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February 22, 2008

Sent via Email: jpatel0730@yahoo.com

Jay Patel
Owners 8 Association
1125 Greenland Drive
Statesville, NC 28677

Re: Super 8's Right to Change the Fees Under the Franchise Agreement

Dear Jay:

You emailed us and asked whether Wyndham¹ has the right under the franchise agreement to change the fees contained therein, which include advertising and reservation fees, TripRewards fees, technology fees, and customer service fees, at any time.

In response to your question, we have reviewed the terms of the Super 8 Motels, Inc. Uniform Franchise Offering Circular, dated March 30, 2007 ("UFOC"), and the franchise agreement ("Franchise Agreement") and "Software and Services Agreement," both of which are attached to the UFOC. We also have generally reviewed the common law and franchise relationship statutes, which may both act to limit Super 8's rights to change fees in the written agreements.

According to the terms of the UFOC, the Franchise Agreement, and the Software and Services Agreement, our answer to your question is:

Maybe. The UFOC, the Franchise Agreement, and the Software and Services Agreement give Super 8 certain rights to change certain fees in particular circumstances, but Super 8's rights to change certain fees are limited by the terms of the written agreements themselves, as well as the common law and statutory law.

¹ For purposes of this letter, we will refer to "Wyndham" as "Super 8", since Super 8 is the franchisor according to the UFOC and the Franchise Agreement.

The UFOC and the Franchise Agreement give Super 8 the right to change the advertising and reservation fees, TripRewards fees, technology fees, and customer services fees. However, Super 8 may only change these fees if Super 8 gives franchisees at least 60 days prior written notice of the change, such notice is signed by Super 8's authorized representative, and Super 8 otherwise complies with the terms of the Franchise Agreement. If Super 8 does not comply with these requirements, it may not lawfully change the fees under the terms of the UFOC or the Franchise Agreement.

Super 8 does not have the right under the UFOC or the Franchise Agreement to change the royalty fee during the term of the Franchise Agreement.

Under the Software and Services Agreement, Super 8 has the right to increase the Monthly Software Maintenance and Support Fee by up to 5% effective on each anniversary of the Maintenance and Support Fee Commencement Date. Super 8 cannot increase the Monthly Software Maintenance and Support Fee by more than 5% and cannot implement the increase at any time other than on the anniversary of the Maintenance and Support Fee Commencement Date.

Because of these limitations in the written agreements, any of Super 8's proposed fee increases should be cross-checked with the particular contractual limitations involved, in order to ensure that Super 8 has the contractual right to make such fee increases.

In addition to the limitations imposed by the UFOC, Franchise Agreement and Software and Services Agreement, Super 8's ability to change the above-listed fees is further limited by the common-law covenant of good faith and fair dealing, which applies in essentially all states and provides that a franchisor's conduct, even if expressly permitted by the terms of the written agreements, must be reasonable. Therefore, Super 8 may not increase fees in an unreasonable manner or by unreasonable amounts.

Finally, Super 8's right to increase fees is limited by certain states' franchise relationship statutes, which may prevent a franchisor from discriminatorily increasing fees—*i.e.*, if fees are changed for one, particular franchisee, fees must be changed in the same way for other similarly-situated franchisees in the same competitive area.

Below is our legal analysis, which points out the specific provisions of the UFOC, the Franchise Agreement, and the Software and Services Agreement that give Super 8 the right to change the advertising and reservation, TripRewards, technology, and customer service fees, and lists the specific procedures Super 8 must follow before it can make any changes to the above-listed fees. Additionally, we have detailed the

implied covenant of good faith and fair dealing and the anti-discrimination language contained in some states' franchise relationship statutes, which may both limit Super 8's rights to change fees under the UFOC, Franchise Agreement, and Software and Services Agreement.

