IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAI SAI BABA LLC, LAXMIKRUPA CORPORATION, KRISHNA HOSPITALITY CORPORATION, VEER HOTELS INC., DEERFIELD HOTEL TWO LLC, AUM INVESTMENTS LLC, SHUBHAM LLC, NEWLIGHT INC., JESSUP QI LLC, CATON HOSPITALITY LLC, ELKRIDGE HOSPITALITY LLC, JAI SWAMINARAYAN CHESTERTOWN LLC, MAHAMATI INC, ALBEMARLE HOSPITALITY LLC, HELI HOSPITALITY, LLC, OUTERBANK HOTEL LLC, A&A HOSPITALITY INC., PREMIER HOSPITALITY LLC, HAVELOCK HOSPITALITY, LLC, HIGHMARK LODGING LLC, ELITE HOSPITALITY LLC, SUNBURST HOTELS, LLC, AHKH LLC, MYGHM COOKSTOWN LLC, JSK MIDDLETOWN LLC, WEST WINDSOR LODGING, LLC, JAI SWAMINARAYAN GLOUCESTER LLC, DIP HOSPITALITY LLC, HARTWICK HOTEL COMPANY LLC, SYRACUSE HOTEL PARTNERS LLC, AKASH HOTELS LLC, AGK REAL ESTATE HOLDING LLC, READING HOTELS LLC, SHREE JAY BHOLE INC, JSK POTTSTOWN LLC, SAI RAM HOTELIERS LLC, GETTYSBURG HOTELS, JSK NEW HOPE LLC, RRR HOTEL LLC, AVIS HOSPITALITY, ANNPURNA SC LLC, OM COMPANY, SAVAN LLC, 9M9 HOSPITALITY INC., JAI MAA UNIVERSAL, LLC, and VAB 435 OCEANFRONT LLC, PLAINTIFFS, V. CHOICE HOTELS INTERNATIONAL, INC. and CHOICE HOTELS OWNERS COUNCIL, DEFENDANTS.	CIVIL ACTION NO. 5:20-cv-02823-JFL

MOTION TO CONFIRM ARBITRATION AWARD

Plaintiff, Highmark Lodging, LLC, by and through its attorneys, White and Williams LLP, submit this Motion to Confirm the Binding Arbitration Award in favor of the Plaintiff and against Defendant, Choice Hotels International, Inc. ("Choice"). In support thereof, Plaintiff avers as follows:

1. In June of 2020, Plaintiffs commenced an action against Choice alleging that Choice engaged in various unfair and deceptive acts and practices in violation of contractual and statutory duties owed to Plaintiffs.

2. By Order, dated March 19, 2021, the Honorable Joseph F. Leeson, Jr., granted Defendants' motion to compel arbitration.

3. The Court granted Choice's request that each claim be arbitrated separately.

4. The instant action was stayed pending the resolution of the arbitration proceedings.

5. The arbitration agreement states that "[j]udgment on the arbitration award may be entered in any court having jurisdiction." A copy of the parties' arbitration agreement, which is contained in Section 21 of the Franchise Agreement between the parties, is attached as Exhibit 1.

6. On or around June 29, 2021, Plaintiff initiated an arbitration action before the American Arbitration Association ("AAA"). The action was assigned Case Number 01-21-0004 5554.

7. By letter, dated September 27, 2001, and pursuant to the parties' agreement to arbitrate, the AAA appointed Steven Petrikis, Esq., as the sole arbitrator. The AAA's letter designating the Arbitrator for Case Number 01-21-0004-5554 is attached as Exhibit 2.

8. Arbitrator Petrikis conducted an evidentiary hearing on February 13, 14, 15, 16, 17, 21, 22, and 23, 2023 by Zoom video conference. The parties presented the testimony of

eighteen (18) witnesses and substantial documentary and other evidence. Both parties also submitted substantial pre- and post-hearing briefing.

9. Arbitrator Petrikis issued a Partial Final Award, dated May 17, 2023, in which he found in favor of Plaintiff and against Choice on three (3) of Plaintiff's contract claims. A copy of the Partial Final Award is attached hereto as Exhibit 3.

10. Specifically, Arbitrator Petrikis found in favor of Plaintiff and against Choice in the amount of $16,361.00 for the volume discount breach of contract claim; $1,589.01 for the Key Money breach of contract claim; and $1,439.64 for the Crowdstrike breach of contract claim. *See id.* at p. 23.

11. All other claims brought by Plaintiff were denied. *See id.*

12. Arbitrator Petrikis did not decide the issue of attorneys' fees. He instead Ordered that, on or before June 5, 2023, each party shall submit a Verified Petition for Fees, Costs and Administrative Expenses in accordance with Section 16 of the Franchise Agreement. *See id.* Arbitrator Petrikis further Ordered that each party shall file a response on or before June 16, 2023. *See id.* Finally, Arbitrator Petrikis noted that "[t]he submissions may include briefing regarding entitlement to fees, costs and expenses." *Id.*

13. Thereafter, the parties submitted additional briefing as Ordered by Arbitrator Petrikis.

14. The AAA notified the parties that the hearing was declared closed as of June 30, 2023 and that a final award was due on July 31, 2023. *See* Exhibit 4.

15. On July 27, 2023, Arbitrator Petrikis issued his Final Award, in which he found that Plaintiff was the prevailing party. A copy of the Final Award is attached hereto as Exhibit 5. The Final Award incorporated the Partial Final Award by reference. *See id.* at p. 12.

16. Arbitrator Petrikis awarded Plaintiff the sum of $760,008.75, representing (a) $649,240.50 for attorneys' fees, (b) $71,581.75 for expenses and (c) $39,186.50 for arbitration fees and costs. *See id.*

17. The Final Award is in all respects proper, and there are no legitimate grounds under 9 U.S.C. § 10 for Choice to contest or seek to vacate the Final Award. Accordingly, the Court should issue an Order and separate Judgment confirming the Final Award.

18. Accordingly, this matter has been successfully concluded, and there can be no re-institution of this action.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court enter the attached Order.

Respectfully submitted,

WHITE AND WILLIAMS, LLP

BY: 

Justin E. Proper, Esquire
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103
215-864-7165
properj@whiteandwilliams.com
Attorneys for Plaintiff Highmark Lodging

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAI SAI BABA LLC, LAXMIKRUPA CORPORATION, KRISHNA HOSPITALITY CORPORATION, VEER HOTELS INC., DEERFIELD HOTEL TWO LLC, AUM INVESTMENTS LLC, SHUBHAM LLC, NEWLIGHT INC., JESSUP QI LLC, CATON HOSPITALITY LLC, ELKRIDGE HOSPITALITY LLC, JAI SWAMINARAYAN CHESTERTOWN LLC, MAHAMATI INC, ALBEMARLE HOSPITALITY LLC, HELI HOSPITALITY, LLC, OUTERBANK HOTEL LLC, A&A HOSPITALITY INC., PREMIER HOSPITALITY LLC, HAVELOCK HOSPITALITY, LLC, HIGHMARK LODGING LLC, ELITE HOSPITALITY LLC, SUNBURST HOTELS, LLC, AHKH LLC, MYGHM COOKSTOWN LLC, JSK MIDDLETOWN LLC, WEST WINDSOR LODGING, LLC, JAI SWAMINARAYAN GLOUCESTER LLC, DIP HOSPITALITY LLC, HARTWICK HOTEL COMPANY LLC, SYRACUSE HOTEL PARTNERS LLC, AKASH HOTELS LLC, AGK REAL ESTATE HOLDING LLC, READING HOTELS LLC, SHREE JAY BHOLE INC, JSK POTTSTOWN LLC, SAI RAM HOTELIERS LLC, GETTYSBURG HOTELS, JSK NEW HOPE LLC, RRR HOTEL LLC, AVIS HOSPITALITY, ANNPURNA SC LLC, OM COMPANY, SAVAN LLC, 9M9 HOSPITALITY INC., JAI MAA UNIVERSAL, LLC, and VAB 435 OCEANFRONT LLC, PLAINTIFFS, V. CHOICE HOTELS INTERNATIONAL, INC. and CHOICE HOTELS OWNERS COUNCIL, DEFENDANTS.	CIVIL ACTION NO. 5:20-cv-02823-JFL

ORDER

AND NOW, this day of , 2023, upon receipt of the Memorandum and Award of Arbitrator Steven Petrikis, Esquire with respect to the Binding Arbitration of the above-captioned matter, it is hereby **ORDERED and DECREED** that Plaintiff Highmark Lodging, LLC's Motion to Confirm Award of the Arbitrator is hereby **GRANTED**.

It is further **ORDERED and DECREED** that:

A. Judgment shall be entered against Choice in the amount of $760,008.75, together with post-judgment interest in accordance with 28 U.S.C. § 1961 from the date that the Court enters judgment confirming the Final Award and the costs incurred in connection with the preparation of this Motion and any related proceedings; and

B. The Court shall retain jurisdiction for the purposes of further proceedings necessary to enforce this Court's Judgment.

BY THE COURT:

_____

Honorable Joseph F. Leeson, Jr.

CERTIFICATE OF SERVICE

I, Justin E. Proper, counsel for Plaintiff, do hereby certify that a true and correct copy of the Motion to Confirm Arbitration Award and Supporting Memorandum of Law, was sent on this 28 day of July, 2023, to all counsel of record via the Court's electronic filing system.

WHITE AND WILLIAMS, LLP

BY: 

Justin E. Proper, Esquire
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAI SAI BABA LLC, LAXMIKRUPA CORPORATION, KRISHNA HOSPITALITY CORPORATION, VEER HOTELS INC., DEERFIELD HOTEL TWO LLC, AUM INVESTMENTS LLC, SHUBHAM LLC, NEWLIGHT INC., JESSUP QI LLC, CATON HOSPITALITY LLC, ELKRIDGE HOSPITALITY LLC, JAI SWAMINARAYAN CHESTERTOWN LLC, MAHAMATI INC, ALBEMARLE HOSPITALITY LLC, HELI HOSPITALITY, LLC, OUTERBANK HOTEL LLC, A&A HOSPITALITY INC., PREMIER HOSPITALITY LLC, HAVELOCK HOSPITALITY, LLC, HIGHMARK LODGING LLC, ELITE HOSPITALITY LLC, SUNBURST HOTELS, LLC, AHKH LLC, MYGHM COOKSTOWN LLC, JSK MIDDLETOWN LLC, WEST WINDSOR LODGING, LLC, JAI SWAMINARAYAN GLOUCESTER LLC, DIP HOSPITALITY LLC, HARTWICK HOTEL COMPANY LLC, SYRACUSE HOTEL PARTNERS LLC, AKASH HOTELS LLC, AGK REAL ESTATE HOLDING LLC, READING HOTELS LLC, SHREE JAY BHOLE INC, JSK POTTSTOWN LLC, SAI RAM HOTELIERS LLC, GETTYSBURG HOTELS, JSK NEW HOPE LLC, RRR HOTEL LLC, AVIS HOSPITALITY, ANNPURNA SC LLC, OM COMPANY, SAVAN LLC, 9M9 HOSPITALITY INC., JAI MAA UNIVERSAL, LLC, and VAB 435 OCEANFRONT LLC, PLAINTIFFS, V. CHOICE HOTELS INTERNATIONAL, INC. and CHOICE HOTELS OWNERS COUNCIL, DEFENDANTS.	CIVIL ACTION NO. 5:20-cv-02823-JFL

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO CONFIRM ARBITRATION AWARD AGAINST CHOICE HOTELS INTERNATIONAL, INC.

