

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

FILED
CIVIL ACTIONS BRANCH
JUN 07 2017
Superior Court
of the District of Columbia
Washington, DC.

DISTRICT OF COLUMBIA
Office of the Attorney General
441 4th Street, NW
Washington D.C., 20001,

Petitioner,

v.

MARRIOT INTERNATIONAL, INC.
10400 Fernwood Road
Bethesda, MD 20817,

Respondent.

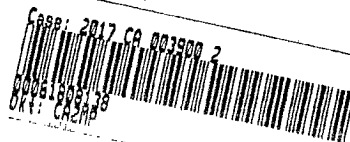
Case No.:

17-0003900

PETITION FOR ENFORCEMENT OF THE ATTORNEY GENERAL'S
JUNE 16, 2016 SUBPOENA TO MARRIOT INTERNATIONAL, INC.

1. Petitioner District of Columbia, by and through the Office of the Attorney General for the District of Columbia ("Office of Attorney General"), pursuant to D.C. Code § 1-301.89c, respectfully petitions this Court for an order enforcing a subpoena (attached as Exh. 1) served on Marriott International, Inc. ("Marriott"). Marriott is a Maryland-based hotel and lodging organization that owns or manages hotels throughout the United States. It offers lodging for rental to DC residents, including through online reservations systems it operates within the District of Columbia.

2. The subpoena was served in connection with a national investigation involving the Attorneys General of 46 states and the District of Columbia that is being led by the Office of the Attorney General for the District of Columbia, and which concerns deceptive price



advertising techniques used by the Marriott.¹ The subpoena required Marriott to produce documents relevant to the Attorneys General's investigation into whether Marriott's practice of charging undisclosed or poorly disclosed resort fees in addition to the advertised daily rate for lodging at Marriott's hotel properties, as well as Marriott's characterization of such charges as a tax or government imposed fee, violated the District of Columbia's Consumer Protection Procedures Act ("CPPA"), D.C. Code §§ 28-3901, *et seq.*, and other State consumer protection laws.

3. Marriott advertises and promotes its hotel rooms by advertising a daily rate. This allows consumers, including consumers residing in the District of Columbia, to compare prices when shopping for a hotel room when they call Marriott, visit its website, or use another online travel price consolidation platform to book a room. Not included in the advertised daily room rates are "resort fees" or "amenities fees" that Marriott includes in its guest room charge and are also imposed daily in addition to the room rate. Marriott either does not disclose these fees during the reservation process or the fees are disclosed in a fashion that is not likely to alert consumers that the advertised room rates do not, in fact, include all guest room charges that must be paid for lodging beyond taxes. As a result, consumers, including those residing in the District of Columbia, have likely been misled concerning the price they will pay when booking a Marriott hotel room.

4. This pricing technique, where a company advertises only part of a product or service's price only to reveal other charges later as the consumer goes through or completes the buying process, has been labeled "drip pricing" by the Federal Trade Commission ("FTC"). In November 2012, the FTC warned lodging industry that this type of drip pricing as it pertains to

¹ The definition of "States" contained in the subpoena, Exhibit 1, has been redacted because a small number of the participating states are statutorily precluded from identifying their investigations.

the practice of separately charging daily resort or amenities fees on top of the advertised daily room rate confuses consumers and may violate the law by misrepresenting the price consumers can expect to pay for their hotel rooms.

5. Since the 2012 FTC issued its industry warning, Marriott has not stopped its practice of drip pricing by charging consumers undisclosed or poorly disclosed resort or amenities fees in addition to its advertised room rate. As a result, the Attorneys General's investigation was commenced in May 2016, when the District served its subpoena on Marriott.

6. D.C. Code § 1-301.89c(a) provides that the Office of the Attorney General "shall have the authority to issue subpoenas for the production of documents and materials or for the attendance and testimony of witnesses under oath, or both, related to an investigation into unfair, deceptive, unconscionable, or fraudulent trade practices by or between a merchant or consumer, as defined in § 28-3901." Consistent with that authority, on May 16, 2016, the District served its subpoena on Marriott seeking the following information:

- The persons responsible for organizing Marriott's response to the subpoena. (*See* Subpoena, Ex. 1, Request Nos. 1 and 2).
- Marriott's legal identity, organization and corporate structure. (*Id.* at Request Nos. 3, 4, 7 and 8).
- The employees and officers responsible for setting its policies for charging and disclosing resort fees. (*Id.* at Request Nos. 5 and 6).
- Data identifying the Marriott properties that charge resort and documents describing their practices of charging and disclosing resort fees. (*Id.* at Request No. 9 and 10).
- Internal and external email and communications concerning the practice of charging and disclosing resort fees. (*Id.* at Request Nos. 11, 12, 18, and 20).
- Data identifying the consumers who were charged resort fees, the hotels where the fees were charged, the date and amount of the resort fees paid, and the amount of resort fees refunded to consumers). (*Id.* at Request Nos. 13 and 14).
- Information concerning how the charged resort fees were calculated and accounted for in profit and loss statements. (*Id.* at Request Nos. 15 and 16).
- Marriott's agreements with its franchises and managed properties that concern the practice of charging resort fees. (*Id.* at Request No. 18).
- Marriott's agreements with online travel agencies concerning resort fees. (*Id.* at Request No. 19).

- Policies, guidelines and manuals concerning Marriott or its franchisee's disclosure of resort fees to consumers. (*Id.* at Request Nos. 21 and 22).
- Limitations placed on consumers' ability to submit reviews. (*Id.* at Request No. 23).
- Consumer complaints received by Marriott, its franchisees, and its managed properties, concerning the practice of charging resort fees. (*Id.* Request No. 24).
- Documents concerning any lawsuits, settlements, or other investigations that concerned Marriott's practice of charging resort fees. (*Id.* at Request Nos. 25, 26 and 27).

7. D.C. Code § 1-301.89c(d) provides that "[i]n the case of refusal to obey a subpoena issued under this section, the Attorney General may petition the Superior Court of the District of Columbia for an order requiring compliance. Any failure to obey the order of the court may be treated by the court as contempt."

8. The standard for determining the validity of a governmental investigative subpoena is whether the inquiry is authorized by statute, the information sought is relevant to the inquiry, and the demand is not too indefinite or overbroad. *See United States v. Morton Salt Co.*, 338 U.S. 632 (1950).

9. The District's subpoena was issued pursuant to statutory authority granted to its Attorney General to compel the production of records. The information sought by the Attorney General is relevant to its and the other 46 investigating Offices of Attorney General's concerns that Marriott is using deceptive trade practices in the pricing of its hotel rooms. The documents requested are not indefinite or overbroad, and have already been subjected to significant limitations proposed by the Attorneys General.

10. The Attorneys General have repeatedly requested that Marriott produce relevant information to their investigation and, to the extent that such information is not in its possession, but in the possession of its franchisees, identify the appropriate franchisees, so that the Attorneys General can move forward with their now one year old investigation and take appropriate action to protect their consumers.

11. To date, Marriott has not cooperated in this investigation and had provided only a limited subset of the requested information. Specifically, Marriott has to date only produced the following information:

- Corporate records and securities filings.
- A form Franchise Agreement.
- Franchise disclosure documents.
- Depictions of the current web-based reservation process for 5 of its hotels.
- A spreadsheet showing the Marriott hotels that currently charge resort fees and the amounts they currently charge.
- Some policy documents concerning resort fees.

Significantly, missing from Marriott's productions are several categories of requested information including, but not limited to:

- Applications Marriott received from its franchisees analyzing their in-market competitors' resort fee practices and seeking authorization to charge resort fees.
- Data showing the historical practices of Marriott and its franchisee's charging resort fees, including their online reservation practices and advertisements.
- All policy documents regarding Marriott's resort fee practices.
- Any data identifying the consumers that were charged resort fees in the properties managed by Marriott or that were owned by franchisees or the resort fees refunded to consumer.
- Any communications either internally or with its managed or franchised properties concerning the practices of disclosing and charging resort fees.
- Any information concerning its customer review policies.
- Complaints that Marriott received from consumers.
- Documents reflecting the other lawsuits or investigations filed or conducted concerning Marriott's resort fee practices.

12. The relevance of much of this information cannot be contested. For example, data identifying consumers charged resort fees identifies potential witnesses in any legal action the Attorneys General may take. Information concerning Marriott's historical online reservation practices and advertising, particularly the documents that reflect its practices prior the issuance of the FTC's warning regarding drip pricing, are also relevant. Lastly, many of the categories of requests, including information about consumer complaints, other related lawsuits, and other

investigations, are standard requests for a government investigation. Nevertheless, Marriott has either ignored or not fully responded to these requests despite having more than a year to do so.

13. Finally, with respect to the last factor for a court to consider when enforcing a subpoena, the investigating Attorneys General have made several attempts to discuss burden with Marriott, many of which have been wholly disregarded or not responded to by Marriott.

14. For each of the reasons stated above, and to allow the Attorneys General to complete their investigation, the District respectfully requests that this Court issue an order compelling Marriott to produce all documents responsive to the District's subpoena.

Respectfully submitted,

Dated: June 6, 2017

KARL A. RACINE

Attorney General for the District of Columbia



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Director, Office of Consumer Protection



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IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
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MARRIOTT INTERNATIONAL, INC.
10400 Fernwood Road
Bethesda, MD 20817,

Respondent.

Case No.:

17-0003900

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR
ENFORCEMENT OF THE ATTORNEY GENERAL'S MAY 18, 2016
SUBPOENA TO MARRIOTT INTERNATIONAL, INC.**

This is a miscellaneous action filed by Petitioner District of Columbia to obtain judicial enforcement of a subpoena issued by the District's Office of the Attorney General pursuant to D.C. Code § 1-301.89c(d). The Consumer Protection Procedures Act ("CPPA") grants the Office of Attorney General authority to prosecute any person who it has reason to believe is using or intends to use any method, act, or practice that violates the CPPA or other consumer protection laws. D.C. Code § 28-3909. The Office of Attorney General also has statutory authority to conduct "investigation[s] to determine whether to seek relief under [the CPPA]," D.C. Code § 28-3910, and may issue subpoenas for the production of records in connection with those investigations. *See* D.C. Code § 1-301.89c(a).

Marriott International, Inc. ("Marriott") is a large Maryland-based hotel and lodging organization that owns or manages hotels throughout the United States. The District's subpoena was served in connection with a national investigation involving the Attorneys General of 46 states and the District of Columbia that is being led by the Office of the Attorney General for the District of Columbia, concerning potentially deceptive price advertising techniques used by Marriott. Marriott advertises and promotes its hotel rooms by advertising a daily rate. This allows consumers, including consumers residing in the District of Columbia, to compare prices when shopping for a hotel room when they call Marriott, visit its website, or use another online travel platform to book a room. However, Marriott has intentionally engaged in a practice

labeled "drip pricing" by the Federal Trade Commission ("FTC"), where it advertises part of the price a consumer will need to pay daily for its rooms, but later adds to the charge a resort or amenities fee, which is an additional charge for the room and is considered part of the guest room revenue by Marriott. In November 2012, the FTC warned the hotel industry that this type of drip pricing may violate the law by misrepresenting the price consumers can expect to pay for their hotel rooms, but Marriott has not ceased this practice.

The District and 46 other Attorneys General initiated their investigation into Marriott's price advertising in May 2016, when the District served the subpoena attached as Exhibit 1, seeking information concerning Marriott's practice of charging separate undisclosed or poorly disclosed resort fees to consumers who purchased lodging from it. The subpoena had a response deadline of June 20, 2016. (*See* Subpoena, Exhibit 1, pg. 1). Although Marriott has produced some of the information requested in the subpoena, to date, Marriott has failed to produce several categories of information crucial to the Attorneys General's investigation, including, but not limited to:

- Applications Marriott received from its franchisees analyzing their in-market competitors' resort fee practices and seeking authorization to charge resort fees.
- Data showing the history of Marriott and its franchisee's resort fee practices, including their online reservation practices and advertisements.
- All policy documents regarding Marriott's resort fee practices.
- Any data identifying the consumers who were charged resort fees in the properties managed by Marriott or that were owned by franchisees or the resort fees refunded to consumers.
- Any communications made either internally or with its managed or franchised properties concerning the practices of disclosing and charging resort fees.
- Any information concerning its customer review policies.
- Complaints that Marriott received from consumers.
- Documents reflecting the other lawsuits or investigations filed or conducted concerning Marriott's resort fee practices.