LEGAL ANALYSIS

I. Super 8's Right to Change Fees Under the Franchise Agreement

The Franchise Agreement plainly states whether Super 8 has the right to change the fees in the Franchise Agreement. Super 8 has reserved for itself the right to modify the Franchise Agreement, including the majority of the fees contained therein. Franchise Agreement ¶ 17.2. Paragraph 17.2, "Waivers, Modifications and Approvals," specifically states:

All modifications, waivers, approvals and consents of or under this Agreement by us must be in writing and signed by our authorized representative to be effective. We may unilaterally revise Schedule C when this Agreement so permits.

Id. (emphasis added). Schedule C of the Franchise Agreement contains descriptive information about the majority of the fees that franchisees must pay and includes the amounts of the following fees:

- System Assessment Fee;² and
- Additional Fees (which include the Mandatory Marketing Program Charge, GDS and Internet Booking Fees, Other Additional Fees or Reservation System Charges, and the Guest Services Assessment)³.

Franchise Agreement Schedule C. Accordingly, Super 8 may change the System Assessment Fee and the Additional Fees as listed in Schedule C, so long as Super 8 complies with the specific terms of the Franchise Agreement that relate to Schedule C

² The System Assessment Fee is the fee a franchisee pays into the Advertising and Reservation Fund.

³ The Mandatory Marketing Program Charge is the charge for a franchisee's participation in the TripRewards guest loyalty program, the GDS and Internet Booking Fees are the charges for reservations processed through the GDS or the Internet, the Other Additional Fees or Reservation System Charges are the charges for reservations booked by travel agencies, annual website maintenance fees, Central Reservation System fees, etc., and the Guest Services Assessment is the charge related to guest complaints.

revisions.⁴

Paragraph 7.1.2 of the Franchise Agreement allows for revisions to the fees contained in Schedule C, including the System Assessment Fee and the Additional Fees.

A. Changes to the System Assessment Fee

Specifically, Paragraph 7.1.2 of the Franchise Agreement states: "Upon 60 days written notice, we may change the System Assessment Fee after the tenth anniversary of the Effective Date to cover costs as described in Schedule C." Franchise Agreement ¶ 7.1.2. Similarly, Schedule C of the Franchise Agreement states,

[W]e may increase the System Assessment Fee you pay upon 60 days advance written notice, effective at any time on or after the tenth (10th) anniversary of the Effective Date of this Agreement, as part of a Chain-wide increase in System Assessment Fees we implement in our sole discretion to cover costs (including reasonable direct or indirect overhead costs) related to such services and programs.

Schedule C (emphasis added).

Accordingly, the System Assessment Fee—*i.e.*, the fee a franchisee pays into the Advertising and Reservation Fund—can be changed by Super 8 only after:

1. Super 8 provides the franchisee with at least 60 days prior written notice of the change to the System Assessment Fee;
2. Super 8's authorized representative signs the notice; and
3. The tenth anniversary of the effective date of the franchisee's franchise agreement has passed.

If Super 8 decides to change the System Assessment Fee, it can only do so to cover costs for services and programs related to advertising, public relations, guest services, training, and the reservation system. See Schedule C; UFOC Item 11. Whenever Super 8 proposes to increase the System Assessment Fee, you should

⁴ Schedule C does not contain the "Royalty" fee, but rather, the Royalty fee is listed in Paragraph 7.1.1 of the Franchise Agreement. Neither Paragraph 7.1.1, nor any other provision of the Franchise Agreement, provides that the Royalty fee can be changed. Therefore, by the plain language of Paragraph 7.1.1, the Royalty fee cannot be changed and is effective until the end of the Franchise Agreement's term.

make absolutely certain that Super 8 is adhering to these provisions in the Franchise Agreement.

If Super 8 increases the System Assessment Fee before the tenth anniversary of the franchisee's franchise agreement, fails to provide franchisees with the requisite notice as listed above, or increases the System Assessment Fee when it is not necessary to cover the costs of the services and programs related to advertising, public relations, guest services, training, and the reservation system, Super 8 would be liable to the franchisees for breach of the Franchise Agreement.