I. PRELIMINARY STATEMENT

Pursuant to Section 9 of the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 9, Plaintiff Highmark Lodging LLC, respectfully submits this Memorandum of Law in Support of its Motion to Confirm Arbitration Award. On May 17, 2023, the American Arbitration Association ("AAA") arbitration entitled Highmark Lodging, LLC and Darshan Patel -vs- Choice Hotels International, Inc.; Choice Hotels Owners Council, Inc., AAA Case No. 01-21-0004-5554, concluded with the issuance by the duly appointed arbitrator ("Steven Petrikis") of a Partial Final Award, in which Arbitrator Petrikis found in favor of Plaintiff and against Choice on three (3) of Plaintiff's contract claims. *See* Exhibit 3. Specifically, Arbitrator Petrikis found in favor of Plaintiff and against Choice in the amount of $16,361.00 for the volume discount breach of contract claim; $1,589.01 for the Key Money breach of contract claim; and $1,439.64 for the Crowdstrike breach of contract claim. *See id.* at p. 23.

Arbitrator Petrikis did not decide the issue of attorneys' fees. He instead Ordered additional briefing to determine each party's claimed entitlement to fees, costs and expenses. *See id.* On July 27, 2023, Arbitrator Petrikis issued his Final Award, in which he found that Plaintiff was the prevailing party. *See* Exhibit 5. The Final Award incorporated the Partial Final Award by reference. *See id.* at p. 12. Arbitrator Petrikis awarded Plaintiff the sum of $760,008.75, representing (a) $649,240.50 for attorneys' fees, (b) $71,581.75 for expenses and (c) $39,186.50 for arbitration fees and costs. *See id.*

The Final Award is the product of an eight-day evidentiary hearing involving claims arising out of a contract affecting interstate commerce. Arbitrator Petrikis heard testimony from eighteen (18) witnesses. Arbitrator Petrikis further permitted the parties to submit extensive pre-

and post-hearing briefing both as to liability and attorneys' fees. Choice made no objections relating to the manner in which the hearing was conducted. The Award is in full and complete settlement and satisfaction of any and all claims, counterclaims, defenses and off-sets submitted to Arbitrator Petrikis. The Award is proper in form, having been signed and affirmed by Arbitrator Petrikis. There is no basis on which to modify or vacate the Final Award. Accordingly, Plaintiff respectfully requests that the Court confirm the award and order the entry of judgment on it.

II. ARGUMENT

A. Venue Is Proper, And The Court Has Jurisdiction.

This Court previously addressed Choice's motion to compel arbitration. In granting Choice's requested relief, this Court stayed the action and retained jurisdiction. In this situation, any subsequent motion to confirm, modify or vacate must be brought in this Court:

> The FAA as a whole creates a procedural mechanism that provides an alternative to litigation, and § 4, as Vaden held, indicates that petitions to compel arbitration may be resolved in the same court that could adjudicate the case in the absence of an arbitration agreement. In our view, it would be surplusage to include in each section of the FAA language specifying jurisdiction over each motion filed subsequent to a § 4 petition. The FAA as a whole creates a procedural mechanism that provides an alternative to litigation, and § 4, as *Vaden* held, indicates that petitions to compel arbitration may be resolved in the same court that could adjudicate the case in the absence of an arbitration agreement. In our view, it would be surplusage to include in each section of the FAA language specifying jurisdiction over each motion filed subsequent to a § 4 petition.

McCormick v. Am. Online, Inc., 909 F.3d 677, 683 (4th Cir. 2018); *Davis v. Fenton*, 857 F.3d 961, 962 (7th Cir. 2017) (where the district court "had [federal-question] jurisdiction over the case at the time it was filed," the court's earlier "order staying the case . . . retained jurisdiction to confirm or vacate [the] arbitral award"); *Dodson Int'l Parts, Inc. v. Williams Int'l Co.*, 12 F.4th 1212, 1227 (10th Cir. 2021); *Hypower, Inc. v. Sunlink Corp.*, 2014 U.S. Dist. LEXIS 56039

(N.D.Ca. Apr. 21, 2014) (granting motion to transfer the petition to vacate to the first filed action in the Southern District of Florida where the court had compelled arbitration and retained jurisdiction by staying the action); *Quezada v. Bechtel OG & C Constr. Servs., Inc.*, 946 F.3d 837, 843 (5th Cir. 2020) ("[A] litigant [is] able to preserve federal jurisdiction over a motion to vacate, modify, or confirm an arbitration award by first filing a motion to compel arbitration under section 4 [of the FAA]"); *Doscher v. Sea Port Grp. Sec.*, LLC, 832 F.3d 372, 386 (2d Cir. 2016) ("If . . . a case were stayed, it could provide . . . an independent jurisdictional basis sufficient to permit the federal court to entertain . . . petitions under [FAA] §§ . . . 9-11."); 13D Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Juris. § 3569 at 500 (3d ed. 2008) (stating, with respect to diversity cases, that when the "underlying litigation . . . was stayed pending arbitration . . . , the jurisdiction invoked in the underlying litigation is retained").

B. The Award Should Be Confirmed

1. The FAA Governs

The FAA governs the scope of review and the enforcement of the Award because it arises out of a contract that involved interstate commerce. 9 U.S.C. § 2. The FAA provides that: "at any time within one year after the award is made any party to the arbitration may apply ... for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected ..." 9 U.S.C. § 9. "[T]he confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court." *Teamsters Loc. 177 v. United Parcel Serv.*, 966 F.3d 245, 248 (3d Cir. 2020) (citing *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984). "The FAA not only authorizes, but mandates, that district courts confirm arbitration awards by converting them into enforceable judgments through a summary proceeding." *Id.*

2. The FAA Requires Confirmation

It is a fundamental tenet of the FAA that judicial review of arbitration awards is "extremely deferential" and the party seeking vacatur bears a heavy burden of proof. *Dluhos v. Strasberg*, 321 F.3d 365 (3d Cir. 2003); *Lebeau v. Oppenheimer & Co.*, No. 05-6779, 2006 U.S. Dist. LEXIS 42613, *5 (E.D. Pa. June 23, 2006) ("Where a party has agreed to arbitrate a dispute, the court will set the arbitration decision aside 'only in very unusual circumstances.'") "In a proceeding to confirm or vacate an arbitration award, a court's review is exceedingly narrow." *Eichleay Corp. v. International Ass'n of Bridge*, 944 F.2d 1047, 1055-56 (3d Cir. 1991). The Third Circuit has repeatedly stressed that there is a strong presumption in favor of confirming arbitration awards. *See Major League Umpires Ass'n v. Am. League of Prof'l Baseball Clubs*, 357 F.3d 272, 280 (3d Cir. 2004); *see also Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003). We "enforce the bargains implicit in [arbitration] agreements by enforcing arbitration awards absent a reason to doubt the authority or integrity of the arbitral forum." *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 219 (3rd Cir. 2012) (*citing Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008).

The "exceedingly narrow" circumstances under which a district court may vacate an arbitration award are specified in § 10 of the FAA. 9 U.S.C. § 10. Indeed, § 9 of the FAA provides that the district court "must" confirm an arbitration award unless the award is subject to vacatur under § 10 or modification under § 11. 9 U.S.C. § 9.

Section 10 sets forth the "exclusive grounds" for vacatur of an arbitration award under the FAA. *Hall Street Assoc. v. Mattel, Inc., supra*, 128 S. Ct. 1396, 1404 (2008). It provides:

> (a) In any of the following cases the United States court in and for the district where the award was made may make an order vacating the award upon the application of any party to the arbitration-
> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was made.

9 U.S.C. § 10.

The federal courts have repeatedly and consistently held that their role in reviewing arbitration awards is extremely limited, and that a district court is not free to vacate an award merely because it views the merits differently from the arbitrators. As the United States Court of Appeals for the Third Circuit has explained: "Since the parties have bargained for the arbitrator's decision, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." *Tanoma Mining Co. v. Local*

1269, United Mine Workers of America, 896 F.2d 745, 747 (3d Cir. 1990) (quoting *United Paperworkers Int'l. Union v. Misco, Inc.*, 484 U.S. 29, 38, 108 S. Ct. 364, 370 (1987)). Mere disagreement with the arbitrator's decision or a belief that the arbitrator committed a serious error is not sufficient grounds to vacate or modify an award. *See United Trans. Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 379 (3d Cir. 1995); *See also News Am. Publications, Inc. Daily Racing Form Div. v. Newark Typographical Union Loc.*, 921 F.2d 40, 41 (3d Cir. 1990) ("[S]o long as the arbitrator arguably has construed or applied the contract, the award must be enforced, even if the court is convinced that the arbitrator has committed a serious error.").

Here, there is no basis on which to vacate Arbitrator Petrikis' Final Award. Arbitrator Petrikis conducted the arbitration hearing over eight (8) days, during which he afforded the parties every opportunity to present and cross-examine witnesses. The entirety of the hearing was transcribed by a court reporter. There was extensive pre- and post-hearing briefing. Choice never raised one objection to the manner in which the hearing was conducted. Accordingly, Arbitrator Petrikis' Final Award must be confirmed.

III. CONCLUSION

For the reasons set forth above, Plaintiff Highmark Lodging LLC respectfully requests that this Court enter the attached Order, together with such other and further relief as the Court may deem just and proper.

Respectfully submitted,

WHITE AND WILLIAMS, LLP

BY: 

Justin E. Proper, Esquire
1650 Market Street
One Liberty Place, Suite 1800
Philadelphia, PA 19103
215-864-7165
properj@whiteandwilliams.com
Attorneys for Plaintiff Highmark Lodging

CERTIFICATE OF SERVICE

I, Justin E. Proper, counsel for Plaintiff, do hereby certify that a true and correct copy of the Motion to Confirm Arbitration Award and Supporting Memorandum of Law, was sent on this 28 day of July, 2023, to all counsel of record via the Court's electronic filing system.

WHITE AND WILLIAMS, LLP

BY: 

Justin E. Proper, Esquire
Attorney for Plaintiff

EXHIBIT 1

(Sec. 21 Arbitration Agreement within Franchise Agreement)

04/16

ND105 – 0000030724
Quality Inn & Suites

CHOICE HOTELS INTERNATIONAL, INC.
FRANCHISE AGREEMENT

THIS AGREEMENT ("Agreement") is made in Maryland, effective as of September 30, 2016 ("Effective Date"), between **Choice Hotels International, Inc.**, a Delaware corporation ("we" or "us"), and **NODAK HOTELS, LLC, a North Dakota limited liability company** ("you").