The District has been engaging in significant discussions with Marriott concerning the production of the remaining information responsive to its subpoena, including requesting Marriott to identify if there are categories of information that would be better sought from its franchisees. To date, Marriott has not cooperated in these efforts. The District now petitions this Court for an order compelling Marriott to fully respond to the District's subpoena.

ARGUMENT

The Office of Attorney General has authority to investigate potential violations of the District's consumer protection laws, including the authority to compel the production of records in order "to determine whether to seek relief under [the CPPA]." D.C. Code § 28-3910. A government agency subpoena should be enforced if (1) the investigation and issuance of the subpoena are within the agency's authority, (2) the demands sought are not too indefinite and are reasonably related to the inquiry, and (3) the demands are not unduly burdensome or unreasonably broad. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977). This test is not onerous: an "agency's own appraisal of relevancy must be accepted so long as it is not 'obviously wrong.'" *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992). Courts should only refuse to enforce a subpoena if

the agency's appraisal is "plainly incompetent or irrelevant to any lawful purpose." *FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977) (quoting *Endicott-Johnson v. Perkins*, 317 U.S. 501, 509 (1943)). The Office of Attorney General subpoena here easily satisfies this test.

1. The Investigation And Issuance Of The Subpoena Is Within the Attorney General's Authority.

The Office of Attorney General's decision to investigate Marriott is clearly within the agency's authority under the CPPA. The CPPA grants the Attorney General the authority to prosecute any person who it "has reason to believe is using or intends to use any method, act, or practice in violation" of the CPPA or other consumer protection laws: D.C. Code § 28-3909. In keeping with this authority, the Office of Attorney General has been conferred broad power to compel the production of documents in the course of determining whether to bring a consumer protection enforcement case. *See* D.C. Code §§ 1-301.89c(a) and 28-3910. Law enforcement agencies, such as the Office of Attorney General, have the right to investigate businesses, such as Marriott, either to discover "the existence of a [statutory] violation or to assure itself that none exists." *Morton Salt Co.*, 338 U.S. at 642-43.

Based on the FTC's warning against drip pricing, national criticism of the practice of hotel's charging resort fees, and the complaints leveled against the practice by consumers, the District and 46 other Attorneys General are concerned that Marriott may be misleading consumers by advertising daily room rates that do not include all amounts (other than taxes) that Marriott charges consumers to pay when lodging at one of Marriott's hotels. Marriott also labels its resort fee a "tax or fee" in its check out process, suggesting it is government imposed, rather than additional guest room revenue that Marriott collects. These concerns, if proven true, would be clear violations of the CPPA. In order to investigate these concerns, the Office of Attorney General, on behalf of the investigating states, served its subpoena seeking documents identifying

Marriott's resort fee practices. The Office of Attorney General's subpoena was therefore properly issued pursuant to its authority to investigate Marriott, a merchant, to discover the existence of CPPA violations.

2. The Subpoena Requests Are Not Too Indefinite And Are Reasonably Related To Its Investigation.

The Attorney General's subpoena only seeks information germane to its investigation into Marriott's practice of charging, but failing to adequately disclose resort fees, including:

- The persons responsible for organizing Marriott's response.
- Marriott's legal identity, organization and corporate structure.
- Employees and officers with knowledge of the practices.
- A list of the Marriott properties that charge resort fees.
- Email and communications concerning the practice of charging and disclosing resort fees.
- Information identifying the consumers who were charged resort fees and the fees they were charged.
- Information concerning how the charged resort fees were calculated and how Marriott profited from charging resort fees.
- Marriott's agreements with online travel agencies concerning resort fees.
- Marriott's resort fee policies, guidelines and manuals.
- Limitations placed on consumers' ability to submit reviews, particularly as they pertain to complaints about resort fees
- Consumer complaints regarding resort fees.
- Information about other lawsuits and settlements concerning resort fees.

See Subpoena (attached as Exh. 1).

In *United States v. R. Enterprises, Inc.*, involving the enforcement of an investigative subpoena, the United States Supreme Court held that unless a court "determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of ... [the agency's] investigation," a request contained within a subpoena must be considered relevant, and therefore, reasonable. 498 U.S. 292, 301 (1991); see also *Unnamed Attorney v. Attorney Grievance Comm'n*, 409 Md. 509, 522-23 (Md. 2009). Therefore, an agency need only establish that the requested documents are

"minimally relevant to the inquiry." *United States v. Aero-Mayflower Transit Co.*, 646 F.Supp. 1467, 1472 (D.D.C. 1986).

Here, the Attorney General is seeking documents that are standard for government investigations and directly identify Marriott's practices in connection with the disclosure and collection of resort fees to consumers. The requested information will show (1) whether Marriott is violating the CPPA, (2) the identity of potential victims, (3) the identity of potential witnesses, and (4) evidence that may be used to pursue an enforcement action. Accordingly, the documents subpoenaed by the District are relevant to Attorneys General's inquiry.

3. The Subpoena Requests Are Not Unduly Burdensome Or Unreasonably Broad.

The Attorney General's subpoena requests are not indefinite or overbroad. While Marriott and the Office of Attorney General have discussed and agreed to some limitations to the subpoena, Marriott has not fully cooperated by producing the requested information. The fact that "compliance with the requirements of a subpoena will be expensive and will interfere with the conduct of respondent's business does not in itself often afford a basis for refusal to enforce the subpoena." *Equitable Trust Co. v. Comm'n on Human Relations*, 287 Md. 80, 93 (Md. 1980); see also *E.E.O.C. v. Maryland Cup Corp.*, 785 F.2d 471, 475 (4th Cir. 1986) (citing *United States v. Powell*, 379 U.S. 48, 57-58 (1964) (holding that although it would cost the business \$75,000 to respond to the EEOC's subpoena, the cost alone did not establish that the subpoena was unduly burdensome)).

The Attorney General's subpoena seeks information that is meaningful to its investigation of Marriott's potentially illegal pricing practices. The 47 Offices of Attorneys General involved in this investigation have chosen not to separately serve subpoenas on Marriott in order to limit its burden when providing relevant information in this national investigation. The Office of Attorney General has asked Marriott to identify any unnecessary burden it may

have in responding to this subpoena, but Marriott has declined to do so. For example, the Office of Attorney General asked Marriott to identify whether any of the requested information is either exclusively in the possession of its franchisees or could more easily be produced by its franchisees, but, to date, Marriott has declined to specifically identify any categories of documents that should more appropriately be requested from its franchisees. The Attorney General, in response to nebulous burden concerns raised by Marriott, has invited Marriott to propose reasonable limitations on certain requests, but Marriott has refused to do so. For example, Marriott was offered an opportunity to limit its production of electronically stored communications requested by four requests contained in the subpoena (*Id.* at Request Nos. 11, 12, 18, and 20) by proposing a list of specific custodians and providing search terms – a method frequently used to resolve similar discovery issues in litigation. To date, however, Marriott has refused to make any such proposal. The Attorney General also agreed to limit its request for documents related to any online travel company's offer of hotel rooms at hotels that charge resort fees (Request 19) to only the agreements between Marriott and any online travel agency. Absent any meaningful evidence of burden, a lack of cooperation by Marriott in accepting or proposing reasonable limitations on any requests contained in the subpoena, and the obvious relevance of the information sought, the Office of Attorney General contends that none of the requests in its subpoena can be shown by Marriott to be overbroad or too indefinite.

Accordingly, the Office of Attorney General's subpoena meets all three prongs of the test set for by the Supreme Court in *Morton Salt*, and it should be enforced by this Court.

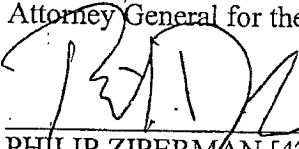
CONCLUSION


For each of the reasons set forth above, the Office of Attorney General requests that this Court enter the attached proposed Order requiring Marriott to provide timely responses to Office of Attorney General's subpoena.

Respectfully submitted,

Dated: June 6, 2017

KARL A. RACINE
Attorney General for the District of Columbia



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GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

Karl A. Racine
Attorney General



Office of Consumer Protection

SUBPOENA

In the Matter of
MARRIOTT INTERNATIONAL, INC.

DEMAND FOR PRODUCTION
OF DOCUMENTS

To: Marriott International, Inc.
10400 Fernwood Road
Bethesda, MD 20817

Serve On: Corporate Creations Network, Inc.
1629 K Street, N.W., #300
Washington, D.C. 20006

The Attorney General for the District of Columbia is investigating whether Marriott International, Inc., or any of its affiliates may have violated one or more of the provisions of the District of Columbia Consumer Protection Procedures Act, D.C. Code § 28-3901, *et seq.*, in connection with its charging resort fees in connection with the offer and sale of hotel rooms.

Pursuant to D.C. Code § 28-3910, and by the authority vested in the Attorney General for the District of Columbia, you are hereby required to produce the documents and information requested below, on or before June 20, 2016, to the attention of:

Office of the Attorney General for the District of Columbia
Attn: Kenneth Barrington, Investigator
441 Fourth Street NW, Suite 600-S
Washington, DC 20001

Questions regarding this subpoena should be directed to Deputy Director Jimmy Rock at (202) 741-0770, jimmy.rock@dc.gov.

I. DEFINITIONS

1. "And" and "or" are terms of inclusion and not of exclusion and shall be construed either disjunctively or conjunctively, as necessary, to bring within the scope of this.

Exhibit

1

subpoena any document or information that might otherwise be construed to be outside its scope.

2. **"Document(s)"** means the original (or duplicate, identical copies when originals are not available), and any non-identical copies (whether different from the original because of notes made on such copies or otherwise) of writings or recordings of every kind and description whether written, mechanical, electronic or any other means, as well as phonic or visual reproductions of oral statements or conversations, and including, but not limited to, any manual, book, pamphlet, periodical, letter, report, memorandum, notation, message, telegram, cable, facsimile, record, study, working paper, accounting paper, telephone log, teletype message, chart, graph, index, tape, minutes, computer printout, contract, lease, invoice, record of purchase or sale, correspondence, electronic or other transcription of taping of telephone or personal conversations or conferences, or any and all other written, printed, typed, punched, taped, filmed or graphic matter however produced or reproduced and any electronic, mechanical, computer, e-mail, or Internet records or representations of any kind (including, without limitation, tapes, cassettes, discs, recordings, and computer and electronic memories). **"Document"** includes the file, folder tabs or containers and labels associated with each original or copy.
3. **"Hotel"** shall mean any of your or your franchisee's establishments providing lodging within the United States. Hotels shall include, but not be limited to, any establishments operating under the following names: The Ritz-Carlton, Bvlgari Hotels & Resorts, Edition, JW Marriott, Autograph Collection Hotels, Renaissance Hotels, Marriott Hotels, Delta Hotels and Resorts, Gaylord Hotels, AC Hotels by Marriott, Courtyard by Marriott, Residence Inn by Marriott, Springhill Suites by Marriott, Fairfield Inn & Suites, TownePlace Suites by Marriott and Moxy Hotels.
4. **"Online Travel Company"** shall mean an entity operating a website that offers consumers the option of searching for establishments that provide lodging including, but not limited to, Expedia, Expedia, Inc., Hotels.com LP, Hotwire, Inc., Trivago GmbH, Travelocity.com LP, Orbitz Worldwide, Inc., Priceline, Priceline Group, Kayak Software Corporation and Booking.com.
5. **"Resort fee"** means any mandatory fees demanded from your guests, by you or your franchisees, in addition to the base rate advertised for a room. Resort fees include any charges for goods or services that are routinely added to the bill of a guest, regardless of whether the guest has actually used the goods or services. Such fees may include, but are not limited to, charges for internet access, exercise and recreational facilities, and cleaning services. Resort fees also include fees that are by default, automatically charged to a guest, but which hotel staff maintains discretion to remove prior to charging or ability to remove after charging. Resort fees do not include amounts collected by you or your franchisees that are passed on to any governmental entity, such as taxes or excise payments.

6. "States"

Redacted

7. "You" and "your" means Marriott International, Inc. and all of its past and present officers and employees, whether assigned to its principal offices or any of its fields or other locations, including all of its divisions, subsidiaries (whether or not incorporated) and affiliated enterprises and all of its headquarters, regional, zone and other offices and its employees, and all agents, contractors, consultants, attorneys and law firms and other persons engaged directly or indirectly (e.g., employee of a consultant) by or under the control of Marriott International, Inc. (including all business units and persons previously referred to).

