members.

In its prior pleadings, Super 8 Motels has asserted that, despite the express contractual language establishing the fees permitted under the franchise agreement, it essentially has the unilateral right to charge its franchisees an additional fee in whatever amount it deems necessary as a condition of remaining a franchisee. The defendant’s strained justification for this assertion is generic language in the franchise agreement stating that Super 8 has the right to make changes or revisions to the Super 8 “System” and its “rules of operation” manuals describing how to properly implement the system. (Ex. C, § 5 at page 14 and § 3(J) at page 8).

This argument is not persuasive. The “System” to which these provisions refer is defined in the agreement as the defendant’s developed and perfected:

[P]lan or system for providing to the general public, and especially to the motoring public, a motel service, including lodging and other accommodations of a distinctive nature, of high quality and of other distinguishing characteristics, as all originally placed in service by FRANCHISOR and operated under the name of “Super 8 Motel”;

(Ex. C at page 1). The agreement lists the distinguishing characteristics of the “System” as including such things as trademarks, building design, characteristic furnishings, standardized methods of operation, advertising, a “Superline reservation service,” and the like. (Ex. C at pages 1-2). By its own definition, the “System” for providing a motel service to the general public does not refer to the fees that a franchisee must pay to the defendant as consideration for remaining a franchisee. Rather, the agreed upon fees that the defendant is authorized to require from franchisees are detailed in section 3(B) of the agreement. (Ex. C, § 3(B)(1)-(3)). Indeed, the specific “Right to Revise System” reserved in the agreement describes “improvements” to the manner of doing business that are the “property” of Super 8 Motels. (Ex. C, § 5 at page 14).

The “rules of operation” to which these provisions refer are the operational manuals and other written rules prescribing how the motel business will be run. (EX. C, § 3(J) at page 8). These manuals do not govern the contractual fees owed by the class members as a condition of being a franchisee. Instead, the fee requirements are governed by Section 3(B) – “Consideration; Royalty and Advertising fees” of the agreement. It is not reasonable to interpret general contract language giving a franchisor the right to revise and amend its branded system and operational rules for providing lodging as permitting it to raise contractually established fees or to invent and extract new fees in excess of what the contract permits. *See Prunty Constr., Inc. v. City of Canistota*, 682 N.W.2d 749 (S.D. 2004) (explaining that where contractual provisions conflict and full weight cannot be given to each, “the more specific clauses are deemed to reflect the parties['] intentions—a specific provision controls a general one”).

As discussed above, moreover, the franchise agreement expressly *precludes* either party from unilaterally modifying its terms. (EX. C, § 20 at page 21). Although Super 8 may have the right to initiate the TripRewards program, it has *no right* under the standard agreement held by the class members to simply just decide to extract additional fees, in excess of the contractually agreed upon fees, whenever it elects to revise its system, rules, or marketing programs. No language in the contracts conveys such a unilateral power. *See Vollmer v. Akerson*, 688 N.W.2d 225, 228-29 (S.D. 2004) (explaining that in interpreting a contract, courts will not seek out a strained or unusual meaning for the benefit of one party).

C. Following the sale of Super 8 to its New Jersey parent corporation in 1993, its standard franchise agreement was revised to include previously nonexistent contractual authority to unilaterally increase mandatory fees.

Tellingly, after Super 8 Motels, Inc. was sold in 1993 to the parent corporation located in Parsippany, New Jersey, the standard franchise agreement was revised, (EX. K at 49-50), with

the apparent intent of allowing the defendant to unilaterally increase the fees charged under the agreement. In other words, some versions of the standard franchise agreement signed by Super 8 franchisees *after* 1993 do contain contractual authorization to unilaterally raise certain fees or impose new mandatory fees, authorization that does *not* exist under the pre-sale standard agreements executed by the class members from 1984 to 1991.

1994 standard agreement

As of 1994, one year after Super 8 was purchased by its New Jersey corporate overlord, the defendant had not yet inserted language allowing it to unilaterally raise the mandatory fees in its standard franchise agreement, as seen in EXHIBIT S, an example of one such agreement executed in 1994. At that time, the royalty fee had been increased to five percent of gross room sales, up from four percent in the class members' pre-1992 standard agreements, and the additional fee for the Advertising and Reservation Fund had been increased from two percent to three percent of gross room sales. (Ex. S, §§ 4(C) & (D) at page 5). Thus, Super 8 franchisees executing agreements after 1994 were required to pay a total monthly fee of eight percent (8%) of gross room sales, as opposed to the six percent (6%) maximum monthly fee permitted by the class members' agreements. In addition, while the 1994 standard agreement still provided that the franchise relationship was to be governed by South Dakota law, a mandatory arbitration provision had been added. (Ex. S, §§ 15, 16 at pages 24-27).