We and you agree as follows:

1. Definitions. In addition to the terms that are defined in other parts of this Agreement, the following terms shall have the indicated meanings:

a. "Hotel" means the property located at **475 15th St. West, Dickinson, ND 58601** ("Location") and includes the building, land and all improvements, structures, fixtures, amenities, equipment, furniture and related rights, privileges and properties at such Location.

b. "Sleeping Rooms" means the number **57**, which is and shall be the total number of rentable sleeping rooms in the Hotel, subject to change only in accordance with Section 8, below.

c. "Meeting Rooms" means the total number of meeting, conference and/or banquet or similar rooms generally available for rent in the Hotel, subject to change only in accordance with Section 8, below.

d. "Rentable Rooms" means the Sleeping Rooms and the Meeting Rooms, collectively.

e. "Designated Representative" means the person designated by you to represent you on all matters relating to this Agreement and to receive notices under this Agreement on your behalf. Unless you change the Designated Representative in accordance with Section 15 of this Agreement, your Designated Representative is **Hitesh Patel** whose address is **475 15th Street West, Dickinson, ND 58601.**

f. "Opening Date" means the date that you begin to rent any portion of the Rentable Rooms under this Agreement.

g. "Gross Room Revenues" means all revenues from the rental, sale, use or occupancy of any of the Rentable Rooms, for whatever purpose, including cash and credit transactions, whether or not collected by you, and any proceeds from business interruption insurance, as required by Section 12 of this Agreement. It does not include taxes required by law (including gross receipt taxes, property taxes, and hotel sales taxes), revenues from telephone calls, movie rentals, vending machines, room service or food and beverages sales.

h. "Hotel Supplies" means all furniture, fixtures, equipment (including, without limitation, computers, printers, telephones and facsimile machines), signs, amenities and other supplies used in the construction, renovation, maintenance and operation of the Hotel.

i. "Brand Mark" means the trademark and trade name **Quality Inn & Suites®** and the logo designated by us for use in association with the Hotel (including designs, stylized letters, colors and other elements that we permit you to use at the Hotel and in advertising for the Hotel) and/or any other trademarks, trade names, trade dress, service marks or logos (whether registered or not), or any domain name, as we may require from time to time be used in connection with the Hotel.

EXHIBIT
C-2

under Maryland law.

21. Arbitration. **Except for our claims against you for indemnification or actions seeking to enjoin you from using any of our Intellectual Property (including the Brand Mark) or the Choice-Related Words in violation of this Agreement or any other related agreements (including the Online Terms of Use), any controversy or claim arising out of or relating to this Agreement or any other related agreements, or the breach of this Agreement or any other related agreements, including any claim that this Agreement or any part of this Agreement or any related agreements is invalid, illegal, or otherwise voidable or void, as well as any claim that we violated any laws in connection with the execution or enforcement of this Agreement or any related agreements and any claim for declaratory relief, will be sent to final and binding arbitration in the state of Maryland before either the American Arbitration Association, J.A.M.S., or National Arbitration Forum in accordance with the Commercial Arbitration Rules of the American Arbitration Association, including its rules for emergency measures of protection, except to the extent that the Commercial Rules of the American Arbitration Association may be interpreted to require you or us to produce documents, witnesses, or information at a time other than at a hearing on the claim without our mutual consent. In the event more than one demand for arbitration is filed in connection with this Agreement or any related agreements, the demand filed with the American Arbitration Association, J.A.M.S., or National Arbitration Forum office having jurisdiction over Maryland proceedings shall take precedence, and any other demand shall be withdrawn and presented in the Maryland filing. The arbitrator will apply the substantive laws of Maryland, without reference to its conflict of laws provision, except that nothing herein shall be construed to establish independently your right to pursue claims under Maryland's Franchise Registration and Disclosure Law. Judgment on the arbitration award may be entered in any court having jurisdiction. If any party fails to appear at any properly noticed arbitration proceeding, an award may be entered against the party, notwithstanding its failure to appear. Any arbitration will be conducted at our headquarters office in Maryland and the parties agree that any state laws attempting to prohibit arbitration in Maryland are pre-empted by the Federal Arbitration Act. Nothing in this Section 21 will be construed as requiring you or us to make a claim in arbitration before exercising any rights you or we may have to give notice of default or termination in accordance with the terms of this Agreement or any related agreements.**

22. NO CLASS ACTIONS. **NEITHER YOU NOR WE SHALL SEEK TO LITIGATE OR ARBITRATE AGAINST THE OTHER PARTY TO THIS AGREEMENT OR SUCH PARTY'S AFFILIATES, EITHER AS A REPRESENTATIVE OF, OR ON BEHALF OF, ANY OTHER PERSON, CLASS, OR ENTITY, ANY DISPUTE, CONTROVERSY, OR CLAIM OF ANY KIND ARISING OUT OF, OR RELATING TO, THIS AGREEMENT, THE RIGHTS AND OBLIGATIONS OF THE PARTIES, THE SALE OF THE FRANCHISE, OR OTHER CLAIMS OR CAUSES OF ACTION RELATING TO THE PERFORMANCE OF EITHER PARTY TO THIS AGREEMENT. NO ARBITRATION OR OTHER ACTION OR PROCEEDING UNDER THIS AGREEMENT SHALL ADD AS A PARTY, BY CONSOLIDATION, JOINDER, OR IN ANY OTHER MANNER, ANY PERSON OR PARTY OTHER THAN US AND YOU AND ANY PERSON IN PRIVITY WITH, OR CLAIMING THROUGH, IN THE RIGHT OF, OR ON BEHALF OF, US OR YOU, UNLESS BOTH WE AND YOU CONSENT IN WRITING. WE HAVE THE ABSOLUTE RIGHT TO REFUSE SUCH CONSENT. YOU AGREE AND ACKNOWLEDGE THAT ANY PROCEEDING DIRECTLY OR INDIRECTLY ARISING FROM OR RELATING TO THIS AGREEMENT, THE RELATIONSHIP BETWEEN THE PARTIES, OR ANY AGREEMENT OR RELATIONSHIP BETWEEN YOU AND US OR ANY AFFILIATE OF OURS WILL BE CONSIDERED UNIQUE ON ITS FACTS AND MAY NOT BE BROUGHT AS A CLASS OR GROUP ACTION.**

23. WAIVER OF JURY TRIAL. **EACH PARTY HEREBY KNOWINGLY, VOLUNTARILY, INTENTIONALLY, AND IRREVOCABLY WAIVES TRIAL BY JURY IN ANY ACTION, PROCEEDING, OR COUNTERCLAIM, WHETHER AT LAW OR IN EQUITY, BROUGHT BY EITHER OF THEM AGAINST THE OTHER.**

24. INTEGRATION. **THIS AGREEMENT, ALL OF ITS ATTACHMENTS, AND ANY AGREEMENT SPECIFICALLY MADE A PART OF THIS AGREEMENT PURSUANT TO THE TERMS**

We and you agree to be bound by the terms and conditions of this Agreement, including all Attachments, by setting the hands and seals of our duly authorized and empowered representatives on this Agreement, effective on the first date written above. This Agreement may be signed with full legal force and effect using electronic signatures and records.

Choice Hotels International, Inc.,
a Delaware corporation

DocuSigned by:
By _____ (Seal)
Name: Christopher J. Wallace
Title: Vice President and Assistant General Counsel

Date: 9/30/2016

NODAK HOTELS, LLC, a North Dakota limited liability company

DocuSigned by:
By: Hitesh Patel (Seal)
9CF5B8D5242745D...
Name: **Hitesh Patel**
Title: Member / Manager

Date: 9/20/2016

PLEASE INITIAL THE ATTACHED SCHEDULE A

EXHIBIT 2

(Sept. 27, 2021 AAA Appointment of Arbitrator Petrikis Letter)

AMERICAN ARBITRATION ASSOCIATION® | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION®

Northeast Case Management Center
Yvonne Baglini
Assistant Vice President
1301 Atwood Avenue, Suite 211N
Johnston, RI 02919
Telephone: (866)293-4053
Fax: (866)644-0234

September 27, 2021

Justin Proper, Esq.
White and William LLP
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Kristen K. Bugel, Esq.
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Attn: Jamie Thrasher
Rockville, MD 20850 Via Email to: kristen.bugel@choicehotels.com

Case Number: 01-21-0004-5554

Highmark Lodging, LLC and Darshan Patel
-vs-
Choice Hotels International, Inc. and Choice Hotels Owners Council

Dear Counsel:

This will advise the parties the American Arbitration Association (AAA) has appointed Steven Petrikis, Esq., as arbitrator. Enclosed please find the arbitrator's duly executed Notice of Appointment and Notice of Compensation Arrangements.

For the purpose of scheduling a preliminary hearing conference call with Arbitrator Petrikis, please provide your availability for the dates of Monday, October 4, through Friday, October 15, 2021. Kindly respond at your earliest convenience, not later than **Wednesday, September 29, 2021.**

Enclosed please find a sample scheduling order template, which will be reviewed on the conference call and completed by the arbitrator. Parties should confer in advance of the call and agree on as many dates as possible. We also ask that you review the attached Billing Information Sheet, and ESI and Protective Order templates.

Please contact me with any questions or concerns, or whenever I may be of assistance.

Sincerely,

Eve Turner
Manager of ADR Services
Direct Dial: (401)431-4774
Email: eveturner@adr.org

Enclosures
cc: Jake P. Etienne, Eliza Ballin, Jamie L. Thrasher
Steven Petrikis, Esq.

EXHIBIT 3

(May 17, 2023 Partial Final Award)

THE AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

HIGHMARK LODGING, LLC and DARSHAN PATEL,	:	Case No. 01-21-0004-5554
Claimants,	:	
v.	:	
CHOICE HOTELS INTERNATIONAL, INC.; CHOICE HOTELS OWNERS COUNCIL,	:	
Respondents.	:	

Opinion and Partial Final Award

I, the undersigned arbitrator, having been designated in accordance with the Franchise Agreement dated September 30, 2016, and having been duly sworn, and having considered the briefs, exhibits and submissions of the parties, and following a hearing on February 13, 14, 15, 16, 17, 21, 22, and 23, 2023, and after due consideration, hereby FIND and AWARD as follows:

Introduction

Claimants Darshan Patel and Highmark Lodging, LLC (collectively, "Patel" or "Claimants") owned and operated a hotel under the Quality Inn and Suite brand in Dickinson, North Dakota from 2018 to 2021. Respondent Choice Hotels International, Inc. ("Choice") is a franchisor comprised of 22 different brands, including Quality Inn. Patel's father built the hotel in 2007, and in June of 2018, Claimants purchased the unit and assumed the then existing Franchise Agreement pursuant to an Assignment and Assumption Agreement dated June 24, 2018. (R-007). Respondent Choice Hotels Owners Council ("CHOC") is an organization of franchisees of

midscale brands, such as Quality Inn, which hosts owners' conferences and meetings to exchange operational ideas and concerns. Choice would participate with various committee business.