II. INSTRUCTIONS

1. **Documents No Longer in Possession of Respondent/Destroyed Documents:** If any responsive document was, but no longer is, in your possession, custody or control, produce a description of each such document. The description shall include the following:
- (a) the name of each author, sender, creator, and initiator of such document;
 - (b) the name of each recipient, addressee, or party for whom such document was intended;
 - (c) the date the document was created;
 - (d) the date(s) the document was in use;
 - (e) a detailed description of the content of the document;
 - (f) the reason it is no longer in your possession, custody or control; and
 - (g) the document's current location.

If the document is no longer in existence, in addition to providing the information indicated above, state on whose instructions the document was destroyed or otherwise disposed of, and the date and manner of the disposal.

2. **Organization of Responses:** The documents produced shall be identified and segregated to correspond with the number of the request. All documents produced must be marked with consecutive document control numbers, i.e. Bates stamped. If a document is responsive to more than one request, identical copies of the document need not be produced. However, any copy of a document that differs in any manner, including but not limited to the presence of handwritten notations, shall be produced. All marginalia, post-its, and attachments to responsive documents shall be produced attached to the responsive documents.

3. **Electronic Documents:** If any responsive document is available or maintained in electronic format, the document shall be provided in electronic format. Electronic documents shall be produced in a format that maintains all metadata, and shall include all file, record, instructions, codes, or other information necessary to retrieve or interpret the data. Provide the documents in one of the forms listed below (in order of preference):

- (a) single-page Tagged Image Format files (.tiff) or "JPG" files, with index files;
- (b) searchable Adobe Reader files (.pdf); or
- (c) Corel WordPerfect files (.wpd), Microsoft Word files (.doc), Microsoft Excel files (.xls), Microsoft PowerPoint files (.ppt), or Text files (.txt).

For information contained in databases, produce the requested information in Excel spreadsheet format (.xls), Microsoft Access (.mdb), or if not possible, comma-separated text files (.csv) or Text files (.txt).

You shall submit electronically-stored data on a generally supported storage medium. Currently supported storage medium include the following: CD-readable disks, DVD-ROMS, external hard drives, or USB flash drives.

4. **Privileged Documents:** If any responsive document is withheld under any claim of privilege, provide a detailed privilege log that contains at least the following information for each document that you have withheld:

- (a) the name of each author, writer, sender, creator, or initiator of such document;
- (b) the name of each recipient, addressee, or party for whom such document was intended;
- (c) the date of such document, or an estimate thereof if no date appears on the document;
- (d) the general subject matter of the document; and
- (e) the claimed grounds for withholding the document, including – but not limited to – the nature of any claimed privilege and grounds in support thereof.

5. **Duty to Supplement:** All document requests are continuing in nature until otherwise directed so as to require the supplementary production if you obtain further responsive documents or information. You are also required to amend your responses to the requests contained within this subpoena if you discover that the previous response was incorrect or incomplete.

6. **Relevant Time Period:** Unless otherwise noted or inclusive dates are requested, the relevant time period for which documents are requested is from January 1, 2010 to the present. In each instance in which a document is produced in response to a request, the current edition should be produced together with all earlier editions, or predecessor documents during the relevant time period, even though the title of earlier documents may differ from current versions.

7. **Duty to Preserve Documents:** All documents and/or other data which relate to the subject matter or requests of this subpoena must be preserved. Any destruction involving such documents must cease, even if it is your normal or routine course of business to delete or destroy such documents or data and even if you believe such documents or data are privileged or otherwise need not be produced.
8. **Notice of Rights:** Any person to whom a subpoena has been issued under the Consumer Protection Procedures Act, D.C. Code § 28-3901, *et seq.* may exercise the privileges enjoyed by all witnesses, including moving to quash or modify the subpoena in the Superior Court of the District of Columbia on grounds including: (1) the Attorney General failed to follow or satisfy the procedures set forth in this section for the issuance of a subpoena; or (2) any grounds that exist under statute or common law for quashing or modifying a subpoena. In the case of refusal to obey a subpoena issued under this section, the Attorney General may petition the Superior Court of the District of Columbia for an order requiring compliance. Any failure to obey the order of the court may be treated by the court as contempt.

III. DOCUMENTS AND INFORMATION REQUESTED

1. Documents sufficient to identify the person or persons responding to this subpoena, as well as their addresses, phone numbers, inclusive dates of employment with you, job titles, and job responsibilities. In lieu of providing actual documents, you may provide a list containing the requested information.
2. Documents sufficient to identify each person who assisted in your response, and for each such person, the number(s) of the request(s) which that person(s) assisted in your response. In lieu of providing actual documents, you may provide a list containing the requested information.
3. Documents sufficient to show your legal identity and organization, including, but not limited to, all articles of organization, articles of amendment, articles of reinstatement, and operating agreements.
4. Documents sufficient to show all trade names under which you have done business.
5. Documents sufficient to show the names, titles, inclusive dates of employment, addresses, and phone numbers of your current and former owners, directors, members, officers and employees responsible for setting your policies, practices and procedures in connection with the disclosure and imposition of resort fees in your hotels. In lieu of providing the actual documents, you may provide a list that contains the names, titles, inclusive dates of employment, addresses, and phone numbers of each current or former owner, director, member, officer and employee responsible for setting said policies, practices, and procedures.
6. Documents that list or that describe the responsibilities of your current and former owners, officers, members, directors and employees responsible for setting your policies, practices and procedures in connection with the disclosure and imposition of resort fees

in your properties. In lieu of providing the actual documents you may provide a list of the individuals and a description of their responsibilities.

7. All documents that show each entity in which you have and/or had an ownership interest or authority to control during the last ten (10) years. In lieu of providing the actual documents you may provide a list containing the names of the entities and a description of the nature and extent of the ownership interest.
8. All documents that show each entity or person that has and/or had an ownership interest in you or authority to control you during the last ten (10) years. In lieu of providing the actual documents you may provide a list containing the names of the entities and a description of the nature and extent of the ownership interest.
9. Documents sufficient to identify the following information about each of your hotels that have collected any resort fees:
 - (a) the name of the hotel;
 - (b) the address of the hotel;
 - (c) the name and contact information of the franchisee of the hotel;
 - (d) the name and contact information for each owner of the hotel;
 - (e) the name and contact information for each management company of the hotel;
 - (f) the name used to identify each resort fee;
 - (g) the amount of each resort fee;
 - (h) the total amount of resort fees collected each year;
 - (i) the point(s) in the transaction when each resort fee is disclosed;
 - (j) the point in the transaction when each resort fee is collected;
 - (k) the benefit or service related to the resort fee; and
 - (l) the inclusive dates each resort fee was collected.

Provide the aforementioned information electronically to the extent such data is available.

10. All notices, disclosures, advertisements, web sites, and other documents that your hotels have used to disclose the existence, amount and terms of any resort fee to consumers seeking to reserve accommodations at any of the hotels identified in your response to Request No. 9. To the extent any documents responsive to this request concern disclosures that have been made electronically via any web site, provide documents that reflect the entire flow of web pages that consumers must land on in order to receive the disclosure in the order in which they are provided to the consumer.
11. All internal correspondence, email, memoranda and other communications sent or received by your officers, managers, employees, contractors and/or agents that refer or relate to resort fees policies and advertisements of pricing of rooms with resort fees.
12. All correspondence, email, memoranda and other communications between you and any franchisee that refer or relate to resort fees policies and advertisements of pricing of rooms with resort fees.

13. Documents providing the following information for any consumer residing in the States who has paid you or any of your franchisees any resort fee from January 1, 2014 to present:

- (a) the consumer's name;
- (b) the consumer's contact information;
- (c) the amount of the resort fee(s) paid by the consumer; and
- (d) the name and location of the hotel where the consumer paid the resort fee.

Provide the aforementioned information electronically to the extent such data is available.

14. Documents providing the following information for any consumer residing in the States to whom you or your franchisees have refunded any resort fees or removed any resort fees from their bills:

- (a) the consumer's name;
- (b) the consumer's contact information;
- (c) the amount of the resort fee(s) refunded or credited back to the consumer;
- (d) the date each resort fee refunded or credited back to the consumer; and
- (e) the name and location of the hotel where the consumer paid or was charged the resort fee that was refunded or credited back to the consumer.

Provide the aforementioned information electronically to the extent such data is available.

15. All documents that refer or relate to your calculation of the amount charged for any resort fee, including an itemization of any costs your resort fees are designed to recover or reimburse.

16. All documents that refer or relate to the gross profit (revenue minus cost of goods sold) you or your franchisees have received from resort fees for each calendar year.

17. All contracts or other agreements that you have entered into with your franchisees that refer, relate, or mention resort fees for the period since January 1, 2010.

18. All documents that refer or relate to your correspondence and communications with consumers concerning the offer of your hotels that charge resort fees. If documents responsive to this request are in the nature of a form or standardized document used in multiple transactions, then multiple copies of the same form or standardized document that are the same except for the information recorded on them need not be produced.


19. All documents that refer or relate to any and all Online Travel Company's offers of your or your franchisees' hotels that charge resort fees.

20. All correspondence, email, memoranda and other communications between you and any and all Online Travel Companies that refer or relate to resort fees.

21. All manuals, guidelines, memoranda, and other documents that refer or relate to your or your franchisee's policies, practices and procedures in connection with the disclosure and collection of resort fees in your hotels.
22. All manuals, training materials, guidelines, memoranda, statements, scripts, and other documents used to train your employees, your franchisees' employees, or any other employees of your hotels, in connection with the disclosure and collection of resort fees.
23. All documents that refer or relate to any limitations placed on a consumer's ability to submit reviews regarding your or your franchisees' services or hotels including, but not limited to, restrictions on referencing the price of hotel rooms, and whether such restrictions apply to references to resort fees.
24. All documents that refer or relate to any complaints, reviews or inquiries received by you, your franchisees and/or hotels, from consumers concerning resort fees and any response(s) thereto.
25. All documents that refer or relate to any lawsuits that have been filed against you, your franchisees, and/or hotels concerning the charging of resort fees.
26. All documents that refer or relate to any settlement that you, your franchisees and/or hotels have been a party to in connection with the charging of resort fees.
27. All documents that refer or relate to any investigation of you, your franchisees, and/or hotels by any judicial, administrative, government or law enforcement agency in connection with the charging of resort fees.

Date: May 18, 2016

KARL A. RACINE
Attorney General for the District of Columbia

Issued: 
NATALIE LUDAWAY
Chief Deputy

PHILIP D. ZIPERMAN
Director, Office of Consumer Protection

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IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA
Office of the Attorney General
441 4th Street, NW
Washington D.C., 20001,

Petitioner,

v.

MARRIOT INTERNATIONAL, INC.
10400 Fernwood Road
Bethesda, MD 20817,

Respondent.

Case No.:

17-0003900

Order

Upon consideration of the District's Petition for Enforcement of the Attorney General's May 18, 2016 Subpoena to Marriott International, Inc., any opposition thereto, and the record herein, it is hereby, this _____ day of _____,

ORDERED, the District's petition is **GRANTED**; and it is further,

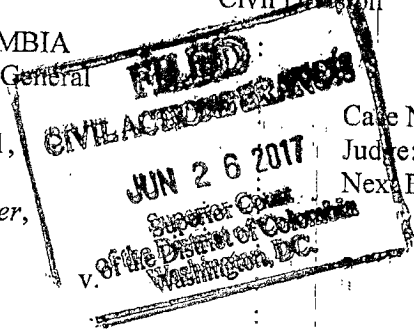
ORDERED that Respondent, Marriott International, Inc. shall furnish all non-privileged documents responsive to the District's May 18, 2016 Subpoena by _____.

Superior Court Judge

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA
Office of the Attorney General
441 4th Street, NW
Washington, DC 20001,

Petitioner,



Case No.: 2017 CA 3900
Judge: Judge-in-Chambers
Next Event: Hearing on
June 29, 2017 at 10:00 AM

MARRIOTT INTERNATIONAL, INC.
10400 Fernwood Road
Bethesda, MD 20817,

Respondent.

