International Franchise Association
48th Annual Legal Symposium
May 3-5, 2015
Chicago Marriott Downtown Magnificent Mile
Chicago, IL

ADVANCED FRANCHISE AGREEMENT AND FRANCHISE DISCLOSURE DOCUMENT DRAFTING TECHNIQUES

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AGREEMENT AND FRANCHISE DISCLOSURE DOCUMENT DRAFTING TECHNIQUES ADVANCED FRANCHISE

Creating franchise agreements for new franchisors, or overhauling franchise agreements for mature franchisors, requires counsel to deploy a broad and sophisticated analysis of the past, the present and the future.

The past (especially the recent past) must be closely examined to discern judicial decisions, regulatory thrusts and other government edicts which may materially impact the subject franchisor's network; for mature franchisors revamping their franchise agreements, the politics of their franchise networks and how their current franchise agreements came to be; and, what franchise structures, economics and relationships have proven fruitful or, alternatively, less than desirable.

Franchise counsel must take into account the present - - today's demographics, consumer preferences, technology and advertising/marketing platforms, as well as what today are considered franchising's "best" (meaning most successful) practices and any possible planned, but not yet implemented, government initiatives which may impact the franchisor's system.

And franchise counsel must delve into the future as well. After all, typical franchise agreements feature terms of five or ten years (frequently with additional five or ten year renewal terms). And those franchise agreements must thus anticipate fundamental change, embrace it and allow franchisors to take advantage of it and not be left behind. Changes in future population shifts; demographics; technology; consumer preferences (kale, anyone?); information technology; robotics; and, delivery systems must be anticipated to the greatest extent possible and will be embraced by a sophisticated franchise agreement.

However, it seems that too many franchise agreements reflect norms, practices and precepts of the 20th century, not the 21st, and thus fail to address (or inadequately address) critical issues which will arise over the ten year term of the typical franchise agreement. In the live version of our program, we will address a number of these issues and suggest how they should be responded to. A legal analysis of all of these issues would consume far too much space than we are allotted. Accordingly, we shall set forth herein a legal analysis of three issues, which analysis prompts suggested franchise agreement language which we set forth for your consideration: resale price maintenance (colloquially referred to as franchisor "price fixing"); franchisee disclaimers; and, the National Labor Relations Board's determination that franchisors may or should be deemed the "joint employers" of their franchisees' employees.

We will address a number of other key issues at the live presentation of our program.

I. FRANCHISEE DISCLAIMERS OF RELIANCE/MERGER AND INTEGRATION PROVISIONS

A. Introduction

From a litigation perspective, one of the critical functions of a franchise agreement, and any ancillary agreements or documents, is to confirm that the written documents are the complete understanding and agreement between the parties. More particularly, it should be clear from the franchise agreement that there are no prior understandings, agreements, promises, financial representations or guarantees, or any other commitments between the franchisor and franchisee that are not expressly set forth in the franchise agreement (or the franchisor's Franchise Disclosure Document). The goal is to be clear about what the exact terms of the parties' agreement are, and to avoid subsequent claims that either the written franchise agreement contains only some of the binding terms of the parties' agreement or that the franchisee relied upon extra-contractual (and fraudulent) promises or understandings when deciding to enter into the franchise relationship.

From a legal perspective, franchise fraud claims encompass common law fraud or misrepresentation claims as well as claims for violation of statutory prohibitions against making such misrepresentations or omissions to a prospective franchisee in connection with the sale of a franchise.[1] From a factual perspective, these claims often arise when a franchisee, disappointed with its investment in a franchise, seeks to minimize its losses and recover its investment by alleging that the franchisor deceptively induced it to purchase the franchise by making false or misleading disclosures, statements or omissions regarding the true nature of the contractual relationship as well as the financial prospects for the franchise and its likelihood of success. Whether termed "earnings claims" or "financial performance representations," such alleged extra-contractual representations by the franchisor (often, a franchise salesperson) prior to a franchisee's execution of its franchise agreement are at the core of most franchise fraud claims.

Understanding the likelihood that disgruntled franchisees are likely to assert such fraud claims, sophisticated franchisors routinely insert provisions in their franchise agreements and utilize separate pre-execution checklists, questionnaires or similar documents, all designed to make clear that no such extra-contractual representations were made, were relied upon, or were otherwise part of the agreement between the parties. These contractual provisions fall into two broad categories: (i) merger/integration provisions; and, (ii) disclaimers of reliance.

Merger/integration provisions generally provide that the franchise agreement contains the entire agreement between the parties and that all prior understandings, representations or agreements are superseded by the written agreement.

Even better, from a franchisor's perspective, then a merger/integration provision is a disclaimer of reliance provision. In these provisions, the franchisee specifically disclaims the existence of any representations, guarantees or promises other than

those set forth in the FDD or the Franchise Agreement, and further specifically represents that it has not relied upon any such representations, guarantees or promises when entering into the franchise agreement. These disclaimers can be contained in the franchise agreement or a separate questionnaire or statement signed by the franchisee before it executes the franchise agreement. Such disclaimers are often accompanied by a statement in Item 19 of the franchisor's FDD that the franchisor has not authorized anyone to make any financial performance representations (other than those contained in Item 19) to prospects and that if a prospect receives any such representations, it should alert the franchisor of its existence.

B. Judicial Treatment of Merger/Integration Provisions and Disclaimers of Reliance in the Franchise Context

Many states have enacted registration and disclosure laws which govern the sale of franchises and establish a statutory private cause of action for fraud in connection with the sale of a franchise. For example, the New York, Michigan, Washington, Minnesota, Maryland and Indiana franchise registration/disclosure statutes include anti-fraud provisions which provide that in connection with the filing, offer, sale or purchase of any franchise, it is unlawful to: (a) employ any device, scheme or artifice to defraud; (b) make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or (c) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.[2] Generally, a franchisee must allege and prove reasonable reliance upon a misrepresentation or omission of a material fact in order to prevail on a franchise fraud claim under these statutes.

Whether a merger/integration provision precludes, as a matter of law, reliance on an alleged prior representation continues to generate disparate results. Several courts have held that merger/integration provisions bar a party from introducing evidence of fraud based on prior oral statements that add to, alter, or contradict the terms of a written agreement because reliance on prior contradictory statements is unreasonable as a matter of law.[3] Other courts have held that merger/integration provisions do not preclude fraud claims.[4] Still others narrowly construe merger/integration provisions, holding that unless the provision specifically negates the false statement, the merger/integration provision will not preclude an allegation that the plaintiff reasonably relied upon the misrepresentation when deciding to enter into the franchise agreement.[5]

Franchisors have more often than not been able to obtain dismissal or summary judgment on franchise fraud claims when the plaintiff-franchisee executed such a disclaimer of reliance.[6]

Recent cases construing the New York Franchise Act are illustrative of the courts' uneven treatment of these critical franchise agreement provisions.

In New York, it has long been established that a contractual provision specifically disclaiming a plaintiff's reliance on certain representations destroys any allegation that

the contract was executed in reasonable reliance upon those disclaimed representations.[7] In other words, "a party cannot justifiably rely on a representation that has been disclaimed by agreement."[8] It is also well-established that a claim for statutory fraud under §687 of the New York Franchise Act requires the franchisee to plead and prove reasonable reliance upon the misrepresentation or omission alleged.[9]

However, it was not until recently that a court first considered the impact of a contractual disclaimer of reliance upon a franchisee's ability to succeed on a franchise fraud claim under §687 of the New York Franchise Act. In *Emfore Corp. v. Blimpie Associates, Ltd*., 51 A.D.3d 434, 860 N.Y.S.2d 12 (1st Dept. 2008), a New York intermediate appellate court held that a franchisee's contractual statements and representations of non-reliance do not bar, as a matter of law, its statutory fraud claim under the New York Franchise Act. And in 2014, a federal court adopted, without analysis, the *Emfore* holding in *Solanki v. 7-Eleven, Inc.*, 2014 WL 320236 (S.D.N.Y. 2014).