1996 standard agreement

By 1996, Super 8's standard franchise agreement had been completely revised by its new owner in New Jersey. EXHIBIT T is an example of a standard agreement executed in 1996. The 1996 standard agreement selects New Jersey as governing law and contains an arbitration provision and jury trial waiver preventing franchisees from seeking recourse in the courts for

disputes involving their franchise agreements. (Ex. T, §§ 17.5 & 17.6 at page 18-19). The “Recurring Fees” to be paid by the franchisee are established by Section 7 of the 1996 agreement. (Ex. T, § 7 at page 8). Section 7.1.1 provides for a “Royalty” fee of five percent of gross room sales. (Ex. T, § 7.1.1 at page 8). Section 7.1.2 provides for an additional “System Assessment Fee” to be paid “as stated in Schedule C” and provides that the fee may be changed after the tenth anniversary of the agreement upon sixty days notice. (Ex. T, § 7.1.2 at page 8). Schedule C then sets the “System Assessment Fee” at three percent of gross room sales. (Ex. T, Schedule C at page 29). Section 17.5 of that agreement then provides: “We may unilaterally revise Schedule C under this Agreement.” (Ex. T, § 17.5 at page 18) (emphasis supplied).

2003 standard agreement

The standard franchise agreement offered to new Super 8 franchisees continued to evolve. By 2003, the year that TripRewards was launched, Super 8 had revised “Schedule C” to expressly provide for an additional “Mandatory Marketing Program Charge” of five percent of gross room sales for “qualifying stays” at a franchisee’s motel in addition to the five percent royalty fee and three percent advertising fee on gross room sales. (Ex. AA at 4). Thus, standard franchise agreements offered to franchisees after 2003 expressly provided for the additional mandatory five percent TripRewards fee that the defendant has attempted to enforce upon all of its franchisees, including the class members whose pre-existing contracts do not permit it.

2009 standard agreement

The 2009 standard franchise agreement now offered by the defendant, as a subsidiary of Wyndham Hotel Group, bears almost no resemblance to the 1984-1991 standard agreement held by the class members. (Ex. CC). The 2009 standard agreement purports to waive the implied covenant of good faith and fair dealing, selects New Jersey law as governing law, waives a jury

trial, requires all disputes to be litigated in the state or federal courts of New Jersey, and (interestingly) purports to prohibit class actions. (Ex. CC, §14.3 at pages 20-21, § 17.6.1-5 at page 24). Under the 2009 agreement, franchisees must pay a monthly royalty fee of five and one half percent (5.5%) on all gross room sales. (Ex. CC, § 7.1.1 at page 12). In addition, franchisees must pay a “System Assessment Fee” and any other “Additional Fees” as set forth in Schedule C. (Ex. CC, § 7.1.2 at page 12). That same section also specifically provides: “We may change, modify, add or delete the System Assessment Fee and/or Additional Fees in accordance with Schedule C.” (Ex. CC, § 7.1.2 at page 12) (emphasis supplied).

Schedule C of the 2009 agreement sets the System Assessment Fee at three percent (3%) of gross room sales, and provides that Super 8 may increase that fee upon 60 days notice after the tenth anniversary of a franchise agreement. (Ex. CC, Schedule C, ¶ I at page 35). Schedule C then sets forth numerous “Additional Fees,” including a “Loyalty Program Charge for your participation in the Wyndham Rewards or successor guest loyalty program,” set at five percent (5%) of gross room sales for any customer enrolled in the loyalty program. (Ex. CC, Schedule C, ¶ II(A) at page 35). The five percent additional fee is charged whether or not a guest presents their membership card or is even aware that they are a member: “We will proactively match and award members with points or other program currency they earn on qualified stays even if they do not present their Wyndham Rewards membership card upon check-in. You will be billed monthly in arrears for qualifying stays for program members during the preceding month.” (Ex. CC, Schedule C, ¶ II(A) at page 35). The last sentence in the 2009 Schedule C then warns: “We may change, modify or delete Additional Fees for existing services and programs and add new Additional Fees for new services and programs at any time upon not less than 30 days written notice.” (Ex. CC, Schedule C, at page 37) (emphasis supplied).