**RESPONDENT MARRIOTT INTERNATIONAL, INC.'S MEMORANDUM OF
OPPOSING POINTS AND AUTHORITY IN OPPOSITION TO THE DISTRICT OF
COLUMBIA'S PETITION FOR ENFORCEMENT OF THE ATTORNEY GENERAL'S
JUNE 16, 2016 SUBPOENA TO MARRIOTT INTERNATIONAL, INC.**

Marriott International, Inc. ("Marriott") submits this memorandum in opposition to the District of Columbia's ("District") Petition for Enforcement of the Attorney General's June 16, 2016 Subpoena to Marriott ("Petition"). On May 18, 2016, the District issued Marriott a subpoena ("Subpoena") seeking documents and information responsive to 27 requests, several of which contain multiple subparts. *See Exhibit A (Subpoena)*. The District's extremely broad Subpoena seeks literally every document that refers or relates to resort fees in Marriott's possession, custody, or control. Marriott lodged its objections to the Subpoena as unduly burdensome, unreasonably broad, and not reasonably relevant to the scope of the District's investigation; specifically, whether Marriott's robust pre-purchase disclosure of resort fees violates the District of Columbia Consumer Protection Procedures Act ("CPPA"), D.C. Code §§ 28-3901, *et seq.*

For the following reasons, Marriott respectfully requests that the Court dismiss the Petition without prejudice, or in the alternative, stay the Petition, to permit the parties to resolve the remaining issues through their ongoing meet-and-confer discussions.

INTRODUCTION

Marriott has cooperated with the District's investigation. The District issued its Subpoena to Marriott pursuant to its authority under the CPPA. *See* D.C. Code § 28-3910. Marriott immediately commenced its review and production of responsive documents. At the same time, Marriott engaged in meet-and-confer discussions with the District to limit its production to documents and information reasonably relevant to the District's investigation that would not impose an undue burden on Marriott. In addition, Marriott executives and in-house counsel met with the District to explain Marriott's approach to resort fees and resort fee disclosure, answering many of the District's questions in person.

The District's Petition was a surprise to Marriott. At the time the District filed its Petition, Marriott had produced documents and information responsive to 14 requests and was engaged in discussions with the District with respect to the remaining requests. Marriott also had prepared additional documents to be produced in response to the Subpoena. On June 13 and 16, 2017, Marriott supplemented its response to one request (Request 9) and produced documents and information responsive to three additional requests (Request 19, 23, and 25). Currently, Marriott is preparing to respond to four additional requests (Request 22, 24, 26, and 27), to supplement its production to previously responded to requests, and is continuing to negotiate the scope of the remaining six requests (Request 11, 12, 13, 14, 18, and 20).

Marriott and the District continue to engage in meet-and-confer discussions to resolve Marriott's concerns regarding the undue burden of complying with the Subpoena. On June 13,

2017, Marriott sent the District a letter proposing a path forward for completing Marriott's response to the Subpoena. *See* Exhibit B (Letter from M. Marquis to P. Ziperman and J. Rock (June 13, 2017)). In this letter, Marriott, among other things, discussed its concerns that email production is overly burdensome and not reasonably relevant to the District's investigation. Despite its objections, Marriott made several substantial concessions and agreed to propose custodians and search terms to review and produce non-privileged emails relating to the disclosure of resort fees, which it did on June 16, 2017. In subsequent conversations, including during an in-person meeting on June 20, 2017, the District proposed additional custodians. The District, by letter dated June 21, 2017, summarized its positions with respect to the Subpoena. *See* Exhibit C (Letter from P. Ziperman to M. Marquis (June 21, 2017)). Marriott remains hopeful that the company and the District will reach a resolution with respect to the remaining subpoena compliance issues.

ARGUMENT

While the District, through the Office of the Attorney General, has the authority to issue subpoenas and to compel the production of records, that authority is not unlimited. *See In re Sealed Case (Administrative Subpoena)*, 42 F.3d 1412, 1418 (D.D.C. 1994) (Agencies are "not afford[ed] unfettered authority to cast about for potential wrongdoing"). A court should not enforce a subpoena if (1) the investigation and issuance of the subpoena are not within the agency's authority, (2) the demands are too indefinite, or (3) the demands are not reasonably relevant to the investigation. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 – 53 (1950) ("[T]he disclosure sought shall not be unreasonable."). To determine whether the demands are reasonably relevant to the investigation, a court should "evaluate the relationship between the particular materials sought and the particular matter under investigation—an analysis 'variable in

relation to the nature, purposes and scope of the inquiry.” *McLane Co., Inc. v. E.E.O.C.*, 137 S. Ct. 1159, 1167 – 68 (2017) (quoting *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 209 (1946)). Similarly, whether a demand is unduly burdensome “turns on the nature of the materials sought and the difficulty the [company] will face in producing them.” *Id.*; see *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1031 (D.C. Cir. 1978) (“[S]ubpoenas [must be] not only relevan[t] in purpose and specific[] in command but also [so] limit[ed] in scope ‘that compliance will not be unreasonably burdensome.’”) (quoting *See v. City of Seattle*, 387 U.S. 541, 544 (1967)). If a demand is unduly burdensome or unreasonably broad, a court has discretion to “impose reasonable conditions and restrictions.” *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977).

I. Many of the Subpoena Requests Are Not Reasonably Relevant to the District’s Investigation

An administrative subpoena is not unreasonable when the documents requested are “adequate, but not excessive, for the purposes of the relevant inquiry.” *Okla. Press Pub. Co.*, 327 U.S. at 209. The District’s Subpoena demands documents and information that are not relevant to the District’s investigation.

The District’s investigation, as described in its Subpoena, relates to whether Marriott’s practice of “charging resort fees in connection with the offer and sale of hotel rooms” violates the CPPA. See Exhibit A at 1 (Subpoena). To Marriott’s knowledge, every court that has considered the issue of resort fees has found that adequate pre-purchase disclosure of a hotel’s resort fee does not violate state consumer protection laws. See, e.g., *Harris v. Las Vegas Sands L.L.C.*, No. CV 12-10858 DMG (FFMx), 2013 WL 5291142, at *5-6 (C.D. Cal. Aug. 16, 2013) (holding that the hotel’s website adequately disclosed the resort fee).

Similarly, the Federal Trade Commission (“FTC”), through a series of warning letters, advised the lodging industry that itemized pricing of resort fees was lawful, as long as the itemized components of the room pricing are clearly disclosed to consumers. *See* Press Release, Federal Trade Commission, *FTC Warns Hotel Operators that Price Quotes that Exclude ‘Resort Fees’ and Other Mandatory Surcharges May Be Deceptive* (Nov. 28, 2012) (“[A] hotel reservation site may breakdown the components of the reservations estimate (e.g., room rate, estimated taxes, and any mandatory, unavoidable fees), [as long as] the most prominent figure for consumers should be the total inclusive estimate.”).

Marriott’s robust disclosure of resort fees fully complies with FTC guidance and the CPPA. Marriott clearly and conspicuously discloses resort fees through all reservation channels, from the time of reservation to check-in. *See, e.g.*, Exhibit B at 1-2.

Despite the well-established legal precedent and FTC guidance that charging resort fees is lawful so long as they are properly disclosed, the District’s Subpoena demands documents and information that extend far beyond resort fee disclosures by Marriott. The Subpoena demands internal communications (Request 11), voluminous franchise documents (Request 17), correspondence between Marriott and its franchisees that refer or relate in any manner to resort fees (Request 12), contracts with online travel companies and communications with such companies (Request 19 and 20), and consumer-specific data regarding resort fees collected or refunded by Marriott hotels (Request 13 and 14), among other things. None of these requests are relevant to the central issue that the District itself identified: whether resort fees were adequately disclosed to consumers.

II. Many of the Subpoena Requests Are Unduly Burdensome and Unreasonably Broad

A court should not enforce a subpoena that is unduly burdensome or unreasonably broad, particularly when the subpoena seeks documents or information not relevant to the investigation. *See Okla. Press Pub. Co.*, 327 U.S. at 209; *Texaco, Inc.*, 555 F.2d at 882 (noting that the burden of showing overbreadth or undue burden is more difficult for a company to meet where “the requested documents *are relevant* to [the government’s lawful] purpose” (emphasis added)). The District’s Subpoena demands are unreasonably broad and compliance with the demands would impose an undue burden on Marriott.

The Subpoena seeks every document that refers or relates to resort fees in Marriott’s possession, custody, or control. The costs to Marriott to collect, search for, review, and produce the demanded documents are enormous, while the benefit to the District’s investigation, if any, is minimal. For example, the Subpoena requests *all* notices, disclosures, and advertisements that reference resort fees for all Marriott hotels that charged a resort fee between 2010 and the present (Request 10). As Marriott has explained to the District in its meet-and-confer discussions, only certain marketing materials are in a centralized location at the corporate entity, and the majority of those materials, if not all, relate to brand marketing that does not refer to resort fees. To identify responsive marketing materials related to resort fees, Marriott must contact each managed or owned Marriott hotel that charged a resort fee, identify and review all of the hotels’ marketing materials, and produce all responsive marketing materials. Marriott has proposed that the District randomly select five managed Marriott properties for which Marriott would conduct a more focused search for marketing and advertising materials referencing resort fees during the Subpoena period. The District has thus far rejected this proposal.

The Subpoena also requests the name, contact information, amount of resort fee paid and refunded, and the name and location of the hotel stayed for all consumers from 46 states and the

District of Columbia that paid a resort fee or had a resort fee refunded since January 1, 2014 (Request 13 and 14). Marriott has explained to the District that this information is not maintained in a central database. To produce this information, Marriott would be required to retrieve every folio or invoice of potentially millions of guests who stayed at an owned or managed property that charged resort fees since 2014 and review each folio to determine whether the consumer paid or was refunded a resort fee. Marriott is also concerned that producing sensitive and private information of its consumers is unreasonable and inappropriate in light of consumers' reasonable expectation that their hotel stays will remain private. The District claims in the Petition that it needs data on potentially several million consumers to "identif[y] potential witnesses in any legal action." *See* Petition at ¶ 12. Invading the privacy of hotel guests and imposing enormous costs on Marriott to collect, review, and produce the requested customer information in order for the District to identify potential witnesses is not so "limit[ed] in scope 'that compliance will not be unreasonably burdensome.'" *See Arthur Young & Co.*, 584 F.2d at 1031.

III. Marriott Continues to Engage in Ongoing Meet-and-Confer Discussions

As discussed earlier, counsel for Marriott and the District are engaged in active discussions. Marriott remains optimistic that the parties will reach a resolution concerning Marriott's Subpoena objections.

Marriott respectfully submits that the involvement of the Court is premature at this point, given the ongoing discussions between the parties and requests that the Court dismiss the Petition. In the alternative, Marriott proposes that the parties provide the Court a joint status report every month until there is either a final resolution or an impasse.

CONCLUSION

For the foregoing reasons, Marriott respectfully requests that the Court dismiss the District's Petition without prejudice or, in the alternative, stay the Petition, to allow the parties to continue to negotiate the scope of the Subpoena.

Respectfully submitted,

COZEN O'CONNOR

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*Attorney for Respondent,
Marriott International, Inc.*

Dated: June 26, 2017

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA,

Petitioner,

v.

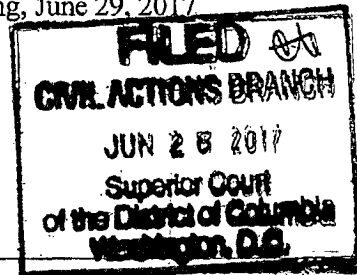
MARRIOTT INTERNATIONAL, INC.,

Respondent.

Case No.: 2017 CA 3900

Judge: Judge-in-Chambers

Next Event: Hearing, June 29, 2017



REPLY TO MARRIOTT INTERNATIONAL, INC.'S OPPOSITION TO
THE DISTRICT OF COLUMBIA'S PETITION FOR ENFORCEMENT
OF THE ATTORNEY GENERAL'S MAY 16, 2016 SUBPOENA

In its Memorandum of Points and Authority in Opposition to the District of Columbia's Petition for Enforcement of Subpoena ("Opposition"), Marriott argues that the information sought by the District is not relevant because it contends its practice of charging resort fees is legal and the information sought by the District is unduly burdensome. In response the District states as follows:

I. The District has a reasonable suspicion that Marriott's failure to include its resort fee in advertised room pricing is an unlawful trade practice.