In *Emfore Corp. v. Blimpie Associates, Ltd., supra*, just prior to the franchisee's execution of its franchise agreement, Blimpie presented the franchisee with a questionnaire/letter asking the franchisee, *inter alia*, to confirm that there were no financial performance representations made to the franchisee and that no representations were made to it other than those set forth in Blimpie's Franchise Disclosure Document. The franchisee executed the letter, initialing each paragraph without comment. Less than a year after opening its business, the franchisee sued Blimpie and certain of its officers asserting the very opposite: that Blimpie, in violation of the New York Franchise Act, provided the franchisee with the very pre-sale misrepresentations concerning, *inter alia*, Blimpie's dissemination of financial performance information that the franchisee had earlier denied were given or relied upon.

Blimpie moved for summary judgment to dismiss all claims in the complaint, relying on the disclaimer questionnaire executed by the franchisee just prior to the franchisee's execution of the Blimpie Franchise Agreement. The trial court dismissed both the common law and New York Franchise Act fraud claims as a result of the franchisee's disclaimer of financial representations in the questionnaire, and specifically rejected the franchisee's argument that the anti-waiver provision of the New York Franchise Act precluded such a holding:

> While plaintiff is correct in stating that the "clear and unambiguous" language of the Franchise Act bars release and waiver clauses, there is no language barring the type of disclaimers presented herein. Nor is the broad statutory anti-fraud purpose furthered by construing the disclaimers… as "illegal." Rather, it is consistent with the Franchise Act's purpose enabling the prospective franchisee to assess the franchisee's [sic] offer and to keep them fully informed as to its rights…

> Far from an attempt to contract out of liability, this documents a responsible attempt by Blimpie to confront prospective purchasers about any misrepresentations or misconceptions. The court finds the letter to be in the same vein… [and] not "illegal" or void pursuant to the Franchise Act. *Emfore*, 2006 WL 6091794 at *9 (Sup. Ct. N.Y.Cty. September 14, 2006).

On appeal, the Appellate Division, First Department reversed, first holding that the questionnaire constituted, itself, a violation of the anti-waiver provision of the New York Franchise Act. *Emfore*, 46 A.D.2d 389, 848 N.Y.S.2d 89 (1st Dept. 2007). However, upon reargument, the First Department reversed its earlier holding that Blimpie's use of a presale questionnaire violated the anti-waiver provisions of the New York Franchise Act but proceeded to hold that the questionnaire responses subscribed by Blimpie's then-prospective franchisee could not be utilized by Blimpie in defense of that franchisee's New York Franchise Act claims. *Emfore*, 51 A.D.3d 434, 860 N.Y.S.2d 12 (1st Dept. 2008).

In other words, the *Emfore* court strangely held that Blimpie committed no wrong under the New York Franchise Act by asking its prospective franchisee to complete a questionnaire inquiring whether any fraud attended the franchise sale, but could not use that prospective franchisee's responses to defend itself when, after becoming a Blimpie franchisee, the franchisee sued Blimpie for statutory fraud under the New York Franchise Act. In doing so, the court made no attempt to distinguish the well-settled principles of New York law, under which specific contractual disclaimers of reliance eliminate the possibility of thereafter establishing reasonable reliance upon disclaimed representations. Nor did it explain how enforcement of these principles of New York law would constitute a "waiver" of any rights afforded to the franchisee by the New York Franchise Act. Nor did the First Department make any attempt to dispute or even address the logic of the trial court's opinion it was reversing, quoted above. *Emfore* is the New York State courts' final word, at least for now, concerning disclaimers of reliance, franchise fraud claims, and in anti-waiver provision of the New York Franchise Act.

In 2014, a federal district court revisited the issue and reinvigorated the *Emfore* decision. In *Solanki, supra*, a 7-Eleven franchisee asserted claims against 7-Eleven under the New York Franchise Act, alleging its receipt of financial performance misrepresentations in advance of its execution of its 7-Eleven Franchise Agreement. 7-Eleven moved for summary judgment arguing, among other things, that the franchisee could not properly plead reasonable reliance upon purported oral financial performance representations after stating in its franchise agreement that it did not rely upon such representations. Citing *Emfore*, but without any independent analysis, the *Solanki* court held that as a result of the anti-waiver provision of the New York Franchise Act, "any disclaimers reviewed, acknowledged or signed by *Solanki* cannot bar his claims under the New York Franchise Act." *Solanki*, 2014 WL 320236 at *5. As a result, the court denied 7-Eleven's motion for summary judgment on plaintiff's New York Franchise Act fraud claims.

Later in 2014, however, the Chief Judge of the same court (the U.S. District Court for the Southern District of New York) revisited the issue and, contrary to *Emfore* and *Solanki*, dismissed a plaintiff-franchisee's New York Franchise Act §687 claim as a result of the franchisee's disclaimer of reliance upon extra-contractual financial representations. In *Governara v. 7-Eleven, Inc*., 2014 WL 4476534 (S.D.N.Y. 2014), Chief Judge Loretta Preska confirmed that the well-settled principle of New York law, pursuant to which "a party cannot justifiably rely on a representation that has been disclaimed by agreement," applies with equal force to claims for violation of §687 of the New York Franchise Act.[10]

In *Governara*, the franchisee alleged that a franchisor's representative made financial performance representations to him which were different from the financial performance representations contained in the franchisor's FDD. However, the franchise agreement executed by the franchisee stated that the franchisee "represented and warranted that [the franchisee] have not relied on and [the franchisor has not] made any representations relating to the Store except as expressly contained in this Agreement, or (i) as to the future or past income… except as provided in [the FDD]…" *Id*. at *1. The franchisee closed the franchised store after approximately twenty months of operation, and thereafter commenced an action against the franchisor asserting, *inter alia*, claims for violation of §687 of the New York Franchise Act.

After identifying the elements of a claim under §687, namely reasonable reliance upon an untrue or misleading statement of material fact causing harm to plaintiff, Judge Preska began her analysis of the franchisor's argument by summarizing New York law: "Where a party specifically disclaims reliance upon a particular representation in a contract, that party cannot, in a subsequent action for common law fraud, claim it was fraudulently induced to enter into the contract by the very representation it has disclaimed reliance upon." *Governara, supra* at *5. The court then rejected the franchisee's argument that the anti-waiver provision of the New York Franchise Act renders non-reliance disclaimers ineffective to bar claims under §687, and squarely held that "the principle enumerated by the New York Court of Appeals in *Danann* should control: parties who specifically disclaim reliance upon a particular representation cannot subsequently allege reasonable reliance upon it." *Id*. at *6.

In so holding, the *Governara* court expressly held that, notwithstanding *Emfore* and *Solanki*, the franchise agreement's non-reliance disclaimer was not violative of the "anti-waiver" provisions of the New York Franchise Act. The *Governara* court specifically addressed the logic and holdings in both *Emfore* and *Solanki*, and expressly declined to follow them.[11] The court further held that the franchisee's attempt to circumvent the effect of the contractual disclaimers contravened a fundamental principle of contract law, which is to "protect the expectations of the parties and provide certainty where the feature would otherwise be uncertain." *Id*. at *7. The court emphasized that declining to enforce the contractual disclaimers would not only contravene basic principles of contract law, but would also undermine the very goals of the New York Franchise Act:

Refusing to enforce non-reliance disclaimers would violate the sanctity of contracts and discourage their use. Ironically, this would undermine the goals of the NYFA, since non-reliance disclaimers help franchisors "root out dishonest sales personnel and avoid sales secured by fraud… by requesting franchisees to disclose whether a franchisor's representatives made statements concerning the financial prospects for the franchise during the sales process." *Id*. at *7 (quoting *Emfore Corp. v. Blimpie Associates, Ltd., supra*.).