In June of 2020, a group of franchisees filed suit in federal court against Choice alleging numerous complaints against Choice's operations and programs. The Plaintiffs contended that in a wholesale fashion, Choice failed to fulfill promises or meet representations made as a franchisor regarding financial and institutional benefits and costs of the franchisee relationship.[1] The federal court, upon Choice's motion, ordered on March 19, 2021, that the claims must be brought in arbitration and must be brought separately by each franchisee. This arbitration is one of four "test" arbitrations arising from the federal action. No evidence of any agreements among the parties regarding the effect of this procedure has been submitted.

The parties have submitted thorough and detailed prehearing briefs, opening and closing statements, post-hearing memoranda, post-hearing reply memoranda and supplemental memoranda. Hearings were held remotely on February 13, 14, 15, 16, 17, 21, 22, and 23, 2023, and a transcript of the proceedings is available. The Claimants are represented by Justin E. Proper and Jake Etienne of White and Williams, LLP, and the Respondents are represented by Eric L. Yaffe, Marisa Jean Frank and Kristin Stock of Lathrop GPM, LLP. Necessary factual findings will be included within my discussion of the various legal theories and arguments advanced by the parties.

I. Issue Preclusion - Arizona

Choice asserts at the outset that certain of the claims pursued in this arbitration are precluded by collateral estoppel. A final award was issued in one of the "test" arbitrations against an Arizona franchisee and wholly in favor of Choice on all claims. The Arizona Claimant and

[1] I understand that no party will be satisfied with this summary, but there is not a nutshell big enough. Individual claims will be addressed in detail throughout the Opinion.

certain witnesses were all parties to the initial federal suit referenced above. The same exhibits, to a large extent, were used in both actions, and a number of witnesses participated in both proceedings. The same arguments were made, the same language was parsed, and the same lawyers did the parsing. The collateral estoppel argument indeed has factual appeal.

I can find nothing, however, which establishes the required element of privity for collateral estoppel to apply. There is no fiduciary or contractual relationship existing between the respective Claimants. Although Respondents state that the parties did agree that testimony from the prior arbitrations could be used to impeach witnesses in this case, if true, that does not establish that the Award is binding. Any appropriate sworn testimony could be so used, and no agreement regarding the preclusive effect of any Award has been proffered.

Most significantly, Claimants set forth numerous on-point cases which clearly dispel any notion that the similarities Respondents rely upon, including the use of the same lawyers, could establish a basis for preclusion. (*See* Claimants' Post-Hearing Brief, pp. 62-63). Respondents cite to no convincing contrary authority, and the principle of "virtual representation," if viable, has not been factually satisfied.

The Award in the Arizona arbitration does not preclude any claim pursued in the instant case.

II. Breach of Contract Claims

Claimants have asserted breach of contract claims arising from the Franchise Agreement assigned to Patel. These claims are for: A) failure of Choice to obtain volume discounts from vendors who supply products to franchisees; B) utilizing funds earmarked for the benefit of franchisees to pay "Key Money" to solicit buyers of a franchise; and C) overcharging for call-forwarding services.

A. Volume Discounts

At issue, in particular, is the language of the Franchise Agreement and Item 8 of the Federal Disclosure Document ("FDD") which states that Choice "may limit the number of Qualified Vendors to obtain volume discounts and to promote consistent quality and adequate supplies for the brand." (C-005 at 1165).

This provision relates to vendors qualified by Choice's procurement department to provide certain goods and services to its franchisees. Some products are mandated, which means Choice requires franchisees to purchase from a single source or a limited number of vendors. Typically, such mandated products are mark-bearing and are mandated to assure consistency and an assured supply. Other products are nonmandated. These may be bought from Choice qualified vendors or any source anywhere. (*See* Respondents' Post-Hearing Brief, pp. 9-10).

The Claimants interpret this provision as requiring Choice to obtain "volume discounts" if Choice chooses to limit qualified vendors. The Respondents claim that the phrase as a whole and that the word "may" in particular is only permissive, and that there is no "promise" to obtain volume discounts. Although my initial understanding of the sentence structure was that one (discounts) must follow the other (limiting vendors) and that the phrase uses "may" only in regards to limiting vendors and not to obtaining volume discounts, I find that the language is ambiguous. Accordingly, extrinsic evidence may be considered to interpret the provision. I also find that consideration of that extrinsic evidence is decidedly in favor of the Claimants' interpretation.

I have reviewed pages 8 through 13 of Claimants' Post-Hearing Brief, and I conclude that it is a well-supported and thorough and convincing presentation of the extrinsic evidence supporting Claimants' interpretation. That evidence includes:

1) Statements by Mr. Summa, Choice's Head of Procurement, as a corporate designee deponent and at hearing, that he recognized an obligation to obtain discounted pricing for both mandated and nonmandated goods and services;

2) Statements in Choice's procurement services and marketing materials regarding the leveraging of Choice's size, scale and distribution to reduce franchisees' costs for goods and services;

3) Statements in the FDD of similar ilk, and, particularly, at C-005 38 and 1144; and

4) Statements regarding volume discounts at CHOC committee meetings and conferences.

I further find that Claimants have met their burden of proof regarding the breach of the Franchise Agreement on this claim. Throughout this proceeding, and not without some merit, Respondents claimed that Claimants had flipped the burden of proof to require Respondents to demonstrate that Choice did obtain or attempt to negotiate volume discounts for franchisees. This led to testimony from each party of a host of specific vendor transactions with reciprocal skilled cross-examination typically diminishing to some degree the proof either side presented. I did not, nor could I, keep a running scorecard. However, I do find that the arguments and evidence as a whole, and the scope of Choice's failings to perform as promised regarding pricing advantages for its franchisees, is nonetheless clear.

Initially, under the direction of Mr. Summa, the procurement revenue of Choice grew significantly. Much evidence, generally unchallenged, demonstrated that the negotiations with vendors, to the extent they occurred, related to the monies paid to Choice as either marketing fees or transaction fees. There is great logic to the argument that Mr. Summa and his department were motivated more by the revenue Choice itself would receive, often substantial, than by securing

product pricing discounts for the franchisees. Salaries within the procurement department were impacted by that revenue number, and particularly Mr. Summa's salary. (Feb. 13 Transcript, pp. 82-84).

Evidence regarding Mr. Summa's management of the Procurement Department supports the conclusion that Choice was revenue driven in its pursuit of vendors. There were no published memos, plans, policies, best practices, instructions, guides or other directions to those working in the department to secure volume discounts for franchisees. Indeed, Mr. Summa testified that he doubted his ability to find any communication where he advised his employees to pursue volume discounts. In addition, neither Ms. Cibello nor Mr. Wilson, employees of the department, recall any emphasis on volume discounts at all. (*See* Claimants' Brief, pp. 11 and 12).[2]

Although evidence regarding the absence or existence of product pricing negotiations with vendors was offered by both sides, the preponderance of the evidence favors the Claimants. I did detect throughout the proceeding the absence of emails, analysis and other documents regarding pricing that one would expect to exist had pricing been negotiated as expected. Counsel for Claimants emphasized this point early and often with most witnesses who would have knowledge of such documents, if they existed. Respondents claim in their Post-Hearing Brief that they limited production of such documents due to the large span of time requested, and that "Claimants seemingly accepted this limitation." Although Respondents said they would produce "emails discussing the documents" after the hearing (p. 32 of Respondents' Post-Hearing Brief), it was clear long before then that Claimants were pressing the argument repeatedly at hearing. Respondents had ample opportunity to proffer such documents during the eight days of hearing time, but did not do so sufficiently. The scarcity of such documents is wholly consistent with

[2] While a basis did exist to find Ms. Cibello's testimony biased, I found it credible. Her testimony aligned with that of Mr. Wilson and even Mr. Summa on key points.

Choice's revenue-driven procurement strategies (*See* C-111 entitled "Procurement Services Assessment" which emphasizes techniques for Choice making money without providing negotiation techniques and procedures for saving the franchisees' money). A brief review of Claimants' procurement expert's testimony, Mr. John Whitman, reveals that proper pricing investigation would produce emails, notes, analysis, studies and more so a discounted price point could be determined with back-up and precision for negotiation purposes. Mr. Whitman reviewed every vendor agreement involved in this case, and his formula-pricing methodology necessitates this granular analysis for the benefit of the franchisees.[3]

A preponderance of the evidence, in both quality and quantity, establishes that Choice made virtually no efforts to leverage its size, scale and distribution to obtain volume discounts on nonmandated goods. Nonmandated goods constitute 75% of Choice's procurement revenue. (*See* C-111). Nonetheless, Mr. Summa was unable to recall a single vendor or agreement for nonmandated goods with a volume discount throughout his entire tenure in the procurement department. Moreover, nonmandated goods are sold through Choice-selected distributors. Regardless of Choice's negotiated prices, there is no doubt that those distributors are free to mark-up prices at their sole discretion for sale to the franchisees. (*See* Claimants' Brief, pp. 12-13). Although competition among the distributors themselves may curb the distributors' desire to increase pricing as Choice argues, this has nothing to do with Choice's efforts, or lack of efforts, to obtain volume discounts. Indeed, Mr. Summa testified as a corporate designee that Choice does not even try to do so with nonmandated products. (RS-21).

Choice answers all of this by pointing to a number of provisions in its form for Qualified Vendor Agreements as the vehicle for obtaining the volume discounts that Claimants claim it is

[3] This is not to suggest that the standards proposed by Mr. Whitman are to be adopted in full. However, his testimony raised many document-generating processes which fit into a determination as to whether Choice fulfilled its contractual obligations to negotiate pricing. (*See* February 13, 2023 Whitman testimony, pp. 259-284).

obligated to seek and obtain. Specifically, many such agreements contain one or more of the following provisions:

1) a clause prohibiting the vendor from charging prices higher than prices offered to participants in comparable distribution systems;

2) a clause prohibiting price increases to one per year, and that Choice may refuse such increases;

3) a clause requiring a vendor to offer a lower price to all Choice franchisees if a lower price is offered a particular Choice franchisee; and

4) a clause requiring a vendor to offer pricing lower than the vendor's generally advertised list price.

(*See* Respondents' Post-Hearing Brief, pp. 14-17).

In addition, Choice focuses on negotiations of Mr. Jason Stead, Choice's Chief Information Security Officer, as an example of negotiations Choice would undertake to obtain volume discounts, for credit card processing and cyber security programs. (Respondents' Brief, pp. 16-17).