B. Changes to the Additional Fees

As previously stated, Additional Fees include the Mandatory Marketing Program Charge (the charge for a franchisee's participation in the TripRewards guest loyalty program), GDS and Internet Booking Fees (the charges for reservations processed through the GDS or the Internet), Other Additional Fees or Reservation System Charges (the charges for reservations booked by travel agencies, annual website maintenance fees, Central Reservation System fees, etc.) and Guest Services Assessments (charges related to guest complaints).

According to Paragraph 7.1.2, Super 8 may "increase or adjust the Additional Fees to cover the cost of the services or to add new services or programs at any time on not less than 60 days prior written notice." *Id.*

Likewise, Schedule C states,

We may increase or adjust any of the Additional Fees to cover increases in their allocated costs and may add new fees and charges for new services and programs at any time upon not less than 60 days notice.

Schedule C (emphasis added).

Accordingly, Super 8 may increase any of the Additional Fees, or even add new fees and charges, so long as:

1. Super 8 provides the franchisee with at least 60 days prior written notice of the increase to any of the Additional Fees or the new fee or charge; and
2. Super 8's authorized representative signs the notice.

If Super 8 decides to increase any of the Additional Fees, it can only do so if the

costs of the services associated with the fees increase. However, Super 8 may implement a new fee or charge for a new program or service at any time, provided it complies with the notice requirements listed above.

Whenever Super 8 proposes to increase any of the Additional Fees, you should make absolutely certain that Super 8 is adhering to the limitations in the Franchise Agreement. If Super 8 increases any of the Additional Fees or implements a new fee or charge for a new program or service, but fails to provide franchisees with the requisite notice, Super 8 would be liable to the franchisees for breach of the Franchise Agreement. Additionally, if Super 8 complies with the notice requirements, but increases the Additional Fees when the costs of the services associated with TripRewards, reservations, and customer service do not increase, Super 8 would be liable to the franchisees for breach of the Franchise Agreement.

II. Super 8's Right to Change Fees Under the Software and Services Agreement

The Software and Services Agreement gives Super 8 the right to "increase the Monthly Software Maintenance and Support Fee by up to 5% effective on each anniversary of the Maintenance and Support Fee Commencement Date." Software and Services Agreement ¶ 9.3. The "Maintenance and Support Fee Commencement Date" is defined by the Software and Services Agreement as the date the computer hardware and software is accepted and tested successfully at the motel property, if such date falls on the first of the month, or the first day of a month following the Acceptance Date. See Schedule A. Unlike fee increases under the Franchise Agreement, Super 8 is not required to give franchisees any notice of an increase of the Monthly Software Maintenance and Support Fee. Therefore, Super 8 may increase the Monthly Software Maintenance and Support Fee by up to 5% immediately upon the yearly anniversary of the Maintenance and Support Fee Commencement Date.

III. Super 8's Right to Change Fees Under Common Law and Statutory Law

A. Limitations Imposed by the Common-Law Covenant of Good Faith and Fair Dealing

Super 8's right to change fees may be limited by the common-law covenant of good faith and fair dealing. New Jersey common law applies to the Franchise Agreement pursuant to Section 17.6.1, which states, "This Agreement will be governed by and construed under the laws of the State of New Jersey, except for its conflicts of law principles." Franchise Agreement § 17.6.1.

Under New Jersey law, there is an implied covenant of good faith and fair

dealing that requires each party to a contract to deal fairly and in good faith with each other in the performance of the contract. *Sons of Thunder, Inc. v. Borden, Inc.*, 690 A.2d 575, 586-587 (N.J. 1997). Although the implied covenant of good faith and fair dealing cannot override an express term in a contract, a party's performance under a contract may breach that implied covenant even though that performance does not violate a pertinent express term. *Id.* at 586. Unlike many other states, in New Jersey, "a party to a contract may breach the implied covenant of good faith and fair dealing in performing its obligations even when it exercises an express and unconditional right" under the contract. *Id.* at 588; see also *Bak-A-Lum Corp. v. Alcoa Bldg. Prods., Inc.*, 351 A.2d 349, 352 (N.J. 1976) (finding that defendant's conduct in terminating the contract constituted bad faith, although conduct did not violate express terms of written agreement).