C. Suggested Merger/Integration Provisions, Disclaimers of Reliance and Pre-Sale Representations/Questionnaire

See Appendix "A".

II. RESALE PRICE MAINTENANCE PROGRAMS/PRICE POINT ADVERTISING

A. Introduction

Over the past decade, it has become increasingly clear to many franchisors that engaging in true "price point advertising" - - that is, advertising a product or service for sale at a unitary price good at every outlet nationwide (and not just "at participating locations only") - - is of critical import. Simply stated, their non-franchised competitors engage in "price point" advertising all the time, while until only recently - - as elucidated below - - franchisors were absolutely forbidden by federal antitrust law from compelling their franchisees to offer products or services at a predetermined retail price.

But all that changed over the past twenty years.

B. The U.S. Supreme Court Eliminates "Per Se" Ban on Resale Price Maintenance

Franchisors historically were legally precluded from dictating the prices which their franchisees could charge for goods/services by virtue of a nearly century old U.S. Supreme Court decision in *Doctor Miles Medical Co. v. John D. Park & Sons Co.*[12] holding that such activity was a *per se* violation of Section 1 of the Sherman Act - - a "red light" infraction, if you will, which could result in an award of treble damages and attorneys' fees.

Since that 1914 U.S. Supreme Court decision, the Court has from time to time provided exceptions from this absolute ban on resale price maintenance. The first exception came in 1919[13], when the Supreme Court decided that while a manufacturer and retailer could not agree to a minimum resale price program, the manufacturer could nevertheless unilaterally refuse to sell to a retailer that did not adhere to the manufacturer's minimum resale price - - even though the economic effects of both categories of activity are generally the same.

But fifteen years ago, in *State Oil Co. v. Khan*[14], the Supreme Court eliminated the *per se* rule against *maximum* resale price maintenance programs, instead subjecting such programs to the more liberal "rule of reason" analysis. (Importantly for franchisors, the U.S. Supreme Court earlier rejected what had been the *per se* prohibition on certain non-price vertical restraints - - such as "exclusive territories" - - instead holding that these, too, should fall under the "rule of reason" analytical prism.[15])

And in 2007, in a dramatic reversal of its own nearly century old doctrine, the U.S. Supreme Court abandoned its absolute prohibition on minimum resale price maintenance agreements, holding that such agreements must be analyzed under the more liberal "rule of reason" standard (and not automatically declared illegal under the *per se* standard) when challenged as a violation of Section 1 of the Sherman Act. The Supreme Court's decision was rendered in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[16]

The *Leegin case* involved a retailer which sold leather accessories manufactured by Leegin Creative Leather Products, Inc. In order to compete with larger suppliers of similar products, Leegin established a policy of only selling its products to those retailers who promised not to resell its leather accessories below Leegin's suggested resale prices and, indeed, offered special incentives if a retailer agreed to carry Leegin's line exclusively at Leegin's suggested minimum process. PSKS, one of Leegin's retailers before the policy was implemented, refused to adhere to Leegin's pricing policies and it continued to sell Leegin's products below Leegin's suggested minimum resale prices. After the retailer refused to accede to Leegin's demand that it cease such discounting activity, Leegin stopped selling its products to the retailer.

The retailer sued Leegin in the United States District Court for the Northern District of Texas alleging *inter alia* that a minimum resale price maintenance ("price fixing") agreement existed in violation of Section 1 of the Sherman Act. While Leegin contended that its program was actually procompetitive, the district court held that the *per se* rule against minimum resale price maintenance agreements precluded any consideration of the program's effects under the rule of reason but, instead, was absolute. The plaintiff-retailer was awarded damages of $1.2 million, trebled under the Sherman Act to $3.6 million. On appeal, the Fifth Circuit affirmed, citing numerous Supreme Court decisions which "…consistently applied the *per se* rule" to minimum price fixing agreements.

In a 5-4 decision, however, the United States Supreme Court reversed the Fifth Circuit, abandoned its nearly century old precedent established in *Doctor Miles* and instead held that minimum resale price agreements should be evaluated under the rule of reason and not declared illegal *per se*. In its decision, the slim majority made frequent references to modern economic analytical studies which, observed the Court, were "replete with pro-competitive justifications for a manufacturer's use of resale price maintenance". After noting that only those acts under the Sherman Act which "always or almost always tend to restrict competition and decrease output" should be governed by a rule of *per se* illegality, and because minimum retail price maintenance agreements

may actually be procompetitive, the Court held that going forward, minimum resale price maintenance agreements will be subjected to a “rule of reason” analysis (to determine their source and procompetitive/anticompetitive effects) rather than automatically declared illegal under the *per se* standard.

In its decision, the Court recognized and analyzed the procompetitive and possible anticompetitive effects of minimum resale price maintenance programs and, in so doing, suggested which such programs may in the future be declared legal or illegal under the “rule of reason” standard.

The following procompetitive consequences of a minimum resale price maintenance program were cited by the court:

- The elimination of “free riding” by low price discount retailers, which place upon their higher price competitors the burden of furnishing better service, product selection and customer training. For example, a customer can go to Saks Fifth Avenue to try out any of a number of different mattresses, seeking advice from the staff as to which was best and why, and then leave the store only to purchase the product online or at a discount retailer;

- If retailers are precluded from competing on the basis of price, they may begin competing on the basis of product selection, customer service and customer training; and,

- Knowing that other retailers are precluded from competing on the basis of lower prices, retailers may make investments in new products or lines that would be otherwise be risky, thus increasing interbrand competition.

On the other hand, the Court noted that minimum resale price maintenance agreements could lead to, among others, the following anticompetitive effects:

- The ability of manufacturers to form a cartel by agreeing to impose identical minimum resale prices on their distributors or retailers;

- The ability of retailers to band together and demand above market minimum prices;

- Enabling a very powerful retailer (such as Wal-Mart) to demand a minimum resale price set so low as to prevent competition from other retailers; and,

- Enabling powerful retailers to demand minimum resale prices set so high as to prevent competition from lower cost distribution channels (such as the internet).

Noting the possible anticompetitive dangers of its decision, the Supreme Court stated that lower courts in future cases, when analyzing price maintenance conduct under the rule of reason, should in particular consider: (i) the number of competing manufacturers using the practice in a product category; (ii) the source of the restraint (manufacturer vs. retailer); and, (iii) the manufacturer's market power.

C. Judicial Decisions Addressing Franchisor Resale Price Maintenance Requirements

Over the past six years, the Eleventh Circuit and the U.S. District Court for the Southern District of Florida have ruled three times that franchisor Burger King Corporation ("BKC") had the right to impose on franchisees maximum prices for its "Value Menu" items by virtue of the Burger King franchise agreement provision which states that the franchisor could make changes and additions to its operating system "…which BKC in the good faith exercise of its judgment believes to be desirable and reasonably necessary…".

In the Eleventh Circuit case[17], the court affirmed the lower court's determination that: "BKC has the right, under the parties' franchise agreements, to require compliance with the Value Menu. The franchise agreements specifically require Defendants to adhere to BKC's comprehensive restaurant format and operating system."[18]

In a subsequent but entirely parallel case whose impact would be felt systemwide within the Burger King network (since plaintiff was Burger King's National Franchisee Association (the "NFA")), the U.S. District Court for the Southern District of Florida issued two opinions. In the first - - rendered in May, 2010 - - the court held that under the above-quoted language of the Burger King franchise agreement, "…(plaintiff's) claim that (the Burger King franchise agreement) does not grant BKC the authority to impose maximum prices…fails as a matter of law"[19].

However, since the subject Burger King franchise agreement language permitted Burger King to compel modifications of its system "which BKC in the good faith exercise of its judgment believes to be desirable and reasonably necessary…", the Court in its first decision granted Burger King's motion to dismiss its franchisees' claim that it did not have the authority under said franchise agreement to set maximum prices but let proceed the franchisees' claim that Burger King's imposition of the $1.00 double cheeseburger violated its contractual duty of good faith.