There is no doubt that Choice's Quality Vendor Agreements typically contain one or more of the provisions referenced. Moreover, there is no doubt that Mr. Stead did vigorously and aggressively exploit Choice's size and scale in various technology purchases. He employed a request for proposal process and evaluated at length the five best proposals. Potential savings to franchisees was a part of the evaluation process. He then ran a sample trial with thirty franchisees to ensure that the program did in fact produce cost savings. A thoughtful and reduced price agreement was reached. Claimants concede all of this. (*See* Claimants' Post-Hearing Brief, pp. 19-20).

Turning to the provisions in the agreement, however, they become meaningless without detailed advance investigation as to: 1) whether a standard or advertised price is even fair or warranted; 2) what prices exist in the market for comparison; 3) what information might a vendor provide regarding its pricing; 4) are marketing and transaction fees impacting the price, and 5) what monitoring is necessary to ensure compliance. The type of analysis, study and negotiation discussed by Mr. Stead is the type of negotiation that Claimants' expert, Mr. Paul Whitman, advocated at length in his testimony at hearing. At Choice, however, the evidence establishes that such negotiation was the exception and not the rule.

The absence of expected negotiation documentation becomes important in reaching this conclusion. Given the consistent and significant documentation and testimony of Choice's focused drive to increase procurement revenue, the absence of documentation and, in most cases, corresponding testimony of price neglect, confirms that in accord with cited testimony of Mr. Summa, Ms. Cibello and Mr. Wilson, this analysis and negotiation just did not occur. That is a breach.

B. <u>The FDD is incorporated into the Franchise Agreement</u>

While the promise to obtain volume discounts if vendors are limited is set forth in the Franchise Agreement itself, as well as the FDD, Respondents argue that there was no evidence that vendors were ever limited regarding nonmandated goods. (Respondents' Prehearing Brief, pp. 30-31). Hence, they claim, the "if" (limiting vendors) in the Franchise Agreement phrase requiring volume discounts did not occur.

Initially, it is clear that the distributors utilized in the purchase of goods were in fact limited as Mr. Summa testified, and that other than market competitive forces at play, the distributors had free reign in pricing. Just as importantly, I accept Claimants' position that the terms of the FDD are in fact incorporated into the Franchise Agreement.

The integration clause in the Franchise Agreement states as follows:

> 24. INTEGRATION. THIS AGREEMENT, ALL OF ITS ATTACHMENTS, AND ANY AGREEMENT SPECIFICALLY MADE A PART OF THIS AGREEMENT PURSUANT TO THE TERMS HEREOF, CONTAIN THE COMPLETE UNDERSTANDING OF THE PARTIES AND REPLACE ANY PREVIOUS WRITTEN OR ORAL AGREEMENT ON THE SAME SUBJECT MATTER. NO REPRESENTATION, INDUCEMENT, PROMISE OR AGREEMENT, ORAL OR OTHERWISE, NOT CONTAINED IN THIS AGREEMENT OR IN OUR FRANCHISE DISCLOSURE DOCUMENT, WILL BE OF ANY FORCE OR EFFECT.

The unadorned language of the clause puts a promise made in the FDD on the precise same footing as those made in the Franchise Agreement. The FDD is clearly, precisely and conspicuously identified. In addition, the cases set forth in Claimants' brief at pages 27-29, though not all directly on point, are persuasive, particularly the decision in Martrane v. Quizno's, 2009 U.S. Dist. Lexis 52025 (W.D. Pa. June 15, 2009).

The FDD in this case does include a promise to negotiate favorable pricing. (*See* C-005 at Choice ND1166-67). There is no preliminary requirement that vendors must be limited before it would do so. Indeed, such a promise seems implicit in the franchisor-franchisee relationship, so a promise in the FDD to that effect should come as no surprise to anyone and fulfills expectations rather than creating hardship. (*See* RTS Shearing LLC v. BNI Coal, 965 N.W. 2d 10 (N.D. 2021)). The promise is more fully stated in the SEC documents filed by Choice at CO5, Choice ND0001243, 1244. That provides:

> *Leveraging, Size, Scale and Distribution.* We continually focus on identifying methods for utilizing the significant number of hotels in our system to reduce costs and increase returns for our franchises. For example, we create relationships with qualified vendors to: (i) make low-cost products available to our franchisees; (ii) streamline the purchasing process; and (iii) maintain brand standards and consistency.

Accordingly, even in the absence of vendor limits regarding nonmandated goods, Choice must attempt to negotiate price. It has much leverage to do so, but it has breached the Franchise Agreement in this regard.

Finally, the evidence of record shows that the clauses Respondents cite as their efforts to obtain volume discounts do not succeed in doing so. The "most favored nation" clauses appear to mandate that Choice franchisees always pay less than comparable entities for products purchased. This is boilerplate, and Respondents point to not a single circumstance where such a clause was vigorously enforced by Choice. Ms. Cibello testified that the provision was "boilerplate language by legal" and that she did not have any conversation ever with a vendor regarding it. Read plainly, a penny less than a standard price would meet this obligation. Indeed, Mr. Summa himself, testifying at his deposition as a company designee and binding the company, admitted that a most favored nation clause was not a volume discount. Moreover, the shopping cart list offered by Claimants revealed numerous products where Wyndham franchisees scored lower pricing than the similarly situated Choice franchisees. Perhaps the inclusion of the provision served some modest deterrent effect on vendors, but coming down a penny in price is not a cause for concern for most vendors. (*See* Claimants' Post-Hearing Brief at p. 14). Like most of Choice's efforts in this arena, it sounds good but it does not save the franchisees' money.

It is to be noted finally that some of the Vendor Agreements do contain price lists which gives the appearance of a negotiation that Choice is obligated to make. However, there is scant evidence of any actual negotiation, investigation or analysis of the price lists. (*See* testimony set forth on pages 16 and 17 of Claimants' Brief). Indeed, Mr. Wilson testified that "it was not my job to force a vendor to adhere to a particular price point for a particular item for a vendor for every product or service." And, yet again, Mr. Summa could not recall a single email or document

reflecting a negotiation of a price list for any vendor. Given the importance of product pricing to the operation of every hotel, and given the tools available to Choice to negotiate it, the testimony of Mr. Summa and his subordinates is, to say the least, problematic.

C. Key Money

Key Money is financing that Choice grants to some franchisees for property improvements and other purposes in the form of forgivable notes receivable.[4] On pages 20 to 24 of their Post-Hearing Brief, Claimants set forth a comprehensive statement of facts regarding the Key Money issues in this arbitration. Similarly, on pages 39 through 46, Respondents set forth their comprehensive statement of facts. Although both of the referenced sections contain the respective parties' interpretation, perspective and fine lawyering, the material facts for purposes of my decision are the same. The issue is fundamentally, again, a contract interpretation involving the meaning of "solicit" and "marketing."

Claimants contend that System Fees, paid by the franchisees, were improperly used to pay Key Money. Section 4.b.2 of the Franchise Agreement states:

> The System Fee will be used to fund ongoing development, maintenance and upgrading of the Property Management System and Reservation System, and for advertising, publicity, public relations, marketing, promotional programs, website maintenance, reservations and other similar services that we will provide to you under this Agreement and for our System as further described in Section 19(h) below, as we determine in our sole discretion (collectively, the "System Fee"). You acknowledge and agree that (i) we may increase the System Fee due to cost increases attributable to inflation, increases in the costs of advertising, publicity, public relations or marketing, additional costs of implementing new or improved programs or systems, or increases in our cost of providing the Property Management or Reservation Systems or any of the other aspects of our System, so long as the increases apply to all or most of the U.S. hotels that are authorized to use the Brank Mark; (ii) we may assess additional fees and charges for various components of the System and other services (including promotional programs and use of proprietary software) as described in the Rules and Regulations; and (iii) we may advance monies

[4] Again, this nutshell is too small for the numerous issues which make up the Key Money determination.

> for the purposes described herein in an amount reasonably necessary to ensure the provision of such services whether or not sufficient System Fees are then available and subsequently obtain reimbursement of such advances through the fee increases described above or utilizing future System Fees to recover previous monies advanced.

(App. 5, R-004 at Attachment B § 1.)

Section 19(h) of the Franchise Agreement further states:

> h. System Fee. You acknowledge and agree that we may use the System Fee to meet all costs incident to providing the Hotel (and all Other Choice Brand Hotels) with marketing and advertising services, the Property Management System, and the Reservation System, and that such costs may include certain of our overhead expenses that are reasonably allocated to provide such services. You further agree that we have the absolute and unilateral right to determine, when, how and what portion of the System Fee may be used for **(i) marketing purposes, including the right to purchase and pay for marketing services, product research and development, production materials, ad slicks, brochures, videotapes, radio and television commercials, media advertising (internet, e-commerce, television, radio, cable, magazines, newspapers and other print), services provided by advertising agencies, market research, trade shows, conventions, promotions, research and design, public relations, and loyalty programs,** (ii) the development, operation and maintenance of the Property Management System and Reservation System, and (iii) the cost of personnel, accounting services, travel expenses, office space, overhead costs, administrative costs, computers, other equipment, furniture, salaries and fringe benefits, development, design and maintenance of internet web-pages and websites, including internet service provider costs, network costs, and for other similar costs that we reasonably deem to be appropriate. You also acknowledge that other franchisees authorized to use our System may not contribute the same percentage or total amount that you must pay to us as the System Fee. You further acknowledge and agree that we are not obligated, in expending the System Fee, to make expenditures for your Hotel or Brand Mark which are equivalent or proportionate to your contribution.

C-2 at ChoiceND0000923 (emphasis added).

As Claimants contend that Choice used System Fee Funds to solicit franchisees, Item 11 of the FDD appears to be squarely on point. It states in part: "we do not use any of the System Fee to solicit new Franchisees" (emphasis added). Of the scores of pages of argument and law on the

Key Money issue, this single sentence is the most directly relevant. It is in the language of promise, and it addresses the issue in the terms of the issue, and not in undefined and expansive categories relied upon by Choice's witnesses. The two interpretative issues which must be addressed are: (1) was Key Money used to "solicit" franchisees by Choice, and (2) was Key Money a "marketing" expenditure permissibly chargeable to System Fees by the terms in the Franchise Agreement.

D. Solicit

Respondents' evidence in this regard supports its claim that Key Money is never actually paid to a franchisee until after a Franchise Agreement is signed. Indeed, there is no contrary evidence in the record. Nonetheless, and despite Respondents' protestations to the contrary (*See* Respondents' Brief, p. 52), Choice solicited new franchisees with Key Money in what I find to be the common meaning of the word "solicit." The evidence suggests that such pre-signing solicitation occurred almost as a matter of course. (*See* Claimants' Post-Hearing Brief at pp. 49-51). There is no definition of "solicit" in either the Franchise Agreement or FDD that would counter the plain meaning of the word, "to urge . . . and to entice or lure." Id. at 49. Key Money discussions did just that. Entrepreneurs and business people are undoubtedly enticed or lured by free money at all times before any payment. Franchisees ask before they sign. I find it impossible, and somewhat artificial, to determine a defined point such as the signing of the Franchise Agreement where solicitation was either commenced or ended.