Accordingly, Super 8 is required to deal with its franchisees fairly and in good faith as it decides to change fees under the Franchise Agreement. This means that, according to the implied covenant of good faith and fair dealing, Super 8 cannot change fees in an unreasonable manner or by unreasonable amounts.

B. Limitations Imposed by State Franchise Relationship Statutes

Certain franchise relationship statutes contain provisions that further limit Super 8's rights to change fees under the Franchise Agreement. For example, under the Minnesota Franchise Act, it is an unfair and inequitable practice for a franchisor to:

discriminate between franchisees in the charges offered or made for royalties, goods, services, equipment, rentals, advertising services, or in any business dealing, unless any classification of or discrimination between franchisees is based on franchises granted at different times, geographic market, volume, or size differences, costs incurred by the franchisor, or other reasonable grounds. . . .

Minn. R. 2860.4400(B).⁵ This provision prevents Super 8 from discriminatorily increasing fees under the Franchise Agreement and the Software and Services Agreement. In other words, if Super 8 changes the fees for one franchisee, it must change the fees for all franchisees who are similarly-situated—*i.e.*, in the same or similar competitive area. Therefore, Super 8 cannot single out a particular franchisee and increase his or her fees, if Super 8 is not going to increase the fees of all other similar franchisees.

⁵ The franchise relationship statutes in Hawaii, Illinois, Indiana, and Washington contain similar provisions, which prevent a franchisor from discriminating between franchisees.

Jay Patel
February 22, 2008
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CONCLUSION

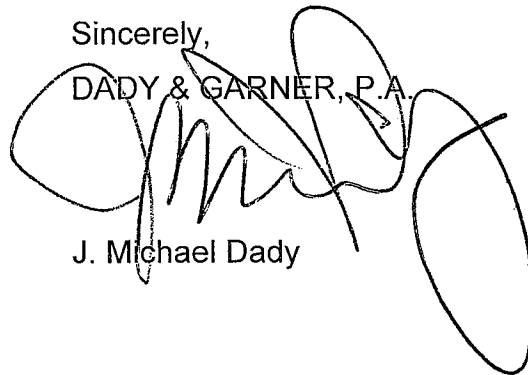
Super 8 has reserved for itself the right in the UFOC and the Franchise Agreement to increase advertising and reservation fees, TripRewards fees, technology fees, and customer service fees, provided Super 8 gives franchisees at least 60 days prior written notice of the change, such notice is signed by Super 8's authorized representative, and Super 8 otherwise complies with the terms of the Franchise Agreement. Super 8 does not have the right under the Franchise Agreement to change the royalty fee during the term of the Franchise Agreement.

Super 8 has reserved the right to increase the Monthly Software Maintenance and Support Fee under the Software and Services Agreement by up to 5% effective on each anniversary of the Maintenance and Support Fee Commencement Date.

However, all of these rights are limited by the implied covenant of good faith and fair dealing, which requires Super 8 to act reasonably when increasing fees, and applicable franchise relationship statutes, which prevent Super 8 from discriminatorily increasing fees.

Jay, we hope this analysis answers your question. If you should have any further questions about Super 8's ability to change the fees under the Franchise Agreement, please let us know.

Sincerely,
DADY & GARNER, P.A.

A large, stylized handwritten signature in black ink, appearing to read 'J. Michael Dady', is written over the typed name and firm name.

J. Michael Dady

JMD/RRM/pg
cc: Rachel Myers, Esq.