However, on that issue, too, Burger King prevailed. In its second decision[20], the Southern District of Florida held:

> The purpose of Section 5 (of the Burger King franchise agreement) is to give BKC broad discretion in framing business and marketing strategy by adopting those measures it judges are needed to help the business successfully compete… (T)o adequately raise a claim of bad faith, Plaintiffs must allege some facts suggesting that BKC did not believe that the prices would be helpful to the businesses competitive position, but, for some other reason, deliberately adopted prices that would injure Plaintiffs' operations. As currently pled, none of the allegations support such an inference of bad faith. Plaintiffs rely principally on their allegation that franchisees could not produce and sell (a double cheeseburger or a double hamburger) at a cost less than $1.00, and therefore that franchisors suffer "a loss" on each of these items sold. Even taken as true, there is nothing inherently suspect about such a pricing strategy for a firm selling multiple products. There are a variety of legitimate reasons where a firm selling multiple products may choose to set the price of a single product below cost. Among other things, such strategy might help build goodwill and customer loyalty, hold or shift customer traffic away from competitors, or serve as "loss leaders" to generate increased sales on other higher margin products.[21]

Of interest to franchisors is the District Court's rejection in its first *Burger King* decision of the NFA's argument that, at the very least, the franchisor could not enforce maximum price restraints against franchisees who signed their agreements prior to 1997's *Khan* decision, because prior to *Khan* maximum pricing was *per se* illegal. Instead, the court found that, if the rule of reason analysis were satisfied, a franchisor may be capable of imposing maximum prices upon its franchisees under its franchise agreement's "system modification" language, even for those franchisees who signed their agreements prior to *Khan's* shift from *per se* illegality to the rule of reason test in 1997:

> (Plaintiff) also argues that because it was *per se* illegal to set maximum prices prior to 1997, the terms of the (Burger King franchise agreement) could not grant BKC the right to fix prices because the Agreement was drafted prior to 1997… The date the Agreement was drafted is…irrelevant. The date the Agreement was entered into was the operative date. The (Plaintiff's) argument would thus apply only to those franchisees who signed their Agreement prior to 1997. Even with respect to those franchisees, this Court sees no reason why BKC's authority under Section 5 to establish and make changes from time to time to its product specifications would not give BKC the authority to impose maximum prices after the *Khan* decision. While the Agreement incorporated the law in place at the time the Agreement was signed prior to 1997, (it) also provided that BKC could, from time to time, modify, revise, and add to its comprehensive restaurant format and operating system. It is this provision that allows BKC to impose maximum prices even as to those franchisees who signed their agreements prior to 1997.

Many have found it curious that the NFA invoked antitrust protections for those franchisees who signed their franchise agreements prior to the *Khan* decision in 1997 but did not similarly attempt to make any broader antitrust arguments in favor of all franchisees, no matter when they signed. After all, *Khan* did not make maximum price fixing "legal." To the contrary, the Khan Court made it very clear that, "[i]n overruling [past precedent], we of course do not hold that all vertical maximum price fixing is *per se* lawful. Instead, vertical maximum price fixing, like the majority of commercial arrangements subject to the antitrust laws, should be evaluated under the rule of reason."[22] Close readers of the Southern District of Florida's original May 2010 opinion noticed the judge's footnote virtually extending an invitation to the NFA to make such a rule of reason argument.[23] Nevertheless, the NFA declined to make any broader antitrust allegations in its complaint. It is also worth noting that no antitrust arguments were advanced in the Eleventh Circuit's Burger King value menu case either.

Thus, while the recent Eleventh Circuit's and Southern District of Florida's opinions in the Burger King cases demonstrate that Burger King's franchise agreement language allows for maximum price fixing, the merits of a bona fide antitrust argument, presenting a rule of reason analysis of potential anticompetitive effects of such price fixing in the franchise context, has not yet been presented to or ruled upon by the courts.

Nor, until recently, has a franchisor's ability to establish its franchisees' prices absent express franchise agreement language reserving this right (recall that the Burger King decision rested upon that franchise agreement's general "modification of system" contractual provision) and when not enjoying a friendly "home court" advantage (as Burger King did). Until, that is, the very recent case of *Stuller, Inc. v. Steak N Shake Enterprises, Inc. et al.*[24]

In *Steak N Shake*, after the franchisor tried to compel one of its franchisees to follow Steak N Shake's pricing directives, the franchisee sued Steak N Shake and sought a preliminary injunction to stop the implementation of the new pricing mandate. Importantly, Steak N Shake, much like Burger King, relied on its franchise agreement's rather standard "system modification" provision as entitling it to mandate franchisee prices. Unlike the decision in *Burger King*, however, the *Steak N Shake* court held that this general "system modification" language was insufficient to entitle Steak N Shake to require its franchisees to adhere to prices established by the franchisor, observing:

> The Agreements do not specifically address whether (Steak N Shake) can modify operational standards to require uniform pricing and promotions. (Steak N Shake) argues that the absence of the term "price" or "pricing" does not render the Agreements ambiguous. However, the absence of the term "price" might be construed as permitting Plaintiff to set its own price but also may be construed as allowing (Steak N Shake) to set the price as part of the System. As such, the Agreements are ambiguous on

> the issue of whether "price" is part of the System (Steak N Shake) may modify…
>
> (T)his Court finds that the undisputed extrinsic evidence demonstrates, as a matter of law, that the parties did not intend for the System to include pricing and promotion… The undisputed extrinsic evidence demonstrates that price and promotions were not part of the System. As such, (Steak N Shake) could not modify the System to require Plaintiff to following (Steak N Shake) pricing and promotions…

Accordingly, the district court granted plaintiff-franchisee's motion for summary judgment, and enjoined Steak N Shake from implementing its pricing policy. On appeal, Steak N Shake argued that its franchisee was not entitled to said preliminary injunction. However, the Seventh Circuit disagreed and affirmed the district court's grant of a preliminary injunction.[25]

Notably, neither the district court nor the Seventh Circuit in *Steak N Shake* addressed the antitrust aspect of a franchisor compelling (or attempting to compel) its franchisees to observe fixed retail prices, whether under federal antitrust law (and its now prevailing "rule of reason" analysis) or under state antitrust laws (many of which still deem resale price maintenance to be a *per se* violation of their state antitrust laws, as discussed below).

Nevertheless, the general consensus among franchisors is that the *Khan* and *Leegin* decisions alleviate most, if not all, worries related to liability on account of federal antitrust violations. Franchisees no doubt disagree with this position.

D. Why Are Resale Price Maintenance Requirements So Vital to Franchise Networks?

The ability of franchisors to dictate precisely the minimum and maximum retail prices which their franchisees may charge the public for products/services can dramatically heighten those franchisors' competitive positions versus other brands.

"Price point" advertising no longer has to be followed by the usual "at participating locations only" disclaimer (with customer dissatisfaction naturally resulting upon a customer's visiting and being charged more at a non-participating franchised location). Instead, the ability to aggressively engage in price point campaigns on a systemwide basis is facilitated. Further, a uniform retail pricing paradigm will preclude one franchisee from seeking to underprice, and draw market share from, its competitive franchisees - - especially important if the first, underpricing franchisee has large economies of scale enabling it to aggressively underprice its franchisee competitors. (Of course, under the Supreme Court decision addressed herein, it would be quite dangerous for franchisors to mandate maximum prices so low, in response to requests from their larger franchisees, that competitive smaller franchisees suffer injury or even elimination.) In addition, not to miss the obvious, franchisor revenues - - based as they are as a percentage of franchisee gross sales - - may more easily be ascertained and

predicted, even optimized, as opposed to the generally prevailing situation where a franchisee can lower or raise its retail prices to any points it desires.