Marriott argues that the records sought by the District are not relevant because it contends its practice of charging daily resort fees in addition to its advertised room rate is not illegal. The statutory subpoena power of the Office of Attorney General permits it to investigate "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. Morton Salt Company*, 338 U.S. 632, 642-643 (1950). In the instant action, the District of Columbia, and 46 other state Attorneys General commenced their investigation

because Marriott International, Inc. ("Marriott") is advertising prices for its rooms without including an additional daily "resort fee." Illustrative of this practice is a sample of Marriott's web-based reservation system attached as Exhibit A. Exhibit A-1 is a web page from Marriott's web site, advertising a room for \$166 a night. Consumers who select this rate and reserve the offered room are subsequently asked to pay an additional \$95.76 that Marriott labels as "taxes and fees." See Exhibit A-2. If the consumer elects to click on a hyperlink next to this price item, she is informed that included among the "taxes and fees" is an additional charge of \$18.00 per day that Marriott describes only as a "resort fee." See Exhibit A-3. In some of its other properties, Marriott has charged resort fees as high as \$75.00 per day. The District is concerned that this practice of advertising a price that does not include all of the room charges may violate multiple sections of the Consumer Protection Procedures Act ("CPPA"), D.C. Code 28-3901, *et seq.*, including the following sections that make it an unlawful trade practice to:

- (e) misrepresent as to a material fact which has a tendency to mislead;
- (f) fail to state a material fact if such failure tends to mislead;
- (f-1) [u]se innuendo or ambiguity as to a material fact, which has a tendency to mislead;
- (h) advertise or offer goods or services without the intent to sell them or without the intent to sell them as advertised or offered;
- (j) make false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reductions, or the price in comparison to price of competitors or one's own price at a past or future time. . . .

Id. at § 28-3904.

The Attorneys General are not the first government agencies to express concerns regarding Marriott's pricing practices. In 2012, the FTC sent Marriott a letter warning it that its practice of "drip pricing" was potentially misleading. Specifically, the FTC letter warned:

“‘[D]rip pricing,’ defined broadly as a pricing technique in which firms advertise only part of a product’s price and reveal other charges later as the customer goes through the buying process. . . . These practices may violate the law by **misrepresenting the price consumers can expect to pay for their hotel rooms**. We believe that online hotel reservation sites should **include in the quoted total price any unavoidable and mandatory fees, such as resort fees**, that consumers will be charged to stay at the hotel. . . . While a hotel reservation site may breakdown the components of the reservation estimate (e.g., room rate, estimated taxes, and any mandatory, unavoidable fees), the **most prominent figure for consumers should be the total inclusive estimate.**”

See FTC Warning Letter, attached as Exhibit B (emphasis supplied). It is against this backdrop, that the Attorneys General commenced their investigation to confirm their reasonable suspicion that Marriott’s drip pricing techniques have been misleading their customers. As is set forth below, the information sought by the District is relevant to its concerns and has not been shown by Marriott to be unduly burdensome to produce.

II. The remaining information the District seeks from Marriott is relevant and Marriott has not shown it to be unduly burdensome.

In its Opposition, Marriott argues without any testimonial or evidentiary support that its costs will be “enormous” to respond to the District’s subpoena, that it has been cooperating with the Attorneys General’s investigation and that enforcement of the District’s subpoena is “premature.” Marriott overstates the extent of its cooperation with the District and fails to address with any precision the remaining disputes between the parties or its burden in resolving the disputes.

At the outset, it is worth noting that the District first served its subpoena in May 2016 and the ongoing discussion that Marriott cites as evidence that it is actively seeking to resolve the District’s concerns only occurred earlier this month following the filing of the District’s petition. Prior to that date, Marriott’s production had been minimal and failed to address several areas crucial to the District’s investigation, including (a) maintained examples of its web-based reservation system and price advertising, (b) any of its email and other communications

concerning resort fees, (c) a complete listing of its hotels that charge resort fees and their ownership, (d) complete copies of Marriott's policies regarding resort fees, (e) a listing of the consumers who were charged resort fees, (f) data reflecting the fees such consumers were asked to pay, (g) a complete identification of its officers responsible for its resort fee practices and (h) other documents relevant to the District's investigation. Below, the District has outlined, for the requests in its subpoena that remain in controversy, the following: (i) Marriott's responses, and (ii) an explanation of the purpose for which the District seeks information not yet produced by Marriott, and (iii) the scope of Marriott's failure to respond to these requests.

Advertising and Websites

Request No. 10 of the District's Subpoena sought Marriott's price advertising and web pages that disclosed its resort fees to consumers seeking to reserve rooms at a Marriott hotel. Throughout this investigation and in its Opposition, Marriott has claimed it makes "robust" disclosures of its resort fees to consumers (*see* Opposition, p. 4), yet, to date, it has produced scant evidence of such disclosures. Marriott's production, to date, consists entirely of web reservation pages currently used by only five of its hotels that Marriott selected. The advertising and other web flow documents the District seeks are relevant not only to show if, indeed, Marriott's disclosures were robust, but also to show the representations Marriott made to consumers about its room pricing.

In its Opposition, Marriott argues, without the benefit of any support that only "certain marketing materials are in a centralized location" and that the remaining information sought by the District is in the possession of its franchisees. First, Marriott has not produced any of the "centralized" files it claims to possess. Second, Marriott's Franchise Agreement provides, in pertinent part, that its franchisees must provide it with samples of all marketing materials, signs

and other postings before they may be used and that these marketing materials may only be used in places and in a manner approved by Marriott.”¹ Marriott’s Franchise Agreement also describes a uniform reservation system known as the “Marriott Automated Reservation System for Hotel Accommodations” or “MARSHA.” These provisions suggest that Marriott, indeed, has centralized its advertising and web-based reservation systems. Finally, the information sought by the Attorneys General is not limited to only Marriott’s current practices. The Attorneys General seek information about Marriott’s historical practices, including those which led to the FTC’s mailing of its 2012 warning letter. Information concerning Marriott’s historical practices is also relevant to the relief the Attorneys General may be seeking – penalties and consumer restitution – neither of which are time-limited under District of Columbia law.

**Data Identifying the Consumers Who Were Charged Resort Fees
and the Amounts Marriott Charged**

Request Nos. 12 & 13 of the District’s subpoena sought data identifying the consumers Marriott charged resort fees, the amounts each consumer paid for their resort fee, and the date(s) and locations where Marriott charged the fees. Consumers who paid Marriott resort fees are important witnesses in the Attorneys General’s investigation and in any potential law enforcement action. Consumers who have been charged resort fees can attest to or testify whether the resort fees they paid Marriott were adequately disclosed. This data is also relevant to the remedies the District may seek if it concludes that Marriott has, indeed, violated the CPPA. The District has the ability to seek restitution in any settlement or litigation of this case, *see* D.C. Code § 28-3909.

¹ The District has refrained from attaching the Marriott Franchise Agreement to this pleading because of its proprietary nature. The District is prepared to produce the Franchise Agreement for inspection at the hearing on its petition.

The District has informed Marriott that the requested information may be produced in the form of a data base. However, Marriott to date has not produced any of the requested data. In its Opposition, Marriott contends that it does not maintain this information in a centralized database and will need to conduct a manual review of each "folio" generated from a consumer stay at one of its hotels. (See Opposition, p. 7). Contrary to its assertion in its Opposition, at its most recent meeting with the District, Marriott's attorneys indicated they were not sure whether or not such a database exists and agreed to discuss the issue with relevant Marriott executives. Marriott's own documents suggest that Marriott, indeed, does have a centralized reservation system – the MARSHA system – and until Marriott has confirmed that no such centralized database exists, the District rejects Marriott's burden claim.

Marriott also objects to producing data concerning the consumers who have paid it resort fees because it contends it would compromise their privacy. Marriott offers no legal support for this except for its citation to *Securities & Exchange Comm'n v. Arthur Young & Co.*, 584 F.2d 1018, 1031 (D.C. Cir. 1978), which does not address Marriott's privacy concern and only held that unduly burdensome subpoenas may be limited in their scope. The Attorneys General routinely request data identifying consumers potentially victimized by deceptive trade practices while remaining sensitive to the privacy of such consumers. In the instant matter, the District and other investigating Attorneys General have already provided Marriott with a Confidentiality Agreement and have no intention of publishing the data they receive concerning Marriott's consumers who paid resort fees. Accordingly, Marriott's privacy claim is not well-founded.

Fully Executed Exemplars of its Franchise and Management Agreements

Request No. 17 of the District's Subpoena sought the contract documents Marriott entered into with its franchisees that concern the collection of resort fees. The District seeks these contracts in order to determine the extent to which Marriott may be held responsible for the advertising practices of its franchisees. The District has agreed to narrow the scope of this request so that Marriott need only produce exemplars of each such agreement. To date, however, Marriott has only produced two unexecuted "Draft" documents. The District is seeking examples of franchise agreements actually executed by Marriott and its franchisees and not drafts of such agreements.

Identification of Officers Responsible for Marriott's Resort Fee Practices and their Job Descriptions

Request Nos. 5 & 6 of the District's subpoena sought identification and the provision of job descriptions for Marriott's officers responsible for its resort fee practices. To date, Marriott has identified only a single officer, although its own documents suggest that a number of its officers' approvals are required before its franchisees were permitted to charge resort fee practices. The District has requested that Marriott provide it at least a narrative response to these requests identifying those officers who were responsible for setting its operating policies for disclosing and charging resort fees, along with their job descriptions. At a minimum, this narrative should include those officers identified in Marriott's own policy documents responsible for approving the practice of charging resort fees in addition to an advertised room price.

Identification of the Marriott Hotels that Charge Resort Fees

Request no. 9 of the District's subpoena asked Marriott to provide data identifying hotels that it either managed or awarded franchises that charged resort fees. In its subparts, the request sought the following information:

- (a) the name of the hotel;
- (b) the address of the hotel;
- (c) the name and contact information of the franchisee of the hotel;
- (d) the name and contact information for each owner of the hotel;
- (e) the name and contact information for each management company of the hotel;
- (f) the name used to identify each resort fee;
- (g) the amount of each resort fee;
- (h) the total amount of resort fees collected each year;
- (i) the point(s) in the transaction when each resort fee is disclosed;
- (j) the point in the transaction when each resort fee is collected;
- (k) the benefit or service related to the resort fee; and
- (l) the inclusive dates each resort fee was collected.

To date, Marriott has produced lists of its properties that charged resort fees, but those lists are inconsistent and incomplete. They do not provide historical data addressing subparts (i) through (l) of the requests above concerning each Marriott property that has charged resort fees.

Additionally, Marriott has only identified some of the owners for each of these properties. In light of Marriott's contention that some of the requested advertising and data concerning collected resort fees is not centralized, and may only be requested directly from its franchisees, it is particularly important for the Attorneys General to get information fully identifying such franchises, their resort fee practices, and their ownership so that the Attorneys General can make informed decisions regarding whether additional subpoenas directed toward Marriott's franchisees are appropriate. To date, Marriott has offered no explanation concerning why this information cannot be produced.

Marriott's Resort Fee Policies

Request Nos. 21 and 22 require Marriott to produce its policy documents concerning its resort fee practices. To date, Marriott has produced some, but not all of its policy documents. Some of the documents produced by Marriott refer to other policy documents that its franchisees are required to use or adhere to, including pamphlets, scripts and FAQs. Marriott also required applications and supporting documents from its franchisees before authorizing them to charge resort fees. These documents have not been provided, are relevant, and have not been shown to be unduly burdensome to produce.

Marriott's Emails and Communications Concerning Its Disclosure and Collection of Resort Fees

Request Nos. 11, 12, 18 & 20 seek Marriott's internal and external communications, as well as emails regarding its resort fee practices. In February, the Attorneys General invited Marriott to narrow the request to only those emails and communications sent or received by specific custodians, as well as use search terms to identify responsive documents that were electronically stored. Earlier this month, Marriott provided its first proposal to narrow these requests, which consisted of a list of search terms and custodians. The principal concern the District has raised regarding Marriott's proposal to limit is Marriott has proposed only three custodians, notwithstanding the fact that documents it has produced thus far identify a greater number of executives whose approval was required before its hotels could charge resort fees. The District has requested that the communications of these additional custodians be included in Marriott's production. The Attorneys General have also proffered a broader list of search terms to Marriott.

Consumer Complaints, Other Investigations and Settlements

Request Nos. 24, 26 and 27 sought information concerning the consumer complaints Marriott has received, other investigations concerning its resort fee practices, and any settlements it has entered into concerning the collection of resort fees. To date, Marriott has not produced any documents responsive to these requests despite having more than one year to do so. In its Opposition, Marriott states it is preparing its response to these requests.

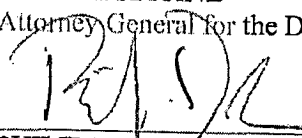
III. Conclusion

Prior to the filing of the District's Petition to Enforce, Marriott made a minimal document production that did not include the categories of information listed above. Contrary to Marriott's assertions, it has not fully engaged with the District regarding its subpoena until the filing of the instant action. Consequently, the District contends that an order from this Court enforcing its subpoena is appropriate and necessary, and requests the Court issue such an Order.