These new provisions allowing Super 8 to change, revise, increase, or invent entirely new mandatory recurring fees to be assessed against franchisees during the term of their franchise agreements do not exist under the standard 20-year Super 8 franchise agreements executed between 1984 and 1991 by the class members to govern their contractual relationships with the defendant. (Ex. I at 40-43; Ex. K at 51-52). Rather, the class members' franchise agreements allow only for a four percent royalty fee of gross room sales and an additional two percent fee for the "Super 8 Advertising and Reservation Fund," with no contractual provision or mechanism for unilaterally raising or assessing additional fees.

If Super 8 had intended to reserve the right to unilaterally increase or add new mandatory fees owed by the class members during the term of their franchise agreements, it could have included specific contractual language in its standard agreement granting such a right. The class members could have then decided whether or not to agree to such terms. But no such contractual language exists in the standard agreement at issue, and the agreements in fact expressly prohibit the unilateral modification of terms or conditions. Super 8's subsequent inclusion of contract language authorizing the imposition of additional fees for franchise agreements entered into after 1993 has no bearing or effect on the fixed, 20-year contracts entered into by the class members that contain no such authorization and expressly prohibit the unilateral modification of terms.

D. The evolution of Super 8's Uniform Franchise Offering Circular further demonstrates that the standard franchise agreement executed by the class members precludes the imposition of additional recurring fees.

An examination of Super 8's contemporaneous fee disclosures required under federal law regarding the standard agreements held by the class members demonstrates its clear understanding that the plain language of those agreements limited any recurring fees to a maximum of six percent of gross room sales and did not permit the imposition of additional fees.

The Federal Trade Commission Act (FTCA), 15 U.S.C. § 41 *et seq.*, provides that “unfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful” and broadly empowers the FTC to issue regulations prohibiting such activities. 15 U.S.C. § 45(a)(1). In 1978, pursuant to this statutory authority, the FTC promulgated what is known as the “Franchise Rule.” *Nieman v. Dryclean U.S.A. Franchise Co., Inc.*, 178 F.3d 1126, 1129 (11th Cir. 1999) (citing 16 C.F.R. § 436). The Franchise Rule requires franchisors to provide prospective franchisees with a detailed disclosure statement prior to selling a franchise. These disclosure statements, also required under many state franchise laws, are commonly referred to as Uniform Franchise Offering Circulars (UFOC). *See United States v. Building Inspector of America*, 894 F.Supp. 507, 510 (D.Mass. 1995); 16 C.F.R. § 436.1; SDCL § 37-5A-19 (repealed in 2008 and replaced with SDCL Ch. 37-5B invoking federal regulations). Failure to furnish prospective franchisees with the specified information is an unfair or deceptive practice within the meaning of the FTCA and a violation of federal law. 16 C.F.R. §§ 436.1, 436.6.

As part of these mandatory disclosures, the Franchise Rule requires franchisors to provide a copy of its standard franchise agreement and to disclose, among other information, a detailed statement of the franchisee’s estimated initial investment, all initial franchise fees, and all other fees that must be paid by the franchisee to the franchisor to operate under the agreement. 16 C.F.R. §§ 436.1, 436.5(e)-(g). Specifically, the regulations require franchisors to:

Disclose, in the following tabular form, all other fees that the franchisee must pay to the franchisor or its affiliates, or that the franchisor or its affiliates impose or collect in whole or part for a third party. State the title “OTHER FEES” in capital letters using bold type. Include any formula used to compute the fees.

16 C.F.R. § 436.5(f) & Item 6 Table. Franchisors must disclose each type of fee, amount, due date, descriptive information, and other requirements. These regulations further provide:

If fees may increase, disclose the formula that determines the increase or the maximum amount of the increase. For example, a percentage of gross sales is acceptable if the franchisor defines the term “gross sales.”