However, we must stress that the benefits afforded by the recent U.S. Supreme Court decisions subjecting resale price maintenance agreements to the "rule of reason" rather than the "*per se*" standard do not yet enable franchisors to engage in such activity nationwide.

First, and most critically, relatively few franchise agreements reserve to franchisors the right to impose minimum or maximum retail prices upon their franchisees. Absent such a contractual reservation of right, these franchisors - - notwithstanding the *Burger King* decisions discussed above - - may be held utterly without power to engage in such activity, as was the case in *Steak N Shake*.

Moreover, and also of critical concern, while the U.S. Supreme Court has declared resale price maintenance as now subject only to a "rule of reason" analysis when federal antitrust law legality is determined, it is critically important to understand that the states - - many of which feature their own non-preempted antitrust laws - - have not followed suit and may never do so. In this regard, it is vital to know that a number of states statutorily declare resale price maintenance agreements to be *per se* unlawful. And many state antitrust enforcement officials were U.S. Supreme Court *amicus curiae* proponents of maintaining the minimum resale price maintenance *per se* illegality rule, leading the author to believe that both government enforcement activity and private litigants will shift their efforts to preclude minimum/maximum price fixing to those states in which courts are not at all required to follow federal antitrust precedents.

Moreover, as noted above, while proving a "rule of reason" case is often difficult for antitrust plaintiffs, the Supreme Court in its recent decision did outline circumstances under which resale price maintenance programs would be considered problematic and perhaps declared illegal.

Finally, it will now be up to lower federal courts to recraft resale price maintenance jurisprudence under the Supreme Court's "rule of reason" analysis - - and one has no way of knowing just how these lower courts will rule on the issue, what disparities among the circuits will evolve and how those disparities will in the future be reconciled by the U.S. Supreme Court.

Accordingly, we recommend that franchisors engage in the following course of conduct: (i) closely analyze state antitrust laws and edicts regarding resale price maintenance agreements and monitor how those may be impacted by, or changed, following the U.S. Supreme Court decisions referenced above, and (ii) feature in successor franchise agreements a reservation of right under which the franchisor may impose minimum/maximum retail prices upon its franchisees to the greatest extent permitted by law (again, a suggested provision is set forth in the appendix of this paper).

E. Suggested Resale Price Maintenance Franchise Agreement Provisions

For your convenience, we set forth in Appendix B of this paper sample language which franchisors may wish to consider incorporating in successor franchise agreements which would, in fact, reserve to franchisors the right to prescribe minimum/maximum franchisee retail prices.

III. FRANCHISOR AS "JOINT EMPLOYER" OF ITS FRANCHISEES' EMPLOYEES

A. Introduction

In a malevolent and noxious effort to bolster the politically correct attack on "income inequality", the efforts to secure an increase in the minimum wage and the fortunes of a labor union whose membership is dwindling according to certain reports - - and in complete and utter disregard of 50 years of legal precepts and business practices - - on July 29, 2014 Richard Griffin, the General Counsel of the National Labor Relations Board ("NLRB") determined that McDonald's Corporation could be deemed a "joint employer" of its franchisees' employees asserting claims of alleged violations of the National Labor Relations Act (NLRA).

As a consequence, the NLRB General Counsel announced on December 29, 2014 that the NLRB filed charges against McDonald's Corporation as a joint employer in 86 allegedly meritorious unfair labor practice complaints filed against McDonald's and its franchisees by those franchisees' employees over the past 24 months.

Mr. Griffin's determination comes against the background of labor unions pressuring fast food restaurants to adopt a $15 per hour wage floor (and against the larger political backdrop of claimed "income inequality" in America). Since 90% of McDonald's restaurants in the United States are franchised, McDonald's (and other franchisors) respond that they do not set employee wages, franchisees do. However, Mr. Griffin's charges (the NLRB General counsel brings charges, the NLRB adjudicates them), if adopted by the National Labor Relations Board, would give rise to McDonald's Corporation being the joint employer of its franchisees' employees and, as a consequence, would enable unions to collectively bargain with McDonald's itself (as opposed to thousands of individual franchisees).

B. "Joint Employer" Charges Contravene 50 Years of Case Law and Business Precepts

The NLRB General Counsel's charge that McDonald's Corporation is a "joint employer" of its franchisees' employees noxiously and entirely disregards 50 years of law and business principles. The very essence of the franchise model involves an arms-length, independent contractual relationship between a franchisor and its franchisees. It is the franchisor which develops the concept in question; the names, marks and logos by which its network will be identified; and, the various operational systems, procedures

and protocols which franchisees must observe when operating under their franchisor's names, marks and logos. In this respect, a franchise is like any other license of intellectual property - - to be valid, that license must contain standards which licensees must adhere to when operating under the subject name/mark/logo or else, as a matter of law, intellectual property rights therein will be deemed abandoned (since a trademark and service mark, by law, stand for the elements and standards of quality and product/service attributes associated therewith).

In the franchise relationship, it is the franchisee (again, a licensee) which most typically alone is responsible for building the subject franchised unit; operating that unit; and, most critically, earning and retaining all of the profits therefrom. Typically, a franchisee only pays an initial franchisee fee to its franchisor (averaging $10 - $50,000 and, thereafter, a royalty on gross sales (averaging 5%.)

The franchise model has proven integral to the American economy. You cannot buy a car; have it serviced; fill it with gas; buy a house; eat at a restaurant; have your taxes prepared or lawn taken care of; shop at a convenience store; stay at a hotel; engage in disaster cleanup; shop at the mall; or, have your hair done without the odds being very high that you are transacting business with a franchised establishment. The latest numbers indicate that franchising today accounts for $840 billion in economic output; employs over 8.5 million individuals; and, features over 770,000 establishments[26].

But the economic realities of franchising and the fundamental business principles upon which it rests appear to matter little to the NLRB's General Counsel. His mission in life appears to be aiding labor unions and fighting "income inequality." Never mind the devastating impact which his "joint employer" ruling against McDonald's may have on such a vital segment of the American economy as the franchise sector.

And toward what end? The authors do not mean to suggest that the American economy is anything but sluggish and has been for the past 15 years. However, perhaps instead of perverting one of our nation's most successful methods of distribution - - franchising - - the NLRB General Counsel and others of his ilk should instead examine the devastating impact of the 1990's "free trade" agreements, which large American multinational companies used as cover to outsource manufacturing to countries whose employees earn a fraction of what American workers do, leaving the American economy in what seems like a permanent malaise but which resulted in the Dow Jones Industrial Average tripling in but a decade's time.

C. The Judiciary Has Almost Unanimously Rejected the "Franchisor as Joint Employer" Theory

Fortunately, the courts continue to respect the economic realities of franchising and legal precedent reflecting same. That legal precedent may be simply stated: if a franchisor does not control the day-to-day operation of its franchisees' businesses, does not set the pay of its franchisees' employees, has no power to hire or fire its

franchisees' employees and does not maintain employment records for them, then that franchisor will not be deemed the joint employer or co-employer of its franchisees' employees. See, for example, *Patterson v. Domino's Pizza, LLC,* 333 P.3d 723 (Cal. 2014); *Singh v. 7-Eleven Inc.*, 2007 WL 715488 (N.D.Cal. 2007); *Reese v. Coastal Restoration and Cleaning Services, Inc.*, 2010 WL 5184841 (S.D.Miss. 2010); and, *Hatcher v. Augustus*, 956 F.Supp. 387 (E.D.N.Y. 1997).

On the other hand, generally speaking courts will refuse to dismiss at the pleading stage a complaint asserting that a franchisor is a joint employer or co-employer of its franchisees' employees. Instead, while the courts almost never reach this conclusion, they wait for discovery to be conducted and a record established before doing so. As long as the subject judicial complaint sufficiently alleges a joint employment scenario, the judiciary will customarily permit that complaint to proceed, deny a motion to dismiss and instead await a post-discovery motion for summary judgment.