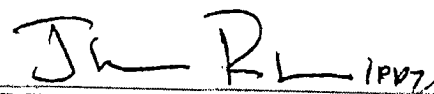
Respectfully submitted,

Dated: June 28, 2017

KARL A. RACINE
Attorney General for the District of Columbia



PHILIP ZIPERMAN [429484]
Director, Office of Consumer Protection



JIMMY R. ROCK [493521]
Deputy Director, Office of Consumer Protection
441 4th Street, N.W., 6th Floor
Washington, D.C. 20001
Jimmy.Rock@dc.gov
(202) 741-0770

https://www.marriott.com/reservations/...

View Favorites Tools Help

No code

Google Suggested Sites

Choose a Room Rate

Marrriott Rewards® members get Free Wi-Fi + mobile check-in + our lowest member rates all the time. [See Details](#)

Standard Rates

Room Packages

Member Offers

From 146 USD per night

From 109 USD per night

From 135 USD per night

Please Note - Daily resort fee of USD 16 added to rate includes basic high-speed internet in guest room, gym, bottled water and more!

Marrriott Rewards Member Rate

You Selected: Guest room, 1 King or 2 Queen

Rate details

Room details

Guest room, 1 King or 2 Queen, Atrium view

Rate details

Room details

Executive Suite, 1 King

Rate details

Room details

Suite, 1 King, Atrium view

Rate details

Room details

River View, Suite, 1 King

Rate details

Room details

166 USD night

215 USD night

283 USD night

MEMBER RATE 303 USD night

Edit Your Search

My dates are flexible

Check in

Check out

11/21/16

11/23/16

Rooms

Guests/room

1

1

REWARDS

Use Rewards points

Rewards number

*****083

SPECIAL RATES

About special rates

Advanced search options

Other Options

Hotels nearby

View alternate resorts

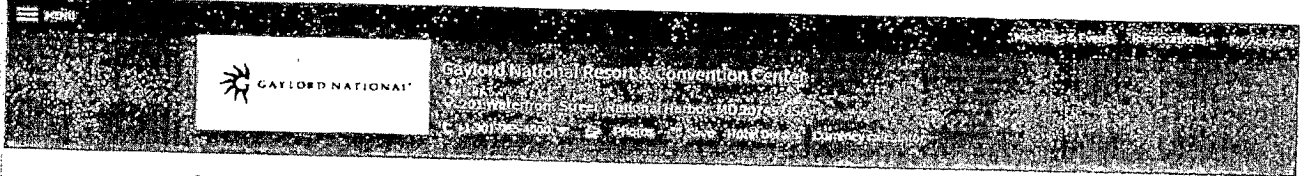
Vacation packages

Room + flight

Phone reservations

Marrriott (800) 451-7000 or 1-800-368-6263

1



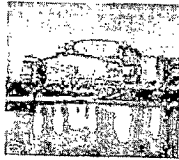
Reservation Step 1 of 3

Review Reservation Details

Room(s) held for: 14:29

1. Your selection

Gaylord National Resort & Convention Center
201 Waterfront Street National Harbor, MD 20745 USA



Check in: Monday, November 21, 2016
Check out: Wednesday, November 23, 2016
Room(s): 1
Guest(s) per room: 1
Room type(s): Guest room, 1 King or 2 Queen
[Edit](#) [Room details](#)

2. Your requests

Make requests for accessibility, early check-in and more.
Another benefit of booking direct on Marriott.com

- ☐ Accessibility
- ☐ Early check-in
- ☐ Extra towels
- ☐ Rollaway/cnb
- ☐ Feather-free room
- ☐ Room location

3. Summary of Charges

1 room(s) for 2 night(s)	Prices in USD
Monday, November 21, 2016	166.00
Tuesday, November 22, 2016	166.00
Total cash rate	332.00
Total taxes and fees	95.76
Total for stay in hotel's currency	427.76 USD
Our best rate. Guaranteed.	

4. Confirm details

About this reservation:
FREE Cancellation You may cancel your reservation for no charge until November 20, 2016 (1 day(s) before arrival).



Next, you'll provide your information



2



Division of Advertising Practices

United States of America
FEDERAL TRADE COMMISSION
Washington, DC 20580



November 26, 2012

Peter Weien, General Manager
The Gaylord Opryland
Resort & Convention Center
2800 Opryland Drive
Nashville, Tennessee 37214

WARNING LETTER

Dear Mr. Weien:

The Federal Trade Commission ("FTC") has investigated whether certain hotel operators are violating Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a), by misrepresenting the hotel room reservation price quoted to consumers.

On May 21, 2012, the FTC held a conference on "drip pricing," defined broadly as a pricing technique in which firms advertise only part of a product's price and reveal other charges later as the customer goes through the buying process. At the conference, FTC Chairman Jon Leibowitz asked consumers to share their drip pricing stories with the FTC. One common complaint consumers raised involved mandatory fees hotels charge for amenities such as newspapers, use of onsite exercise or pool facilities, or internet access, sometimes referred to as "resort fees." These mandatory fees can be as high as \$30 per night, a sum that could certainly affect consumer purchasing decisions.

Specifically, consumers complained that they did not know that they would be required to pay resort fees in addition to the quoted hotel room rate. Several stated that they only learned of the fees after they arrived at the hotel, long after making a reservation at what they believed to be the total room price. Others paid for the reservation in advance, and only found out after they arrived at the hotel that they would have to pay additional mandatory fees.

FTC staff has reviewed a number of online hotel reservation sites, and has confirmed that some hotels exclude resort fees from the quoted reservation price. Instead, the "total price" or "estimated price" quoted to consumers includes only the room rate and applicable taxes. At some of these sites, the applicable resort fee is listed nearby, but separate from, the quoted price. In others, the quoted price is accompanied by an asterisk that leads consumers to another location at the site – sometimes on the same page, sometimes not – where the applicable resort fee is disclosed, typically in fine print. A few sites fail to identify applicable resort fees anywhere, and instead inform consumers that other undefined fees may apply.

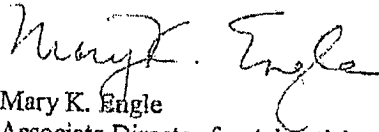
Attn: Peter Weien
Page 2

These practices may violate the law by misrepresenting the price consumers can expect to pay for their hotel rooms. We believe that online hotel reservation sites should include in the quoted total price any unavoidable and mandatory fees, such as resort fees, that consumers will be charged to stay at the hotel. While a hotel reservation site may breakdown the components of the reservation estimate (e.g., room rate, estimated taxes, and any mandatory, unavoidable fees), the most prominent figure for consumers should be the total inclusive estimate.

We reviewed your website at <http://www.gaylordhotels.com/gaylord-opryland/index.html/> and found that in at least some instances mandatory resort fees are not included in the reservation rate quoted to consumers. We strongly encourage you to review your company's website to ensure you are not misrepresenting the total price consumers can expect to pay when making a reservation to stay in your hotel. Please be advised that the FTC may take action to enforce and seek redress for any violations of the FTC Act as the public interest may require.

Thank you for your attention to this matter. Please direct any inquiries concerning this letter to Annette Soberats at asoberats@ftc.gov or at 202-326-2921.

Very truly yours,



Mary K. Engle
Associate Director for Advertising Practices

cc: Arne M. Sorenson, President & CEO
Marriott International Inc.

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA
Office of the Attorney General
441 4th Street, NW
Washington, DC 20001,

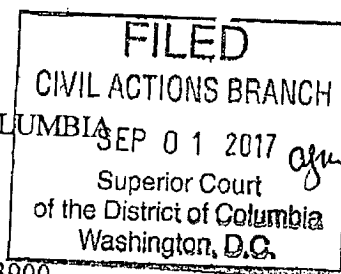
Petitioner,

v.

MARRIOTT INTERNATIONAL, INC.
10400 Fernwood Road
Bethesda, MD 20817,

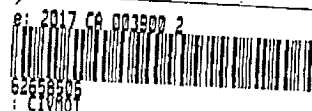
Respondent.

Case No.: 2017 CA 3900
Judge: Judge-in-Chambers
Next Event: Motions Deadline on
September 1, 2017



**RESPONDENT MARRIOTT INTERNATIONAL, INC.'S MOTION TO
MODIFY THE DISTRICT OF COLUMBIA'S MAY 18, 2016 SUBPOENA**

1. Pursuant to D.C. Code § 1-301.89c(e), Respondent Marriott International, Inc. ("Marriott") requests that the Court issue an order modifying the District of Columbia's ("District") May 18, 2016 Subpoena on the grounds that it is overly broad, unduly burdensome, and seeks information and documents that are not relevant to the District's investigation.
2. Specifically, Marriott requests that the Court issue an order (1) limiting Marriott's production of electronically stored information in response to Subpoena Request Nos. 11, 12, 18, and 20 to responsive electronically stored information in the possession of Jeff Wolff, Vice President of Guest Experience and Room Operations, and Harvey Kellman, Vice President & Assistant General Counsel, two Marriott employees primarily responsible for Marriott's resort fee policies, disclosures, and approval process; and (2) limiting Marriott's production of documents from individual Marriott properties in response to Request Nos. 10, 21, and 22 to the five Marriott-managed properties selected by the District.



3. This motion is supported by an accompanying memorandum, which is incorporated herein by reference.

ORAL HEARING REQUESTED

Dated: September 1, 2017

Respectfully submitted,

/s/ Milton A. Marquis

Milton A. Marquis, Esq. (#472979)

COZEN O'CONNOR, P.C.

1200 19th Street, N.W.

Washington, DC 20036

Tel: (202) 471-3417

Fax: 202-471-3417

mmarquis@cozen.com

*Attorney for Respondent,
Marriott International, Inc.*

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA
Office of the Attorney General
441 4th Street, NW
Washington, DC 20001,

Petitioner,

v.

MARRIOTT INTERNATIONAL, INC.
10400 Fernwood Road
Bethesda, MD 20817,

Respondent.

Case No.: 2017 CA 3900
Judge: Judge-in-Chambers
Next Event: Motions Deadline on
September 1, 2017

**RESPONDENT MARRIOTT INTERNATIONAL, INC.'S MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO
MODIFY THE DISTRICT OF COLUMBIA'S MAY 18, 2016 SUBPOENA**

Marriott International, Inc. ("Marriott") submits this memorandum in support of its Motion to Modify the District of Columbia Office of the Attorney General's (the "District") May 18, 2016 Subpoena ("Motion"). On May 18, 2016, the District issued Marriott a subpoena seeking documents and information responsive to 27 requests, several of which contain multiple subparts ("Subpoena"). *See* Exhibit A (Subpoena). Marriott objected to many of the requests as unduly burdensome, unreasonably broad, and not reasonably relevant to the District's investigation; specifically, whether Marriott's robust pre-purchase disclosure of resort fees violates the District of Columbia Consumer Protection Procedures Act ("CPPA"), D.C. Code §§ 28-3901, *et seq.* Despite Marriott's objections, and in the interest of compromise, Marriott will produce documents and information in response to 25 requests.¹ This includes responsive electronically stored information ("ESI") in the possession of two Marriott employees (Request

¹ Marriott production of documents in response to Request Nos. 13 and 14 is not addressed in the Motion. Marriott and the District continue to meet and confer regarding the scope of Marriott's production in response to Request Nos. 13 and 14. Marriott remains optimistic that the parties will reach a resolution.

Nos. 11, 12, 18, and 20), and responsive property-level materials in the possession of five Marriott-managed properties (Request Nos. 10, 21, and 22). The District now demands, without reviewing the materials Marriott will produce, (1) responsive ESI from ten additional Marriott employees with extremely limited involvement with resort fees; and (2) responsive property-level materials in the possession of ten Marriott-managed properties.

For the following reasons, Marriott respectfully requests that the Court issue an order to modify the Subpoena by (1) limiting Marriott's production of ESI in response to Request Nos. 11, 12, 18, and 20 to that in the possession of the two Marriott employees primarily responsible for Marriott's resort fee policies, disclosures, and approval process; and (2) limiting Marriott's production of documents available at individual properties in response to Request Nos. 10, 21, and 22 to five Marriott-managed properties.

INTRODUCTION

Marriott's commitment to provide its customers with excellent customer service and experiences is central to its success as a global hospitality leader with over 6,000 hotel properties around the world. A small number of Marriott properties in the United States charge consumers a resort fee in exchange for a bundle of resort products and services. These properties are located in areas where resort fees are common market practice. The bundle of products and services covered by the resort fee at these properties not only provides customers with a greater value than the resort fee charge, but also provides a more transparent experience than a la carte pricing. Marriott clearly and prominently discloses the existence and amount of the resort fee through all reservation channels, from the time of reservation to check-in.