16 C.F.R. § 436.5(f) n.3. Thus, before it entered into its standard franchise agreement with the class members between 1984 and 1991, Super 8 Motels was required to disclose any and all mandatory fees and the manner in which any fees could increase in its disclosure document or be guilty of an unfair or deceptive trade practice and in violation of federal law.

Super 8’s UFOCs filed with the FTC and provided to prospective franchisees for 1987 and 1990, applicable to the standard franchise agreement held by the class members, are attached as EXHIBITS DD and EE. Super 8’s 1991 and 2003 UFOCs, applicable to revised standard franchise agreements executed *after* the class members’ agreements, are attached as EXHIBITS FF and GG. In accordance with FTC regulations, these circulars prominently advised that:

IF THIS OFFERING CIRCULAR/PROSPECTUS IS NOT DELIVERED ON TIME, OR IF IT CONTAINS A FALSE, INCOMPLETE, INACCURATE, OR MISLEADING STATEMENT, A VIOLATION OF FEDERAL AND STATE LAW MAY HAVE OCCURRED AND SHOULD BE REPORTED TO THE FEDERAL TRADE COMMISSION, WASHINGTON D.C. 20580 AND TO THE APPROPRIATE STATE REGULATORY AUTHORITY.

(Ex. FF at 2; *see also* Ex. DD at 1; Ex. EE at 2; Ex. GG at 1).

In its 1987 and 1990 UFOCs, Super 8 represented to the FTC and prospective franchisees, under penalty of federal law, that the standard franchise agreement now held by each of the class members permitted only the following recurring fees:

Recurring fees are limited to a royalty of 4% of gross room revenue, payable to Super 8 Motels, Inc. and 2% of the gross room revenue payable to the Super 8 Advertising and Reservation Fund. There are no other royalties or fees.

(Ex. DD, § 6(A) at page 9; *see also* page 28 for effective date; Ex. EE, § 6(A) at page 11) (emphasis supplied). The 1987 and 1990 UFOCs further represented, under penalty of law, that “[t]he term of the franchise is 20 years which term is not affected by any agreement other than

the Franchise Agreement,” and that “[t]he Franchisor may not modify the Franchise Agreement except by independent written agreement between it and Franchisee (See Paragraph TWENTIETH of the Franchise Agreement).” (Ex. DD, § 17(A) & (L) at pages 18-19; Ex. EE, § 17(A) & (K) at pages 21-22;) (emphasis supplied).

Thus, the defendant’s contemporaneous representations, made under penalty of law, regarding the allowable fees under the class members’ standard agreements confirm, as they must, the unambiguous language of the contracts themselves.

Beginning in mid-1991, *after* the standard agreement held by the class members had been revised, Super 8’s UFOCs reflected various new contract provisions allowing the defendant to raise or impose additional fees. Super 8’s UFOC made effective in April of 1991 and thereafter provided to prospective franchisees states that “Recurring fees are limited to a royalty of 4% of gross room sales, payable to Super 8 Motels, Inc., and 3% of the gross room sales payable to the Super 8 Advertising and Reservation Fund through December 31, 1994.” (Ex. FF, § 6(A) at page 11). It then advises that Super 8 may, “at its sole discretion,” increase the latter fee “by such percentage amount as Franchisor deems necessary,” not to exceed five percent of gross room sales, and that “[t]here are no other royalties or fees.” (Ex. FF, § 6(A) at page 11).

When TripRewards was developed and launched in 2003, the Super 8 UFOC had been revised to include a five percent royalty fee, three percent system assessment fee, and the five percent “Mandatory Marketing Program Charge” for gross room sales to TripRewards members. (Ex. GG, § 6 at page 16). By that time, the defendant’s executive leadership had long been located in New Jersey and none of its principals became affiliated with the company until *after* it was purchased by Cendant in 1993. (Ex. GG, § 2(A) at pages 6-9). Those individuals

accordingly do not have any first-hand knowledge of the defendant's understanding of class members' agreements at the time that they were drafted and signed.

In contrast, John Foy was Super 8's Executive Vice President of Sales and Marketing for Super 8 Motels in Aberdeen from 1987 to 1991, before it was sold to Cendant. On behalf of Super 8, Foy executed approximately 142 of the 226 franchise agreements that constituted the original certified class, and at least 105 of the 160 standard agreements held by the present class members. (EX. F at 25, 32-35; EX. DD at page 2; Doc. 98, CD-Rom). As Foy testified:

Q: Is it your opinion that the 5 percent fee that's now being imposed as part of the trip rewards program violates the contract that you signed on behalf of Super 8?