This occurred twice in the past year. In *Cordova et al. v. SCCF, Inc. et al.*, 2014 WL 3512838 (S.D.N.Y. 2014), the franchisor of Sophie's Cuban Cuisine Restaurants was alleged to be the joint employer or a single integrated employer of its franchisees' employees in a putative class action alleging Fair Labor Standards Act and New York State Labor Law violations. Sophie's moved to dismiss the complaint. However, as observed, the court denied Sophie's motion as being premature:

> The Second Circuit has not yet considered whether a franchisor can qualify as a joint employer, but (Sophie's) cites decisions from other circuits in which courts, using versions of the economic reality test established by the Supreme Court, have generally concluded that franchisors are not employers within the meaning of the FLSA (citations omitted)… The decisions that (Sophie's) cite, however, were all issued on motions for summary judgment after the parties had completed discovery… Here, however, there has not been any discovery and the question on this motion practice is whether the allegations pleaded in the (complaint) are sufficient plausibly to state a claim for relief… While it is not far from this juncture that Plaintiffs will need to show that (Sophie's) qualifies as a joint employer, taking the facts in the light most favorable to Plaintiffs, the Court finds that Plaintiffs have plausibly pleaded facts suggestive of joint employment (citation omitted).
>
> Accordingly, Sophie's motion to dismiss the complaint was denied.

The same result pertained in *Olvera et al. v. Bareburger Group LLC et al.*, 2014 WL 3388649 (S.D.N.Y. 2014), a putative class action alleging that the franchisor of Bareburger restaurants, as a joint employer, violated the rights of its franchisees' employees under the Fair Labor Standards Act and New York Labor Law. Franchisor Bareburger moved to dismiss but, again, the franchisor's motion was denied as being premature:

> Taking these pled facts as true, as the Court must at this stage, they state a plausible claim that the franchisor defendants were plaintiffs' joint employers under the FLSA and NYLL. The cases on which the franchisor defendants rely are not to the contrary. In these cases, franchisors were held not to be employers but, in all but one, this determination was made not on the pleadings but at summary judgment… These cases may signal the challenge plaintiffs may face in establishing their claims after discovery but, at this stage, plaintiffs need only plead enough facts to "state a claim to relief that is plausible on its face" (citation omitted)…
>
> Although plaintiffs may ultimately fail to prove that the franchisor defendants were joint employers under the FLSA and NYLL, they have pled enough facts to survive a motion to dismiss, and are thus entitled to test their claims in discovery.

In other words, while the facts adduced in discovery will generally support a franchisor's claim that it in no fashion serves as the joint employer or co-employer of its franchisees' employees, at the pleading stage it is enough for franchisees to adequately allege franchisor co-employment to survive an initial motion to dismiss.

D. Suggested Franchise Agreement Provision

We set forth in Appendix C suggested franchise agreement language to anticipate and respond to allegations that a franchisor is the "joint employer" of its franchisees' employees.

APPENDIX "A"

SUGGESTED FRANCHISE AGREEMENT LANGUAGE AND FRANCHISE DISCLAIMERS

INTEGRATION OF AGREEMENT

This Agreement, all exhibits to this Agreement, and all ancillary agreements executed contemporaneously with this Agreement constitute the entire agreement between the parties with reference to the subject matter of this Agreement and supersede any and all prior negotiations, understandings, representations and agreements. You acknowledge that you are entering into this Agreement, and all ancillary agreements executed with this Agreement, as a result of your own independent investigation of the Area Development Business and the Restaurants operated thereby and not as a result of any representations about us made by our shareholders, officers, directors, employees, agents, representatives, independent contractors or franchisees which are contrary to the terms set forth in this Agreement or any franchise disclosure document required or permitted to be given to you pursuant to applicable law. You specifically acknowledge that no officer, director, employee, agent, representative or independent contractor of ours is authorized to furnish you with any financial performance information; that, if they nevertheless do, you have not relied on any such financial performance information given to you by any such individual; and, that if any such individual attempts to or actually does give you any such financial performance information in contravention of this provision, you will immediately communicate such activity to us. For the purpose of this Agreement, "financial performance information" means information given, whether orally, in writing or visually which states, suggests or infers a specific level or range of historic or prospective sales, expenses and/or profits of franchised or non-franchised Luke's Lobster Restaurants.

FRANCHISEE REPRESENTATIONS

Important Instructions: Read this document carefully and do not sign it if it contains anything you think might be untrue. If you sign this document, you are confirming that what it says is true. In addition, if you sign it, we will take actions in reliance on the truth of what it says.

The following franchisee - - FRANCHISEE LLC (the "Franchisee") - - is interested in acquiring a franchise for a XYZ Facility to be operated within a specified territory (the "Facility"). Each of the undersigned represents that all of the following statements are true:

I. Each of the undersigned has conducted its, his, or her own independent investigation of XYZ Franchise Company, LLC ("we," "us," or "our"), the Franchise System (as that term is used in our Franchise Agreement), the risks, burdens,

and nature of the business Franchisee will conduct under the Franchise Agreement, the Facility's site (if already selected), and the Franchisee's proposed Territory.

2. Each of the undersigned understands that the business Franchisee will conduct under the Franchise Agreement involves risk and that any success or failure will be substantially influenced by the Franchisee's ability and efforts and the viability of the Facility's site.

3. Each of the undersigned understands that we previously might have entered into franchise agreements with provisions different from the provisions of the Franchise Agreement for the Facility and may enter into franchise agreements in the future with provisions different from the provisions of the Franchise Agreement for the Facility.

4. Franchisee has received a final, ready-to-be-signed copy of the Franchise Agreement and all related documents and has had ample opportunity to consult with its, his, or her attorneys, accountants, and other advisors concerning those documents.

5. If we unilaterally made material changes in Franchisee's final, ready-to-be-signed copies of the Franchise Agreement and related documents (other than as a result of our negotiations with Franchisee), Franchisee has had possession of those documents for at least seven (7) calendar days before executing them.

6. Franchisee has received a Franchise Disclosure Document ("FDD") as required by federal law at least fourteen (14) calendar days before signing the Franchise Agreement, this document, or any related document, or before paying any funds to us, and has had ample opportunity to consult with its, his, or her attorneys, accountants, and other advisors concerning the FDD.

7. Franchisee also has received the FDD at the earlier of our first personal meeting with Franchisee to discuss the franchise opportunity but at least l 0 business days before signing the Franchise Agreement and at least 10 business days before paying any consideration to us or an affiliate in connection with this franchise.

8. Except as provided in our FDD, we have made no representation, warranty, promise, guaranty, prediction, projection, or other statement, and given no information, as to the future, past, likely, or possible income, sales volume, or profitability, expected or otherwise, of the Facility or any other facility, except: (None. unless something is filled-in here.)

9. Each of the undersigned understands that:

9.1 Except as provided within the FDD, we do not authorize our officers, directors, or employees to furnish any oral or written representation, warranty,

promise, guaranty, prediction, projection, or other statement or information concerning actual or potential income, sales volume, or profitability, either generally or of any XYZ Facility.

9.2 Actual results vary from unit to unit and from time period to time period, and we cannot estimate, project, or predict the results of any particular XYZ Facility.

9.3 We have specifically instructed our officers, directors, and employees that, except as provided in our FDD, they are not permitted to make any representation, warranty, promise, guaranty, prediction, projection, or other statement or give other information as to income, sales volume, or profitability, either generally or with respect to any particular XYZ Facility.

9.4 If any unauthorized representation, warranty, promise, guaranty, prediction, projection, or other statement or information is made or given, the undersigned should not (and will not) rely on it and should report it to our management.