E. Marketing

I find the weight of the evidence supports Claimants' argument that "marketing" in the Franchise Agreement does not include Key Money (*See* Claimants' Pre-Hearing Brief, pp. 51-54), and I focus, again, on the language of the documents themselves. As noted by Claimants, the Franchise Agreement lists permissible marketing activities for the use of System Fees, all of which

are directed to marketing to hotel customers. Key Money is not of that "marketing" character. Moreover, the evidence suggests that the term Key Money is not of recent vintage. (*See* Respondents' Brief at p. 39, footnote 13). If use of System Fee funds is to be permitted under an unchecked limitless definition of marketing, it could have been plainly stated, particularly in light of the FDD's prohibition. While I do not discount the marketing effect of any Choice hotel anywhere that appears new, improved and sleek, I nonetheless believe that Claimants' have met their burden in this regard. And Respondents' argument proves too much. Under their logic, the entire overhead of the franchising department could be perceived as "marketing" as it puts a new "dot on the map."

F. System Fund v. System Fees

Choice also argues that because Choice capital funds exist in the System Fund separate and apart from the System Fees (though comingled with them in principle), there is no breach. In their opposition to this argument, Claimants set forth numerous accounting calculations and budgetary actions by which other system developments fees are not allocated to the System Fund. (*See* Claimants' Brief p. 51). Moreover, no salaries or benefits of franchise sales employees regarding key money activities is allocated to the System Fund. I see no document or direction or allocation or policy that states that only non-System Fee money in the System Fund may be used for the Key Money costs. It appears that this was an argument to be discovered, not a result intended by the Key Money language in particular or any implemented practice to be followed. Claimants have met their burden.

G. Call-Forwarding

I find this issue to be close. Claimants argue, and properly so, that the Franchise Agreement explicitly states that the definition of reservation system includes call-forwarding and that that

benefit is included as part of the System Fee that franchisees already pay. They also argue that the course of performance of the parties in the billing and payment of call forwarding fees as optional fees is properly considered only for purposes of interpreting an ambiguous contract and cannot create a liability where none exists. I agree.[5]

All of that said, on page 58 of their Brief, Respondents note that Claimants "agreed" to "terms of use" which set forth a choice to join the call-forwarding program at $2.95 a call, and that such charges are brought to the attention of franchisees in the FDD, invoices and fee schedules repeatedly. It is indisputable that the Claimants knew they were paying $2.95 a call. The Respondents contend that the Terms of Use constituted a "separate and independent agreement,"[6] that should be enforced.

As a result of the documentary evidence Respondents have submitted, the testimony of Mr. Jason Stead regarding call-forwarding, and the absence of contrary testimony, I find that Claimants have not proven this claim by a preponderance of the evidence. (*See* Exhibits R-345 and R-348). Despite the unambiguous language of the Franchise Agreement, the Terms of Use fall within Choice's right to assess "additional fees and charges" for "various components of the System." (Franchise Agreement, Section 4.b.2 (ii)). Choice did.

III. Fraud

The Claimants allege that certain statements in the Franchise Agreement, the FDD, SEC documents and other written and oral communication constitute the tort of fraud. Regardless of the nature of the fraud alleged, and whether Claimants can establish other elements of fraud with clear and convincing evidence, Claimants produce virtually no evidence of the "essential element" of fraud, reliance. It is admitted that Mr. Patel did not read the Franchise Agreement, the FDD

[5] I will note that in an arbitration proceeding, evidence need not be admissible under rules of law governing evidence.
[6] The Respondents do not argue that the Terms of Use are proper modifications to the Franchise Agreement.

and certain other documents which allegedly set forth fraudulent statements, and that he did not attend CHOC conferences where allegedly fraudulent statements were made. Reliance could not be proven. (*See* p. 35 of Respondents' Brief). For this reason, the fraud claims are dismissed.

Claimants' Brief appears to also seek damages of $16,000.00 as alleged overpayment by Patel's father for signage. This fraud claim is brought by Patel as an assignee.[7] (See Claimants' Brief, p. 35). Mr. Patel testified that his father was directed to use Persona for signage, but in assisting his father at a later time, he learned that he could get the work done for 50% less. Mr. Patel later changed his testimony to "30 percent, 35 percent" discount. In addition, Ms. Kempton of Choice testified that quotes would often come in low due to a contractor's inexperience with installation needs, concrete information, accreditations required, etc. Regardless of this confused damage testimony, reliance on the oral statement has not been established as the Claimants themselves did not buy a sign, and the claim lacks the specificity required for proof of fraud. It appears that Mr. Patel was told only that Choice had negotiated with Persona and that signage could be at "the best price." This is not clear and convincing proof of actionable words.

IV. RICO

Claimants' RICO claim is set forth on pages 31 to 35 of its initial Brief. They cite to Martrane v. Quizno's Franchise, Civil Action No. 08-0932, 2009 U.S. Dist. Lexis 52025 (W.D. Pa. 2009), a case with some very similar facts as persuasive authority. However, despite Judge Lenihan's compelling Opinion, it was rendered in the context of a Motion to Dismiss. Claimants now must set forth facts supporting all of the required elements of a viable RICO claim. Although the activities Claimants alleged appear to meet the structure of a RICO claim outlined in Martrane,

[7] Choice argues that this claim was released at the time of the assignment agreement. I need not decide this issue as I do not find that Claimants meet their liability burden.

the necessary facts are scant, if not wholly absent, in the instant case. I agree with Respondents' conclusions on p. 38 of their initial Brief:

> Although Claimants do not explicitly refer to Section 1962(d), they argue that Rick Summa conspired with Qualified Vendors to defraud franchisees. Claimants have not produced any evidence, or even made any arguments, regarding which specific Qualified Vendors were allegedly involved in the conspiracy, what specific acts were taken in furtherance of the conspiracy and when those acts occurred, or that there was a "meeting of the minds" among the alleged co-conspirators. For the same reasons, Claimants have not shown any sort of "enterprise" as required under Section 1962(c). They have not even articulated specifically what the "enterprise" was, have not identified specific acts of "racketeering activity" or produced evidence of such activity, have not identified who specifically was involved in this alleged activity, and have not proved that any conduct or activity occurred.

I also do not accept that the marketing and transaction fees collected from vendors amount to a "kickback" to Choice. The term gives a RICO-like criminal flavor to revenue sources enjoyed by many franchisors in the industry. Pejorative terms are not a substitute for the detailed facts a RICO claim demands.

Finally, both parties to this arbitration recognize that a RICO claim is to "serve as a weapon against ongoing unlawful activities whose scope and persistence pose a special threat to social well-being." Blester Co. v. Blomquist, 987 F.2d 1319, 1330 (8th Cir. 1993). Even under a most favorable reading, Claimants' proof is not close to that.

V. Choice Privileges Program

I have reviewed the parties' briefs and reply briefs on this matter. No law providing for a tort claim of violation of an implied duty of good faith has been provided, and no factual basis for claimed damages is clear from the submissions. The claim is dismissed.

VI. Conversion

Claimants have alleged that Choice's use of the System Fees to solicit Key Money constitutes the tort of conversion. In its Brief, Respondents note that North Dakota law does not

recognize a conversion claim when the defendant's conduct "would give rise to liability only because it breaches the parties' agreement." (Van Sickle v. Hallmark, 744 N.W. 2d 532, 539-40 (N.D. 2008)). (*See* Respondents' Brief at p. 54). I so find as a matter of law, and the conversion claim is denied.

VII. Damages

The cases cited on pages 45-46 of Claimants' Brief are controlling. "Evidentiary imprecision" in proving damages will not prevent recovery where substantial damages have resulted. That is the case here.

I do find it rare for adverse experts to agree on an appropriate formula for calculating damages in a case with such a large number of transactions and where some imprecision is unavoidable by the nature of the claim. Nonetheless, Mr. Whitman for the Claimants and Mr. Kirwin for the Respondents agreed that damages arising from the breach of promise to obtain volume discounts is 15 to 20% of the purchase price. Although Respondents carefully noted the distinctions between the respective expert's testimony, the agreement is complete enough for me to accept Claimants' damage calculations in these circumstances.

Claimants set forth the damage calculation on page 34 of their Brief. Claimants' General Ledgers reflect total expenditures of $109,073.35 from 2018 to 2021, the years when Patel owned the hotel. Fifteen percent of that equates to damages of $16,361.00, and twenty percent of that is $21,814.67. Respondents do not challenge this calculation. I award $16,361.00 as a result of the imprecision which is inherent in a calculation of this nature.[8] On pages 20 and 35 of their Brief, Choice outlines a claim regarding Crowdstrike, setting forth that a negotiated discount was reduced in part by the collection of substantial transaction fees. This breach of contract cost the Claimants

[8] I note that Claimants calculate their disgorgement remedy at $26,215.36, a number surprisingly close to the percentage savings calculation. I find the disgorgement theory to be too speculative, however, for the reasons stated by Respondents on pages 23 and 24 of their Reply.

$1,439.64. Choice offered no clear rebuttal to this claim, and only argued that this was an example of a negotiated discount it obtained, lessened by administrative costs. Claimants have met their burden.

As for the breach of contract regarding Key Money, the damage calculation is set forth on page 55 of Claimants' Brief at $1,598.01.

Finally, I find no basis for the award of punitive damages.

VIII. CHOC

The Briefs of the Claimants offer no theory of liability regarding the actions of CHOC, and I find none in any event. To the extent any claim is asserted, it is denied.

IX. Issue Prelusion – California

Subsequent to the closing of the hearings in this matter, and literally but days before my interim award was to issue, the parties made cross motions via email for issue preclusion relating to the newly issued Award in the California case. I deny both motions.

I start by noting that according to Respondents' supplemental brief, I do not as yet know what law will determine the preclusive effect of the California award. Federal law will determine the effect if the award is confirmed in Federal Court, and the determination of law impacts whether mutuality is required. It does not matter much in my determination, however, as I find that application of offensive collateral estoppel would be plainly unfair in the circumstances present here, in any event.

I decided before the issuance of the California award that Choice was not entitled to assert collateral estoppel due to the Arizona award as the respective Claimants were not in privity. I see no reason to change that determination regarding the California award. However, even assuming that the applicable law permits non-mutuality, in the exercise of my discretion, I must also deny

Claimants' motion. I have carefully read both awards and in my judgment, Choice has prevailed twice on the key issues presented before me. Claimants have prevailed only on one issue involving a single product. The United States Supreme Court has noted the unfairness of allowing issue preclusion "if the judgment to be relied upon to effect preclusion was inconsistent with one or more previous judgments." *Parklane Hosiery v. Shora*, 439 U.S. 322, 330-31 (1979). The Court noted also that allowing offensive collateral estoppel is discretionary and improper where its application "would be unfair to a defendant." In this case, it would be unfair to Choice.