Despite Marriott's cooperation with the District's investigation, on June 7, 2017, the District filed its Petition for Enforcement of the Attorney General's Subpoena to Marriott

("Petition"). The District and Marriott resolved the Petition by consent order, which was entered by the Superior Court of the District of Columbia in *District of Columbia v. Marriott, International, Inc.*, 2017 CA 3900, on June 29, 2017 ("Consent Order"). See Exhibit B (Consent Order). The Consent Order required the parties to meet and confer until August 1, 2017, and finalize any agreement on documents and information to be produced by August 8, 2017, established a deadline of September 1, 2017 for motions regarding the Subpoena, and required Marriott to produce documents and information responsive to the Subpoena that are not subject to a pending motion by October 16, 2017. Pursuant to the Consent Order, Marriott submits this Motion to address the remaining issues in dispute.

Marriott has made significant compromises to reach substantial agreement with the District on the documents and information requested in the Subpoena. Notwithstanding its objections, Marriott has produced and will continue to produce thousands of documents and information in response to 25 requests. These include current and historical policies, advertising, disclosures, and training materials related to resort fees available at Marriott corporate offices and at a sample of five managed properties selected by the District, information on the historical resort fee charges of its properties, applications submitted by properties for approval to charge a resort fee, complaints from consumers related to resort fees, franchisee and online travel company agreements, and ESI related to resort fees from Jeff Wolff, Vice President of Guest Experience and Room Operations, and Harvey Kellman, Vice President & Assistant General Counsel.

Despite Marriott's significant compromises, the District continues to demand that Marriott produce additional materials related to two categories of documents: (1) ESI from ten additional employees in response to Request Nos. 11, 12, 18, and 20, and (2) property-level

materials from five additional managed properties in response to Request Nos. 10, 21, and 22. Marriott has agreed to produce materials related to both of the disputed categories of documents, including responsive ESI in the possession of Messrs. Wolff and Kellman and responsive property-level materials from five Marriott-managed properties. Without reviewing Marriott's forthcoming production, however, the District contends that Marriott's proposed production is insufficient. In meet-and-confer discussions with the District, Marriott explained that the request for additional materials imposes an undue burden on the company to produce duplicative materials that are not relevant to the District's investigation. The District rejected Marriott's burden and relevance explanation and continues to demand these documents.

ARGUMENT

While the District, through the Office of the Attorney General, has the authority to issue subpoenas and to compel the production of records, that authority is not unlimited. *See In re Sealed Case (Administrative Subpoena)*, 42 F. 3d 1412, 1418 (D.C. Cir. 1994) (agencies are "not afford[ed] unfettered authority to cast about for potential wrongdoing"). The District lacks the authority to enforce a subpoena if (1) the investigation and issuance of the subpoena are not within the agency's authority, (2) the demands are too indefinite, or (3) the demands are not reasonably relevant to the investigation. *United States v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950) ("the disclosure sought shall not be unreasonable"); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 385 (D.C. Cir. 1981) (overbroad subpoenas will not be enforced). To determine whether the demands are reasonably relevant to the investigation, a court should "evaluate the relationship between the particular materials sought and the particular matter under investigation—an analysis 'variable in relation to the nature, purposes and scope of the inquiry.'" *McLane Co., Inc. v. E.E.O.C.*, 137 S. Ct. 1159, 1167-68 (2017) (quoting *Okla.*

Press Pub. Co. v. Walling, 327 U.S. 186, 209 (1946)). Similarly, whether a demand is unduly burdensome “turns on the nature of the materials sought and the difficulty the [company] will face in producing them.” *Id.*; see *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1031 (D.C. Cir. 1978) (“[S]ubpoenas [must be] not only relevant in purpose and specific in command but also [so] limit[ed] in scope ‘that compliance will not be unreasonably burdensome.’”). If a demand is unduly burdensome or unreasonably broad, a court has discretion to “impose reasonable conditions and restrictions.” *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977).

For the following reasons, the District’s demand that Marriott produce additional ESI and property-level materials is unreasonably broad, unduly burdensome, and not reasonably relevant to the investigation.

I. The Court Should Modify the District’s Subpoena to Limit Marriott’s ESI production to the Two Marriott Employees Responsible for Its Resort Fee Policies, Disclosures, and Approval Process.

Marriott has agreed to produce ESI in the possession of Messrs. Wolff and Kellman in response to Request Nos. 11, 12, 18, and 20. Mr. Wolff is responsible for the company’s resort fee policies and the approval of a property’s request to charge a resort fee. Mr. Kellman is responsible for communicating with online travel companies and provides legal advice regarding issues related to resort fees. Without reviewing Marriott’s production, the District demands that Marriott produce ESI for ten additional employee custodians. This request is not relevant to the District’s investigation, duplicative of Marriott’s ongoing ESI production, and unduly burdensome.

State consumer protection laws and existing FTC guidance permit a hotel to charge a resort fee if the resort fee is clearly disclosed to consumers. See, e.g., *Harris v. Las Vegas Sands L.L.C.*, No. CV 12-10858 DMG (FFMx), 2013 WL 5291142, at *5-6 (C.D. Cal. Aug. 16, 2013) (holding that the hotel’s website did not violate state consumer protection law because it

adequately disclosed the resort fee); Press Release, Federal Trade Commission, *FTC Warns Hotel Operators that Price Quotes that Exclude 'Resort Fees' and Other Mandatory Surcharges May Be Deceptive* (Nov. 28, 2012) (“[A] hotel reservation site may breakdown the components of the reservations estimate (e.g., room rate, estimated taxes, and any mandatory, unavoidable fees), [as long as] the most prominent figure for consumers should be the total inclusive estimate.”).

Marriott's prominent disclosure of resort fees fully complies with FTC guidance and state consumer protection laws. Marriott has produced documents showing the disclosure of resort fees on Marriott.com and during call center reservations, as well as policies and training materials requiring properties to disclose resort fees throughout the reservation process. Marriott also will produce any policies, advertisements, disclosures, and training materials related to resort fees that it obtains from a sample of Marriott properties selected by the District. The documents will show that Marriott clearly and conspicuously discloses resort fees through all reservation channels, from the time of reservation to check-in. *See, e.g.*, Exhibit C at 1-2 (Letter from M. Marquis to P. Ziperman (June 13, 2017)).

The additional ESI sought by the District is “excessive[] for the purposes of the relevant inquiry.” *See Okla. Press Pub. Co.*, 327 U.S. at 209. Any email production is not relevant to a reasonable inquiry regarding whether and how Marriott disclosed resort fees to consumers. In the interest of compromise, Marriott agreed to produce responsive, non-privileged ESI in the possession of Messrs. Wolff and Kellman, utilizing (among others) the broad and inclusive search term, “resort fee.” To be clear, Mr. Wolff is *the Marriott executive* with overall responsibility for resort fee issues. Yet, despite an opportunity to meet and confer with Mr. Wolff and despite the bounty of relevant ESI to be produced under this broad search, the District

now demands that Marriott collect, process, review, and produce ESI from ten additional employees who are primarily responsible for other areas of Marriott's business. At various points in time, the ten employees served with Mr. Wolff on Marriott's five-member resort fee approval committee. As members of this committee, their responsibility was limited to confirming recommendations by Mr. Wolff regarding a property's request to charge a resort fee. The ten employees were not involved in the disclosure of resort fees to consumers—the central issue identified by the District.

In addition, any responsive correspondence to or from the ten employees will be duplicative of that in the possession of Mr. Wolff. As mentioned, the role of the approval committee is to confirm Mr. Wolff's recommendations. In the event Mr. Wolff determines that a property's application to charge a resort fee is consistent with Marriott's policies, Mr. Wolff submits his determination and the completed application to the other members of the approval committee. The other approval committee members respond by either concurring with Mr. Wolff's determination or asking questions about the property's request. Mr. Wolff responds to the committee members' questions until the committee approves or rejects a property's application. Any responsive correspondence that these ten employees would have sent or received would have been sent or received by Mr. Wolff. Moreover, these communications would be retained by Mr. Wolff as a record of the approval process for each resort fee hotel.

Marriott has requested that the District consider whether the ESI from the ten additional custodians would be responsive and/or duplicative after reviewing Marriott's forthcoming production. Nonetheless, without reviewing the likely thousands of Messrs. Wolff and Kellman documents that Marriott will produce, the District has rejected Marriott's request and insists that

the company undertake the unnecessary burden and expense to collect, process, review, and produce ESI from ten additional employees.

Marriott estimates that the production of non-privileged, responsive ESI from an additional ten employees would cost the company more than \$100,000 for a third-party vendor to collect and process the documents, more than \$3,500 per month to host and store the documents, and, more significantly, the additional costs and legal fees to review the documents for responsiveness and privilege. This additional burden is not reasonable in light of the lack of relevance of the District's demand and the fact that any review would be duplicative of the ESI produced from Mr. Wolff.

Marriott's agreement to produce ESI in the possession of Messrs. Wolff and Kellman is reasonable given their involvement with Marriott's resort fee policies and the disclosure of resort fees to consumers. By insisting that Marriott undertake the considerable expense of searching for additional documents, the District is "second-guessing" Marriott's good faith representation that it has performed a reasonable inquiry and its offer to substantiate the basis for its representation. *See Enslin v. Coca-Cola Co.*, No. 2:14-cv-06476, 2016 WL 7042206, at *1 (E.D. Pa. June 8, 2016) ("[A] party who is asked to produce ESI is 'best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing [its] own electronically stored information.'") A court should not require a recipient of a subpoena to search the ESI of additional custodians without the government making a showing that the recipient has not "conducted a reasonable inquiry for responsive information." *Cf. id.* at *3 (holding that plaintiff had failed to show that the additional custodians would uncover information that had not already been captured); *In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, No. 09-CV-02137, 2013 WL 4838796, at *1-2 (S.D.N.Y. Sept. 11, 2013)

(denying plaintiffs' request for additional custodians that defendant claimed were "irrelevant" and/or 'duplicative'" because plaintiffs had not shown that the custodians "are likely to have unique responsive documents"). Marriott has been more than reasonable; it has been accommodating.

II. The Court Should Modify the District's Subpoena to Limit Marriott's Production of Property-Level Materials to Five Managed Properties.

The Subpoena requests notices, disclosures, and advertisements related to the disclosure of resort fees to consumers seeking to reserve accommodations at a Marriott property (Request No. 10), policies, practices, and procedures in connection with the disclosure and collection of resort fees (Request No. 21), and training materials related to the disclosure of resort fees (Request No. 22). Marriott has produced current and historical policies, advertising, disclosures, and training materials related to resort fees that it has located at Marriott corporate offices and will produce applications from properties requesting to charge a resort fee. The District continues to demand that Marriott produce property-level materials related to resort fees in response to the Subpoena. Marriott informed the District that the individual resort fee applications contain some property-level materials, but Marriott has not located other property-level policies, advertising, disclosures, or training materials responsive to Request Nos. 10, 21, and 22 at its corporate offices.

To address the District's request, Marriott proposed to contact five managed properties, selected by the District, to obtain responsive property-level policies, advertising, disclosures, and training materials. The collection process requires Marriott to request the general manager and other employees at each managed property to search for responsive materials from the subpoena's time frame that are in the property's possession. These properties do not have large staffs, and the search for responsive information will disrupt their operations.

The District responded to Marriott's proposal by doubling the number of managed properties selected by the District to ten. The District claims, without reviewing any documents, that the production of materials from ten properties is necessary for a sufficiently varied collection to review Marriott's property-level practices and to determine whether those practices varied among its properties. The District also denied Marriott's request to produce responsive materials from five properties without prejudice to request an additional five properties once the District has the opportunity to review the responsive documents to determine whether further collection is necessary. That denial is unreasonable.

The production of property-level materials from five properties, in addition to the thousands of other documents that Marriott will produce, is sufficient for the District to confirm Marriott's clear and conspicuous disclosure of resort fees. Marriott should not be required to collect materials from an additional five properties based on an arbitrary and unsupported demand for documents from ten properties.

CONCLUSION

For the foregoing reasons, Marriott respectfully requests that the Court enter the attached proposed Order to modify the Subpoena by (1) limiting Marriott's production of ESI in response to Request Nos. 11, 12, 18, and 20 to that in the possession of Jeff Wolff and Harvey Kellman; and (2) limiting Marriott's production of documents available at individual properties in response to Request Nos. 10, 21, and 22 to five managed properties.