10. Before signing the Franchise Agreement and any related documents, the undersigned Franchisee has had ample opportunity: (A) to discuss the Franchise Agreement, any related document, and the business Franchisee will conduct with its, his, or her own attorneys, accountants, and real estate and other advisors; (B) to contact our existing franchisees; and (C) to investigate all statements and information made or given by us and our officers, directors, employees, and agents relating to the Franchise System, the Facility, and any other subject.

11. Each of the undersigned understands that the Franchise Agreement franchises certain rights for one, and only one, Facility, operated only at the location now specified (or to be specified) in the Franchise Agreement, and that, except as provided in the Franchise Agreement or a Development Rights Rider signed with us, no "exclusive," "expansion," "protected," "non-encroachable," or other territorial rights, rights of first refusal, or rights of any other kind are granted or have been promised concerning the structure in which the Facility is operated, the contiguous or any other market area of the Facility, or any other existing or potential XYZ Facility or geographic territory.

12. Each of the undersigned understands that the Franchise Agreement (including any riders and exhibits) constitutes the entire agreement between the parties and supersedes all prior and contemporaneous oral or written agreements, statements, representations, or understandings of us, the undersigned, and the Franchisee, except as provided in the FDD.

13. Each of the undersigned understands that, except as provided in the FDD, nothing stated or promised by us that is not specifically set forth in the Franchise Agreement can be relied upon by the undersigned or the Franchisee.

14. The only state(s) in which each of the undersigned is a resident is (are):

15. Each of the undersigned understands the importance of the Facility's location. The undersigned and the Franchisee have had, or will have, ample opportunity and the means to investigate, review, and analyze independently the Facility's location, the building in which it is contained, the market area and all other facts relevant to the selection of a site for a XYZ Facility location, and the lease documents for the location.

16. Each of the undersigned understands that neither our acceptance of any location nor our acceptance of any lease implies or constitutes any warranty, representation, guarantee, prediction, or projection that the location will be profitable or successful or that the lease is on favorable terms, its often being the case that leases are available only on very tough terms.

17. Each of the undersigned understands that site selection is a difficult and risky proposition. We have not given (and will not give) any representation, warranty, promise, guaranty, prediction, projection, or other statement or information relied upon by the undersigned or Franchisee regarding a location's prospects for success, nearby tenants or other attributes, or the form or contents of any lease. Franchisee will have any lease reviewed by its, his, or her own attorney and other advisors.

18. The covenants and restrictions concerning competition contained in the Franchise Agreement are fair and reasonable and will not impose an undue hardship on the undersigned or the Franchisee. Each of them has other considerable skills, abilities, opportunities, and experience in other matters and of a general nature that enable each of them to derive income that is satisfactory to them from other endeavors.

19. There is no fiduciary or confidential relationship between us and the undersigned or between us and the Franchisee. Each of the undersigned expects us to deal, and will act as if we are dealing, with it, him, or her at arm's length and in our own best interests.

20. We have advised the undersigned and the Franchisee to consult with their own advisors on the legal, financial, and other aspects of the Franchise Agreement, this document, the Facility, any lease or sublease for the Facility's location, and the business contemplated. Each of the undersigned has either consulted with such advisors or deliberately declined to do so.

21. Neither we nor any employee has provided the undersigned or the Franchisee with services or advice that are of a legal, accounting, or other professional nature.

22. The statements made in this document supplement and are cumulative to statements, warranties, and representations made in other documents, such as the Franchise Agreement. The statements made in this document or the Franchise Agreement are made separately and independently. They are not intended to be, and will not be, construed as modifying or limiting each other.

23. The President of the United States of America has issued Executive Order 13224 (the "Executive Order") prohibiting transactions with terrorists and terrorist organizations, and the United States government has adopted, and in the future may adopt, other anti-terrorism measures (the "Anti-Terrorism Measures"). We therefore require certain certifications that the parties with whom we deal are not directly or indirectly involved in terrorism. For that reason, the undersigned and the Franchisee hereby certify that neither they nor any of their employees, agents, or representatives, nor any other person or entity associated with the Franchisee, is: (a) a person or entity listed in the Annex to the Executive Order; (b) a person or entity otherwise determined by the Executive Order to have committed acts of terrorism or to pose a significant risk of committing acts of terrorism; (c) a person or entity who assists, sponsors, or supports terrorists or acts of terrorism; or (d) owned or controlled by terrorists or sponsors of terrorism. The undersigned and the Franchisee further covenant that neither they nor any of their employees, agents, or representatives, nor any other person or entity associated with them, will during the term of the Franchise Agreement become a person or entity described above or otherwise become a target of any Anti-Terrorism Measure.

[Signature Page follows]

APPENDIX "B"

PROPOSED FRANCHISE AGREEMENT LANGUAGE - - RESALE PRICE MAINTENANCE

As discussed in the body of our paper, even assuming that a franchisor is able to set minimum and maximum resale prices and not run afoul of federal or state law, it must still review its franchise agreement (and accompanying Franchise Disclosure Documents) to confirm that the agreement is broad enough so as to permit it to establish the minimum and maximum prices at which franchisees can sell products or services to the general public. Not surprisingly, most franchise agreements do not reserve to the franchisor the right to impose minimum or maximum retail prices upon its franchisees. Absent such a contractual reservation of right, these franchisors cannot engage in such activity.

Set forth below is a sample franchise agreement provision that franchisors may wish to include in their franchise agreements in order to establish the right to impose minimum and/or maximum retail prices at which its franchisees may offer products or services.

> Because enhancing our interbrand competitive position and consumer acceptance for our products and services is a paramount goal of us and our franchisees, and because this objective is consistent with the long term interest of the our System overall, we may exercise rights with respect to the pricing of products and services to the fullest extent permitted by then-applicable law. These rights may include (without limitation) prescribing the maximum and/or minimum retail prices which you may charge customers for the goods and/or services offered and sold at your franchised unit(s); recommending retail prices; advertising specific retail prices for some or all products or services sold by your franchised unit(s), which prices you will be compelled to observe; engaging in marketing, promotional and related campaigns which you must participate in and which may directly or indirectly impact your retail prices (such as "buy one, get one free"); and, otherwise mandating, directly or indirectly, the maximum and/or minimum retail prices which your franchised unit(s) may charge the public for the products and services it offers. We may engage in any such activity either periodically or throughout the term of this Agreement. Further, we may engage in such activity only in certain geographic areas (cities, states, regions) and not others, or with regard to certain subsets of franchisees and not others. You acknowledge and agree that any maximum, minimum or other prices we prescribe or suggest may or may not optimize the revenues or profitability of your franchised business and you irrevocably waive any and all claims arising from or related to our prescription or suggestion of your franchised business' retail prices.

APPENDIX "C"

SUGGESTED FRANCHISE AGREEMENT LANGUAGE TO ANTICIPATE AND RESPOND TO ALLEGATIONS THAT A FRANCHISOR IS THE "JOINT EMPLOYER" OF ITS FRANCHISEES' EMPLOYEES

RELATIONSHIP OF THE PARTIES

You understand and agree that you are and will be our independent contractor under this Agreement. Nothing in this Agreement may be construed to create a partnership, joint venture, agency, employment or fiduciary relationship of any kind. None of your employees will be considered to be our employees. Neither you nor any of your employees whose compensation you pay may in any way, directly or indirectly, expressly or by implication, be construed to be our employee for any purpose, most particularly with respect to any mandated or other insurance coverage, tax or contributions, or requirements pertaining to withholdings, levied or fixed by any national, city, state or federal governmental agency. We will not have the power to hire or fire your employees. You expressly agree, and will never contend otherwise, that our authority under this Agreement to certify certain of your employees for qualification to perform certain functions for your franchised Business does not directly or indirectly vest in us the power to hire, fire or control any such employee.