A: *Yes.*

(EX. F at 57) (emphasis supplied). Foy additionally confirmed that it was never Super 8's intent at that time for the company to be able to unilaterally raise or charge additional fees and that their imposition is a clear violation of those agreements. (EX. F at 47-49, 52, 55-57).

Under the direction of its New Jersey parent corporation, the defendant is purporting to treat all current Super 8 franchisees in a singular fashion under the terms of the 2009 standard agreement, brazenly disregarding the binding terms of its franchise agreements with the 160 class members who agreed to enter into their contracts under vastly different financial terms. In essence, the defendant is pretending that the pre-1993 franchise agreements were somehow revised or replaced. Super 8's imposition of additional mandatory fees in conjunction with TripRewards, or under the cloak of any other purported rationale, violates the class members' franchise agreements that do not allow for such additional fees. The class members respectfully suggest that this Court should construe their standard agreements according to their plain meaning and grant summary judgment in their favor on their breach of contract claim.

E. The contract damages incurred by the class members are finite, known to the defendant, and undisputed.

In this action, the class members do not seek to stop or interrupt the TripRewards program implemented by the defendant and its parent corporation, nor do they seek injunctive relief of any kind. Rather, as damages for breach of contract, the class members simply seek compensation for the TripRewards fees that they have already been required to remit to Super 8 that were not permitted under their particular class of standard franchise agreements executed prior to the parent corporation's acquisition of Super 8 Motels, Inc.

Because the defendant apparently amended its standard agreement some time after 1993 to allow for the unilateral imposition of additional fees, the injury suffered by all class members is finite. All of the class members have standard 20-year agreements executed between 1984 and 1991 that have expired or will expire in the near future just like the plaintiff. Moreover, the damages are readily ascertainable and not subject to dispute. If the class members prevail on their breach of contract claim, the damages are simply the mandatory TripRewards fees that each class member has been required to remit to the defendant since the program was launched in December of 2003. Those figures are readily available to the defendant and have been provided and updated on an ongoing basis during discovery. (Ex. B; U; Ex. V; Ex. W). Through the end of June 2009, the TripRewards fees paid by the class members amount to \$3,418,112.34. (Ex. B; Ex. U; Ex. B; Ex. HH – underlying data). Should the class members prevail on the issue of liability, this figure will need to be updated as of the date that final judgment is entered. The class members therefore respectfully request summary judgment in the amount of \$3,418,112.34, plus any additional TripRewards fees paid by the class members between June 2009 and the date that the judgment is entered, as well as pre-judgment interest on the entire amount.

CONCLUSION

The sole legal question in this action is: Did Super 8 Motels, Inc. breach the class members' franchise agreements by unilaterally requiring and extracting an additional, unauthorized recurring monthly fee? Once this Court construes the standard agreement at issue according to South Dakota contract principles, that question of law becomes ripe for a grant of summary judgment against the defendant. The price for doing business as a Super 8 franchisee was negotiated and agreed upon by the defendant and the class members in their standard franchise agreements when they were signed. Super 8 may revise its system and rules of operation for running its franchised motels, but it has no power to unilaterally change the essential terms of the binding contract by imposing an additional fee upon the class members during the 20-year terms of their agreements.

The defendant cannot unilaterally decide to start charging a franchisee *more* than the contract between them permits, any more than a franchisee could unilaterally decide to start paying *less* than the contract requires. Rather, any such change to contractual terms must be negotiated and mutually agreed upon. The defendant's imposition of an additional five percent fee for all gross room sales for customers enrolled with its mandatory TripRewards program, amounting to \$3,418,112.34 in unauthorized fees extracted from the class members through the end of June 2009, violates their franchise agreements as construed under South Dakota law.

WHEREFORE, the class members respectfully request that this Honorable Court grant their motion for summary judgment on their breach of contract claim, and enter judgment against the defendant in the amount of \$3,418,112.34, plus any additional TripRewards fees paid by the class members between June 2009 and the date that final judgment is entered, as well as pre-judgment interest on the entire amount.

Dated this 10th day of October, 2009.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of **Plaintiff's Brief in Support of Motion for Summary Judgment** was served by electronic means upon the following:

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