I also must address the issues raised regarding paragraph 22 of the Franchise Agreement. I have considered the California award as it laments the lack of consolidation of the Franchisees' arbitrations and, without any allocation of fault, I express similar concern. However, paragraph 22 was not a subject of this arbitration, and I can make no determination regarding it.

X. Counterclaim

Choice did file a Counterclaim on October 15, 2021 alleging failure by Claimants to pay certain fees, costs and penalties under the Franchise Agreement. The parties resolved the Counterclaim, and it was dismissed on January 18, 2022.

XI. Attorneys' Fees

Section 16 of the Franchise Agreement provides that the prevailing party may recover attorneys' fees, costs and expenses. The parties have stipulated to the applicability of North Dakota law.

The Partial Final Award in this case will establish dates for the filing of a Verified Petition for Fees and Expenses by each party and a response by each party. This Partial Final Award shall be incorporated into the Final Award.

Date: May 17, 2023 /s/Steven Petrikis
Steven Petrikis, Arbitrator

THE AMERICAN ARBITRATION ASSOCIATION

HIGHMARK LODGING, LLC and DARSHAN PATEL,	:	Case No. 01-21-0004-5554
Claimants,	:	
v.	:	
CHOICE HOTELS INTERNATIONAL, INC.; CHOICE HOTELS OWNERS COUNCIL,	:	
Respondents.	:	

Opinion and Partial Final Award

AWARD in favor of Claimants, Highmark Lodging, LLC and Darshan Patel, and against Respondent, Choice Hotels International, Inc. ("Choice"), in the amount of $16,361.00 for the volume discount breach of contract claim.

AWARD in favor of Claimants and against Choice in the amount of $1,589.01 for the Key Money breach of contract claim.

AWARD in favor of Claimants and against Choice in the amount of $1,439.64 for the Crowdstrike breach of contract claim.

All other claims or counterclaims not expressly granted herein are hereby denied.

On or before June 5, 2023, each party shall submit a Verified Petition for Fees, Costs and Administrative Expenses in accordance with Section 16 of the Franchise Agreement. Each party shall file a response on or before June 16, 2023. The submissions may include briefing regarding entitlement to fees, costs and expenses.

I, Steven Petrikis, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Partial Final Award.

Date: May 17, 2023 /s/Steven Petrikis
Steven Petrikis, Arbitrator

EXHIBIT 4

(June 30, 2023 AAA Letter Notifying Closing of Hearing and Final Award Date)

AMERICAN ARBITRATION ASSOCIATION | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Northeast Case Management Center
Yvonne Baglini
Assistant Vice President
1301 Atwood Avenue
Suite 211N
Johnston, RI 02919
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June 30, 2023

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Case Number: 01-21-0004-5554

Highmark Lodging, LLC and Darshan Patel
-vs-
Choice Hotels International, Inc.;
Choice Hotels Owners Council

Dear Counsel:

Per Arbitrator Petrikis, the hearings are declared closed as of June 30, 2023. Pursuant to the Rules, the award of the arbitrator is due on July 31, 2023.

Inasmuch as the parties have not attempted mediation pursuant to Rule R-10 (Mediation), the AAA confirms this as the parties' intent to opt out.

In accordance the Rules, unless the parties or arbitrator direct otherwise, the award will be sent out in the same manner in which the AAA has been communicating with the parties (email, us mail, fax, etc.).

In the event there is a refund due, it is important that you advise the AAA the name and address to which the refund check should be issued. If the AAA does not receive a response by **Monday, July 10, 2023** any refunds due will be issued directly to you.

Please be reminded any direct exchange with the Arbitrator is terminated. All communications shall be directed to the AAA.

Sincerely,
/s/
Erika Lincoln, on behalf of

Eve Turner
Manager of ADR Services
Direct Dial: (401)431-4774
Email: eveturner@adr.org

cc: Kristen K. Bugel, Esq.
Eliza Ballin
Eric L. Yaffe, Esq.
Jamie L. Thrasher
Kristin M. Stock

Steven Petrikis, Esq.

EXHIBIT 5

(July 27, 2023 Final Award Issued by Arbitrator Petrikis)

THE AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

HIGHMARK LODGING, LLC and DARSHAN PATEL,	:	Case No. 01-21-0004-5554
Claimants,	:	
v.	:	
CHOICE HOTELS INTERNATIONAL, INC.; CHOICE HOTELS OWNERS COUNCIL,	:	
Respondents.	:	

Opinion and Final Award

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated September 30, 2016, and having been duly sworn, and having duly heard the proofs and allegations of the Claimants, represented by Justin Proper, Esq., and of the Respondents, represented by Maisa Frank, Esq., Kristin Stock, Esq., and Eric Yaffe, Esq., and having issued a Partial Final Award dated May 17, 2023, hereby AWARD as follows:

INTRODUCTION

I entered an Opinion and Partial Final Award in this matter on May 17, 2023. I found in favor of Claimants for three breaches of contract and awarded modest damages for each such breach. Those breaches have been referred to as the Volume Discount claim, the Key Money claim and the Crowdstrike claim. Additional claims for fraud, RICO violations, conversion, breach of implied duty of good faith and breach of contract for call-forwarding charges were denied. The Opinion and Partial Final Award is incorporated into this Opinion and Final Award.

The parties have each submitted emails and briefs regarding an award of attorney fees and costs. Each have filed Verified Petitions, responses opposing the Verified Petition of the other, emails regarding the issue of whether attorney fees must be "incurred," and supplemental briefs on the same issue. Following careful consideration, and for the reasons which are set forth below, I find that the Claimants are the prevailing party pursuant to Section 16 of the Franchise Agreement and issue an AWARD in the amount of $720,822.25.

PREVAILING PARTY

By order and agreement of the parties, North Dakota law is to govern this determination. The determination of who is a prevailing party is a question of law, Lemer v. Campbell, 602 N.W. 2d 686 (N.D. 1999), and Section 16 of the Franchise Agreement states that the arbitrator will make that determination. The trial court, or arbitrator, "is in a much better position to determine the reasonableness and necessity of the costs and disbursements sought by the prevailing party." Vegal v. Parden, 444 N.W. 2d 348 (N.D. 1989).

Claimants contend that North Dakota law dictates that the party who prevails on the major or main or significant issues in the litigation is the prevailing party, *See* Lemer, 1999 N.D. 223, p. 9, and that a party "may be the prevailing party although he recovers no award of damages." Respondents agree that a party may be a prevailing party even if no damages are recovered, but Respondents argue for a "comparative approach," tallying up who won what and how much. *See* Respondents' Petition at pp. 9-10. The approaches are not miles apart, and I think each at their center involve a "flexible and reasoned" approach in determining a reasonable fee. My determination is discretionary.

From my perspective, I find that the issues of the Volume Discount and Key Money were the two major or main issues involved in this case. Virtually all the testimony I heard and exhibits I considered involved these subjects usually directly and, if not, peripherally. Claimants prevailed on those issues under a breach of contract analysis. While the claims for fraud and the RICO violations involving these issues were denied, they arose from a common core of operative facts, and little trial time was devoted exclusively to either of those claims. Indeed, Claimants acknowledged at trial the lack of evidence of reliance to support the claims of fraud. Similarly, both the fraud and conversion claims relating to Key Money were based on the same set of facts as the successful breach of contract claim. Under these circumstances, courts have frequently determined that a plaintiff is nonetheless a prevailing party. *See* Palmer v. Gentek Bldg., 936 N.W. 2d 522, 560 (N.D. 2019) ("the district court sufficiently explained that the Palmers had in fact prevailed under the Magnuson Moss Warranty Act and that, while the Palmers did not recover on all of their issues concerning damages, their damage issues were intertwined so as to preclude a reduction from a prevailing party award.")[1] *See also* cases cited on pages 7 and 8 of Claimants' Response Brief.

While Respondents point to repeated arguments of counsel regarding the fraud and RICO claims, Claimants needed to preserve those for the potential recovery, albeit a remote one, of treble damages or punitive damages. But neither of those claims were the main claims litigated. Indeed, the very structure of my Opinion and Partial Final Award with fifteen pages addressing breach of contract claims and with but four pages addressing the RICO, fraud and conversion claims reflects accurately what occurred at trial.

[1] Although Palmer was a statutory fee-shifting award, I think that it is nonetheless appropriate North Dakota precedent for determining a prevailing party.

Finally, Respondents point to a number of claims which were set forth in Claimants' demand but which were not pursued at trial. None of these claims were litigated to conclusion at any time but were voluntarily withdrawn before hearing. For the size and importance of the overall matter at issue,[2] there was limited written discovery and I authorized but two depositions. Not only am I unaware of any overwhelming expense in this regard, or even an expense warranted by the claims, but neither would necessarily matter. I do not consider Claimants' determination to not proceed with certain claims, something to place in Respondents' prevailing party tally.[3]

CALCULATION OF FEES AND EXPENSES

The parties agree that the issue of whether attorney fees must be actually incurred by a party to be recovered as a prevailing party has not been decided under North Dakota law. The parties have briefed this issue exhaustively, and there are cases supporting the positions of both sides throughout the country. Section 20(f) of the Franchise Agreement does identify Maryland law as the governing law in this case. Accordingly, as the fee issue is a question of contract, and as the expectations of the parties are paramount, I agree with Respondents that Maryland law should be weighted heavily in the absence of North Dakota authority, but I will consider other law that may be particularly relevant to particular issues as well. That is a proper consideration under North Dakota law. *See* Borris Carpet v. Borris, 785 N.W. 2d 164, 178 (N.D. 2010).[4]

Section 16 of the Franchise Agreement, entitled "Attorneys' Fees" states in its entirety as follows:

---

[2] This will be discussed in detail in subsequent portions of this Opinion and Final Award.

[3] I see nothing to suggest that the withdrawal was undertaken to avoid an imminent ruling on the merits. (*See* Claimants' Response, pp. 14-16).

[4] I have no evidence as to why the parties' subsequent agreement to substitute Maryland law was made, but both parties have now briefed the issue from a Maryland perspective. Also, it appears undisputed that the contract was made in Maryland as Respondents state in their email of June 19, 2023.

> **16. Attorneys' Fees.** Attorneys' fees must be paid according to the terms of this Section 16 and also, as may be applicable, Section 13 of this Agreement. The prevailing party (as determined by the court or arbitrator) in any arbitration or claim filed to enforce the terms of this Agreement will recover from the other party the reasonable expenses of its attorneys, whether that attorney is employed by you or us or specially retained in connection with the proceeding, along with any court costs, arbitration costs, arbitrator fees, the reasonable costs of necessary expert witnesses, and the reasonable travel costs (including food and lodging) of the prevailing party's witnesses in the proceeding. If such a claim seeks, in whole or in part, attorneys' fees under Section 13, that provision will control. Attorneys' fees, including those payable to any attorney who is an employee of yours or ours, will be determined by reference to the usual and customary rate for such attorney, and the rates charged by attorneys of similar background and experience performing similar work in the area where the proceeding is conducted. Any judgment or arbitration award for fees or other amounts owed to us to enforce our rights under Section 4, Section 10(d) or Section 21 of this Agreement will bear interest at the rate referred to in Section 4(f) until paid.