Dated: September 1, 2017

Respectfully submitted,

/s/ Milton A. Marquis

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IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

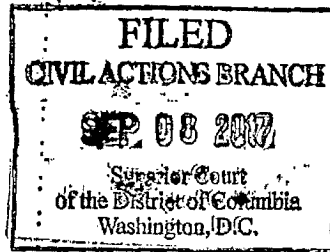
DISTRICT OF COLUMBIA
Office of the Attorney General
441 4th Street, NW
Washington, DC 20001,

Case No.: 2017 CA 3900
Judge: Judge-in-Chambers

Petitioner,

v.

MARRIOTT INTERNATIONAL, INC.
10400 Fernwood Road
Bethesda, MD 20817,



Respondent.

**RESPONDENT MARRIOTT INTERNATIONAL, INC.'S SUPPLEMENTAL MOTION
TO MODIFY THE DISTRICT OF COLUMBIA'S MAY 18, 2016 SUBPOENA**

1. Pursuant to D.C. Code § 1-301.89c(e), Respondent Marriott International, Inc. ("Marriott") requests that the Court issue an order modifying the District of Columbia's ("District") May 18, 2016 Subpoena on the grounds that it is premature, overly broad, unduly burdensome, and seeks information and documents that are not relevant at this stage of the District's investigation.
2. On September 1, 2017, Marriott moved the Court for an order to (1) limit Marriott's production of electronically stored information in response to Subpoena Request Nos. 11, 12, 18, and 20 to responsive electronically stored information in the possession of Jeff Wolff, Vice President of Guest Experience and Room Operations, and Harvey Kellman, Vice President & Assistant General Counsel, two Marriott employees primarily responsible for Marriott's resort fee policies, disclosures, and approval process; and (2) limit Marriott's production of documents

from individual Marriott properties in response to Request Nos. 10, 21, and 22 to the five Marriott-managed properties selected by the District.

3. Marriott now requests that the Court issue an order to quash Subpoena Request Nos. 13 and 14.

4. This motion is supported by an accompanying memorandum, which is incorporated herein by reference.

ORAL HEARING REQUESTED

Dated: September 8, 2017

Respectfully submitted,

/s/ Milton A. Marquis

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Marriott International, Inc.*

CERTIFICATE OF SERVICE

I, Milton A. Marquis, hereby certify that on this 8th day of September, 2017, I caused a true and correct copy of the foregoing Respondent Marriott International, Inc.'s Motion to Modify the District of Columbia's May 18, 2016 Subpoena to be served via electronic mail upon the following:

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Director, Office of Consumer Protection
Philip.ziperman@dc.gov

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441 N.W., Suite 600 South
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Attorneys for Petitioner

/s/ Milton A. Marquis
Milton A. Marquis

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA
Office of the Attorney General
441 4th Street, NW
Washington, DC 20001,

Case No.: 2017 CA 3900
Judge: Judge-in-Chambers

v.

MARRIOTT INTERNATIONAL, INC.
10400 Fernwood Road
Bethesda, MD 20817,

Respondent.

**RESPONDENT MARRIOTT INTERNATIONAL, INC.'S MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT OF SUPPLEMENTAL MOTION TO
MODIFY THE DISTRICT OF COLUMBIA'S MAY 18, 2016 SUBPOENA**

Marriott International, Inc. ("Marriott") submits this memorandum in support of its Supplemental Motion to Modify the District of Columbia Office of the Attorney General's (the "District") May 18, 2016 Subpoena ("Supplemental Motion"). These filings are intended to supplement Marriott's September 1, 2017 Motion to Modify the District of Columbia Office of the Attorney General's (the "District") May 18, 2016 Subpoena ("September 1 Motion") and accompanying Memorandum of Points and Authorities, both of which are incorporated herein by reference.

Marriott and the District are continuing to engage in good faith meet-and-confer discussions regarding Request Nos. 13 and 14. These Requests seek to compel Marriott to provide the name, contact information, amount of resort fee paid and/or refunded, and the name and location of the hotel stayed for every single consumer from 46 different states and the District of Columbia who has paid a resort fee or had a resort fee refunded at a Marriott property within the last 45 months. Despite the ongoing discussions regarding these Requests, Marriott is

regrettably forced to file this Supplemental Motion, because of the District's refusal to extend the period for Marriott to file this Supplemental Motion while the discussions continue. Marriott regrets the unnecessary expenditure of resources on an issue that may be promptly resolved without the Court's intervention.

Marriott will promptly make available as soon as the week of September 11 a senior Marriott IT professional to discuss with the District the data systems that contain the customer data the District demanded in Request Nos. 13 and 14. As the Marriott IT professional will discuss with the District, with the possible exception of consumer information regarding recent guest stays, such information is simply unavailable or would require Marriott to retain the assistance of outside computer programmers to create a new program designed to retrieve archived customer folios for resort fee-paying customers. Even if retrievable via such a program, there would be no guarantee that those folios would be searchable based upon the resort fee-related criteria demanded by the District. Furthermore, the extent of recoverable data within the requested time frame would be uncertain.

For these reasons and the reasons explained below, Marriott requests that in addition to modifying the Subpoena as requested in Marriott's original Motion to Modify, the Court order that Marriott is not required to provide customer information in response to Requests 13 and 14 on the grounds that these requests are irrelevant to the scope of the District's investigation, overly broad and unduly burdensome, and because these requests seek to unnecessarily and unreasonably invade Marriott's customers' privacy.

ARGUMENT

As Marriott described in its Motion, while the District has the authority to issue subpoenas and to compel the production of records, that authority is not unlimited. See *In re*

Sealed Case (Administrative Subpoena), 42 F. 3d 1412, 1418 (D.C. Cir. 1994) (agencies are “not afford[ed] unfettered authority to cast about for potential wrongdoing”). The District lacks the authority to enforce a subpoena if (1) the investigation and issuance of the subpoena are not within the agency’s authority, (2) the demands are too indefinite, or (3) the demands are not reasonably relevant to the investigation. *United States v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950) (“the disclosure sought shall not be unreasonable”).

For the following reasons, the District’s demand that Marriott produce customer and resort fee information for every customer who paid or was refunded a resort fee in the last four years is not reasonably relevant to the District’s investigation, is unduly burdensome, and unnecessarily seeks the disclosure of personal information that millions of customers have entrusted to Marriott.

I. The Identification of Individual Customers Who Have Paid or Been Refunded Resort Fees Is Irrelevant to Whether Marriott Adequately Discloses Resort Fees to Consumers.

As discussed more fully in Marriott’s September 1 Motion, there is no authority for the proposition that charging a resort fee is illegal; rather, state consumer protection laws and existing FTC guidance permit a hotel to charge a resort fee if the resort fee is clearly disclosed to consumers. *See, e.g., Harris v. Las Vegas Sands L.L.C.*, No. CV 12-10858 DMG (FFMx), 2013 WL 5291142, at *5-6 (C.D. Cal. Aug. 16, 2013) (holding that the hotel’s website did not violate state consumer protection law because it adequately disclosed the resort fee); Press Release, Federal Trade Commission, *FTC Warns Hotel Operators that Price Quotes that Exclude ‘Resort Fees’ and Other Mandatory Surcharges May Be Deceptive* (Nov. 28, 2012) (“[A] hotel reservation site may breakdown the components of the reservations estimate (e.g., room rate, estimated taxes, and any mandatory, unavoidable fees), [as long as] the most prominent figure for consumers should be the total inclusive estimate.”).

Accordingly, the scope of the District's investigation may not reasonably exceed the question of whether Marriott complies with FTC guidance and state consumer protection laws regarding the *disclosure* of resort fees to the consuming public. This is a limited inquiry, and Marriott has already produced or agreed to produce documents showing the disclosure of resort fees on Marriott.com and during call center reservations, related advertisements, as well as policies and training materials requiring properties to disclose resort fees throughout the reservation process. However tenuously connected to the issue of fee disclosure, in the interest of compromise Marriott has also produced or agreed to produce a host of additional documents including policies, training materials, and numerous other documents, including internal and external correspondence related to resort fees and data collected from individual Marriott properties to be selected by the District.

Request Nos. 13 and 14, which seek the names, contact information, hotel information, and payment information for all customers who have paid or been refunded resort fees, bear no relationship to the "particular matter under investigation." *McLane Co., Inc. v. E.E.O.C.*, 137 S. Ct. 1159, 1167-68 (2017) (reviewing courts must evaluate whether "the particular materials 'sought' are related to the "particular matter under investigation"); *Morton Salt*, 338 U.S. at 652-53 (government demands that are not reasonably relevant to their investigative authority should be enforced). They exceed the District's reasonable authority, and should not be enforced.

II. Enforcing Request Nos. 13 and 14 Would Require Marriott to Create Documents or Records that It Does Not Collect in the Normal Course of Business and Would Impose an Unreasonable Burden on Marriott.

Even if Request Nos. 13 and 14 are plausibly relevant to the scope of the District's inquiry, Marriott should not be required to "prepare, or cause to be prepared, documents not already in existence solely to satisfy the requests of the opposing party." *Ascom Hasler Mailing*

Sys., Inc. v. U.S. Postal. Serv., 267 F.R.D. 1, 8 (D.D.C. 2010) (interpreting the obligation to produce documents under the Federal Rules of Civil Procedure); *Alexander v. F.B.I.*, 194 F.R.D. 305, 310 (D.D.C. 2000); *Flying J Inc. v. Pilot Travel Centers, LLC*, No. 1:06-CV-00030 TC, 2009 WL 1835000, at *2 (D. Utah June 25, 2009) (holding that a civil request for production “cannot require a responding party to compile and summarize” data); *Columbia Pictures Indus. v. Bunnell*, No. CV 06-1093FMCJCX, 2007 WL 2080419, at *6 (C.D. Cal. May 29, 2007) (holding that party had no duty to create new data or documents in response to a civil discovery request).

Marriott customer information is not stored and categorized in a central database that includes “resort fee payment” as a discrete, searchable category, as has already been explained to the District. Rather, customer information is stored by individual guest folios. Recent folios are made searchable by property, customer name, and Marriott Rewards number for purposes of responding to customer inquiries. Folios older than a year are automatically archived. Retrieval of individual archived folios would require Marriott to hire an outside support team of computer programmers to investigate whether subparts of folios can be separately searched and, if feasible, to *create a specialized program* designed to complete the folio retrieval. Even if folios proved retrievable, there would be no guarantee that data from the entire period of the District’s Requests would be available. Furthermore, there would be no guarantee that such information would be searchable by the resort fee-related criteria demanded by the District.

Engaging programmers to conduct this review would not only be costly and potentially unnecessary, but the creation of a specialized program would be akin to the preparation of a compilation of documents or data that is not maintained by Marriott in the course of its business solely to comply with the District’s investigative demand. This is not only unreasonable and

unduly burdensome, but compelling Marriott to create such a program would exceed the Court's reasonable enforcement authority. *See Ascom Hasler Mailing Sys.*, 267 F.R.D. at 8; *Alexander*, 194 F.R.D. at 310; *Flying J*, 2009 WL 1835000, at *2; *Columbia Pictures Indus.*, 2007 WL 2080419, at *6.

The District has represented that this consumer information is necessary because of the District's need to identify potential witnesses. Potential witnesses can be identified through less burdensome and invasive means. Marriott will produce complaints from consumers regarding resort fees. In addition, the District has available consumer complaints submitted to the District, the Federal Trade Commission, and other consumer protection authorities.

III. Revealing Customers' Reservation, Payment, and Personal Information Would Severely Infringe Upon the Trust Customers Place in Marriott.

The District's demand for hotel reservation information threatens the privacy interests of millions of American consumers, including potentially thousands of District residents, without reference to those consumers' actual wishes. It is within the District's power and the power of the various other government entities who are engaged in this multi-state investigation to invite consumers who have been charged resort fees to identify themselves and to authorize the District to seek their specific hotel reservation information. Despite being able to identify individual potential witnesses through customer complaints, the District demands the unprecedented production of thousands or millions of individual guests' reservation information.

CONCLUSION

For the foregoing reasons, Marriott respectfully requests that the Court enter the attached proposed Order.

Dated: September 8, 2017

Respectfully submitted,

/s/ Milton A. Marquis

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Order

Upon consideration of Respondent Marriott International, Inc.'s Supplemental Motion to Modify the District of Columbia's May 18, 2016 Subpoena, any opposition thereto, and the record herein, it is hereby, this _____ day of _____,

ORDERED, Marriott's motion is **GRANTED**; and it is further,

ORDERED that Marriott shall not be required to respond to Subpoena Request Nos. 13 and 14.

Superior Court Judge