Initially, I agree with Claimants' reading that there is nothing within Section 16 which in any way limits recovery to fees actually paid by or incurred by a party. Section 13, which is cited therein, is an indemnification provision requiring payment of attorney fees in addition to damages awarded for conduct of the franchisee resulting in liability of Choice Hotels International Inc. ("Choice"). It is to be noted that attorney fees relating to Section 13 are controlled by "that provision" (emphasis added), meaning Section 13, as clearly stated in Section 16. Respondents' suggestion that the sentence which follows that phrase in Section 16 is nonetheless for purposes of Section 13 is thus in error. (*See* Supplemental Brief, p. 9). Accordingly, that sentence governs attorney fees under Section 16 and states: "Attorney's fees, including those payable to any attorney who is an employee of yours or ours, will be determined by reference to the usual and customary rate for such attorney, and the rates charged by attorneys of similar background and experience performing similar work in the area where the proceeding is conducted." The "reasonable

expenses" (emphasis added) of a party's attorney are also to be recovered as stated at the opening of Section 16 as well as the list of other expenses set forth therein. Clearly, the reasonableness of both fees and expenses is the central inquiry. Although Respondents cite to a number of Maryland cases which state that a loadstar analysis is "inappropriate" for a contractual fee-shifting case (*See* Supplemental Brief, pp. 7-8), the Franchise Agreement itself adopts elements of a loadstar calculation by its express terms, as quoted above.

Respondents have cited to certain Maryland cases which state that regardless of what the fee-shifting contract says, they are in the nature of indemnity agreements and nothing more than fees incurred may be recovered. *See, e.g.,* Sun Trust Bank v. Goldman, 201 Md. App. 390, 398 (2011) and cases discussed on pages 2 and 3 of Respondents' Supplemental Brief. On the other hand, Claimants cite to Weichart Co. of Maryland v. Faust, 19 A.3d 393 (Md. 2011) which found that "absent restrictive language in the contract creating the obligation that the incurring party personally pay (or be obligated to pay) attorney's fees, a general obligation to pay for incurred attorney fees refers to those fees incurred on behalf of the prevailing party". (Emphasis added.) In that case, the prevailing party's fees were paid by her employer.

Claimants further cited Henriquez v. Henriquez, 413 Md. 287, 292 (2010) a case relied upon by the court in Weichert. There, a nonprofit legal organization pursued a statutory claim for a party and was itself paid attorney fees although its undertaking was pro bono. The court noted that the statute at issue had no requirement that the party itself had to be a paying client or actually owe fees. Similarly here, the Franchise Agreement contains nothing of the sort. In fact, it suggests a loadstar analysis consistent with the services rendered to the party. Indeed, the Franchise Agreement also provides for recovery of the services of in-house counsel although there is no client "obligation", as that term is used in the sense of fee requirements, to do that.

Both parties cite and discuss the Maryland case of Herst Revocable Trust v. Blinds To Go, 2011 WG 6444980 (D. Maryland). The case supports propositions advanced by both parties, but culminates in leaving the gates open for consideration of "any other factor reasonably related to a fair award of attorney fees." Although the opinion notes Maryland cases have stated that the lodestar approach is inappropriate in contractual fee-shifting cases, it also notes that the lodestar approach can "provide helpful guidance", quoting Congressional Hotel, 28 A.3d 75, 84 (Md. App. 2011). It then goes on to note Section 1.5 of the Maryland Rules of Professional Conduct as listing a total of eight non-exclusive factors for attorney fee awards in a contract case. Those factors are as follows, and many parallel the factors considered in a lodestar analysis:

> ***3** MRPC 1.5(a) enumerates eight non-exclusive "factors to be considered in determining the reasonableness of a fee":
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment of the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

The parties have also briefed California law in their respective papers as well. Although I do not find any particular connection to California to warrant unusual consideration of its attorney fees jurisprudence, I do find cases highly analogous to the instant one. In particular, I find the case of Persson v. Smart Inventions, Inc., 23 Cal. Rptr. 3d 335 (2005) to be instructive and persuasive. In that case, and despite the use of "incur" in the fee-shifting agreement on two occasions, the Court found as follows:

> We discern no basis in the stock redemption agreement for restricting the trial court's discretion, clearly granted in the first sentence of the attorney fee clause, to fix reasonable attorney fees. The court would not be bound to award the full amount of a contingency fee, simply because a party was actually liable for that amount under a contingency fee agreement. **Similarly, the court should not be bound to award the exact amount of a contingency fee when that amount would be less than a reasonable amount for services performed. Nothing in the parties' agreement, or in the costs statutes, requires that result, and the trial court did not err when it ruled accordingly.**

(emphasis added).

Moreover, I do not find as Respondents have argued that this case law cannot be considered because North Dakota law is inconsistent with it. Respondents cite to Big Pines, LLC v. Baker, 958 N.W. 2d 480, 487 (N.D. 2021), for the proposition that a lodestar analysis is not required. While certain North Dakota cases do state such a proposition, Big Pines notes clearly that the lodestar analysis yields a presumptively reasonable result. It further states that Rule 1.5(a) of the North Dakota Rules of Professional Conduct lists eight factors to consider in determining a reasonable fee, all parallel to factors considered in the lodestar methodology.[5] The North Dakota courts follow those guidelines, while being careful to note that the "decision rests in the sound discretion of the district court."

[5] The factors are identical to those set forth by the Maryland court in Herst.

In accordance with my review of the case law, I determine that fees need not be "incurred" to be awarded to a prevailing party in a contract fee-shifting case.

CALCULATION OF AWARD

I carefully observed a host of talented professionals throughout the eight-day trial. I have reviewed thorough and thoughtful briefing and argument by professionals particularly skilled and experienced in franchise law. There is no way that I could determine that $11,377.93 is a reasonable attorneys' fee either factually or legally.

At the outset, I have reviewed the various Declarations of Attorney Proper submitted in support of Claimants' Application for Attorneys' Fees and Costs. The amounts calculated, the reasonableness of the rates, and the skill and experience of all White and Williams professionals is not challenged, nor could it be from my perspective.

Mr. Proper's Final Declaration setting forth the final calculation of hours worked and rates seeks recovery of $649,240.50 in attorney's fees. Costs are detailed in the Declaration attached to the initial Application in the amount of $115,831.75. No challenge was made to any specific cost, and I find them to be both reasonable and recoverable.[6]

OTHER FACTORS

White and Williams undertook a significant and complex task and faced a premier firm in the area of franchise law. The Fee Application filed by Lathrop GPM, LLP sought fees and expenses of $814,650.57. Fees of opposing counsel are properly considered in determining the reasonableness of fees and costs awarded to a prevailing party. As stated to Duchscherer v. W.W. Wallwork, 534 N.W. 2d 13 (N.D. 1995), "the value of Wallwork's defensive efforts creates a more suitable comparison to measure the value of offensive efforts by Duchscherer's counsel."

[6] The expenses will be reduced to $71,581.75 and the Final Award will separately address arbitration fees and costs.

Respondents contend that their fees were the product of numerous withdrawn and meritless claims and discovery and investigation relating to them, whereas Claimants argue that virtually every contention and allegation raised was defended to the hilt. Throughout the proceeding, and contrary to my usual practice, I asked few questions. That was because whenever I thought something was being missed or unclear, it was addressed and clarified before I could ask. It took roughly equivalent dedication, skill and effort to meet with the success that Claimants achieved, particularly in light of the limited discovery allowed to overcome such efforts.

In rendering this award, I have taken into consideration the modest amount of damages of the award to a single franchisee, and Claimants' argument that every franchisee in the Choice group has been positively impacted by the Award obtained by Claimants. The scope of any of the awards in any of the four test cases remains to be determined from an issue preclusion perspective, and the ultimate impact on future potential liability or adjustments to contract performance and thinking is unknown. I do find, however, that Mr. Proper's affidavit rings true when stating that absent recovery of its attorney fees from the Respondents, there could be no economic sense for a single franchisee to risk paying hundreds of thousands of dollars in attorney fees if they lose, and incurring fees of hundreds of thousands in litigation clarifying whatever they might recover. *See* Declaration of Justin Proper in Support of Claimants' Application, paragraphs 5-13. I do believe the arbitration provisions and attorney fee provisions as Choice would have them interpreted with single arbitrations, the absence of consolidation and fee reimbursement for only fees incurred insulates Choice from suits. For these reasons as well as the foregoing, I find the present fee award to be reasonable.

ADJUSTMENT

While I have found that the fees sought as a prevailing party need not be reduced for the RICO, fraud and conversion claims due to their factual overlap with the contract claims, an adjustment is in order for the call-forwarding claim. It is a distinct claim both legally and factually. Accordingly, I reduce the award by the sum of $25,000.00 as it did not involve a significant amount of testimony or unusual legal analysis and research. This is an estimate of a reasonable reduction for that claim.

I did not enter any Award against Choice Hotels Owner Council ("CHOC"), and I see no reason for a reduction arising from its involvement. While evidence was provided by CHOC's leadership, CHOC was by no means the focus of liability determinations throughout the entirety of this proceeding.

A Final Award follows.

Date: July 27, 2023 /s/Steven Petrikis

THE AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

HIGHMARK LODGING, LLC and DARSHAN PATEL,	:	Case No. 01-21-0004-5554
Claimants,	:	
v.	:	
CHOICE HOTELS INTERNATIONAL, INC.; CHOICE HOTELS OWNERS COUNCIL,	:	
Respondents.	:	

FINAL AWARD

The Opinion and Partial Award dated May 17, 2023, is hereby incorporated by reference.

In addition to my Partial Award, I determine that Claimants are the prevailing party for purposes of Section 16 of the Franchise Agreement and AWARD as follows:

1) AWARD for Claimants and against Choice Hotels International, Inc. for attorney fees in the amount of $649,240.50.

2) AWARD for Claimants and against Choice Hotels International, Inc. for expenses in the amount of $71,581.75.

The administrative fees of the American Arbitration Association totaling $10,175.00, and the compensation of the arbitrator totaling $61,873.00 shall be borne by Choice Hotels International, Inc. Therefore, Choice Hotels International, Inc. shall reimburse the sum of $39,186.50, representing that portion of said fees in excess of the apportioned costs previously incurred and paid by Claimants.

This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

July 27, 2023 — *s/ Steven Petrikis*
Date — Steven Petrikis

I, Steven Petrikis, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

July 27, 2023 — */s/ Steven Petrikis*
Date — Steven Petrikis