You acknowledge and agree, and will never contend otherwise, that you alone will exercise day-to-day control over all operations, activities and elements of your franchised Business and that under no circumstance shall we do so or be deemed to do so. You further acknowledge and agree, and will never contend otherwise, that the various requirements, restrictions, prohibitions, specifications and procedures of the System which you are required to comply with under this Agreement, whether set forth in our Manual or otherwise, do not directly or indirectly constitute, suggest, infer or imply that we control any aspect or element of the day-to-day operations of your Franchised Business, which you alone control, but only constitute standards you must adhere to when exercising your control of the day-to-day operations of your Franchised Business.

You may not, without our prior written approval, have any power to obligate us for any expenses, liabilities or other obligations, other than as specifically provided in this Agreement. Except as expressly provided in this Agreement, we may not control or have access to your funds or the expenditure of your funds or in any other way exercise dominion or control over your Franchised Business. Except as otherwise expressly authorized by this Agreement, neither party will make any express or implied agreements, warranties, guarantees or representations or incur any debt in the name of or on behalf of the other party, or represent that the relationship between us and you is other than that of franchisor and franchisee. We do not assume any liability, and will not be considered liable, for any agreements, representations, or warranties made by you which are not expressly authorized under this Agreement. We will not be obligated for any damages to any person or property which directly or indirectly arise from or relate to your operation of the Franchised Business.

ENDNOTES

[1] Examples of such statutory prohibitions include: Alaska Sale of Business Opportunities, ALASKA STATUTES §45.66.150 (2014); Arkansas Franchise Practices Act, ARK. CODE. ANN. §4-72-207 (2010); California Franchise Investment Law, CAL. CORP. CODE §31202 (1971); Connecticut Business Opportunity Investment Act, CONN GEN. STAT. § 36b-67 (2013); Florida Sale of Business Opportunities Act, FLA. STAT. §559.809 (2010); Hawaii Franchise Investment Law, HAW. REV. STAT. § 482E-5 (2014); Illinois Franchise Disclosure Act, 815 ILL. COMP. STAT. §705/6 (1988)**;** Indiana Franchise Disclosure Act, IND. CODE §23-2-2.5-27 (2015); Kentucky Sale of Business Opportunities, *KY*. REV. STAT. ANN. §§367.815 (2005); Maine Regulations of the Sale of Business Opportunities, ME. REV. STAT. ANN. tit.32 §4699 (1991); Maryland Franchise Registration and Disclosure Law; MD. CODE BR §14-229 (1992); Michigan Franchise Investment Law, MICH. COMP. LAWS §445.1505 (1984); Minnesota Franchise Act, MINN. STAT. §80C.13 (2014); New York Franchise Act, N.Y. GEN. BUS. L. §687 (2012); North Dakota Franchise Investment Law, N.D. CEN. CODE §51-9-11 (1995); Ohio Business Opportunity Purchasers Protection Act, OHIO REV. CODE ANN. §1334.03 (1991); Oklahoma Business Opportunity Sales Act, OKLA. STAT. tit. 71 §819 (1991); Oregon Franchise Transactions, OR. REV. STAT. §650.020 (2013); Rhode Island Franchise Investment Act, R.I. GEN. LAWS §19-28.1-17 (2012); South Dakota Franchise Investment Law, S.D. CODIFIED LAWS §37-5B-24 (2008); Texas Business Opportunity Act, TEX. BUS. & COM. CODE ANN. §51.302 (2009); Virginia Retail Franchising Act, VA CODE ANN. §13.1-563 (2006); The Washington Franchise Investment Protection Act, WASH REV. CODE §19.100.090 (2012)*;* Wisconsin Franchise Investment Law, WISC. ADMIN. CODE §553.41 (2011).

[2] New York Franchise Act, N.Y.Gen Bus. Law §680 et seq.; Indiana Franchise Disclosure Act, IND. CODE §23-2-2.5-27 (2015); Maryland Franchise Registration and Disclosure Law; MD. CODE BR §14-229 (1992); Michigan Franchise Investment Law, MICH. COMP. LAWS §445.1505 (1984); Minnesota Franchise Act, MINN. STAT. §80C.13 (2014); Washington Franchise Investment Protection Act, WASH REV. CODE §19.100.090 (2012).

[3] See, e.g., *Ellering v. Sellstate Realty Sys. Network, Inc.*, 801 F.Supp.2d 834 (D.Minn. 2011); *JM Vidal, Inc. v. Texdis USA, Inc,* 764 F. Supp. 2d 599, 613 (S.D.N.Y. 2011); *Teng Moua v. Jani-King of Minnesota, Inc*., 810 F. Supp. 2d 882 (D. Minn. 2011); *U-Bake Rochester, LLC v. Utecht,* 2014 WL 223439 (D. Minn. Jan. 21, 2014).; *Watkins & Son Pet Supplies v. The Iams Co,* 254 F.3d 607 (6th Cir. 2001).; *WW, LLC v. The Coffee Beanery, Ltd.,* 2013 WL 4602845 (D. Md. Aug. 28, 2013).; *Avon Hardware Co. v. Ace Hardware Corp.,* 2013 IL App (1st) 130750, 998 N.E.2d 1281, *appeal pending* (Jan Term 2014); . *Volvo Trucks North America v. Andy Mohr Truck Center,* 2012 WL 4794934 (S.D. Ind. Oct. 9, 2012; *Partner & Partner, Inc. v. ExxonMobil Oil Corp.,* 326 F. App'x 892, 895 (6th Cir. 2009); *Papa John's, Int'l., Inc. v. Dynamic Pizza, Inc., 317 F.Supp.2d 740 (W.D.Ky 2004); Wooton Enter., Inc. v. Subaru of Am., Inc., 134 F. Supp.2d 698 (D.Md. 2001) (summary judgment granted upon finding that there could be no reasonable reliance in the face of a merger clause superseding alleged promises); OKI Distrib., Inc. v. Amana Refrigeration, 850 F.Supp. 637 (S.D.Ohio 1994) (integration clause precludes proof of promissory fraud); Cook v. Little Caesar Enter., Inc., 210 F.3d 653 (6th Cir. 2000) (no reasonable reliance possible based on the existence of an integration clause); Coffee Beanery, Ltd. v. Albert, 2006 WL 1330326 (Mich. App. Ct. May 16, 2006) (no reasonable reliance as a matter of law where franchisee signed a franchise agreement containing an integration clause); Schubot v. McDonald's Corp., 757 F.Supp. 1351, Bus. Franchise Guide (CCH) ¶9,737 (S.D.Fla. 1990) (franchisee's claims were dismissed based on the existence of an integration clause and a disclaimer of prior oral representations); Quality Inns Int'l., Inc. v. Dollar Inns of Am., Inc., Bus. Franchise Guide (CCH) ¶10,007 (D.Md. 1989) (reliance was unreasonable where parties' agreement contained disclaimer and integration provisions*).

[4] See, e.g., *Hockey Enterprises, Inc. v. Total Hockey Worldwide*, *LLC,* 762 F. Supp. 2d 1138 (D. Minn. 2011); *Long John Silver's Inc. v. Nickleson,* 923 F. Supp. 2d 1004 (W.D. Ky. 2013); *Hanley v. Doctors Express Franchising, LLC,* 2013 WL 690521 (D. Md. Feb. 25, 2013; *Simann, Inc. v. BP Prods. N. Am., Inc., 395 F.Supp. 2d 271 (M.D.N.C. 2005) (parol evidence admissible because allegations of fraud challenge the validity of a contract); West Coast Video Entm't, Inc. v. Ponce De Leon,* Bus. Franchise

Guide (CCH) ¶10,102 (N.D. Ill. 1991) (allegations of fraudulent conduct was admissible despite existence of an integration clause in an agreement the parties' subsequently signed); *Salkeld v. V.R. Bus. Brokers,* 548 N.E.2d 1151 (Ill. App. Ct. 1989) (holding that an integration clause would not serve to shield fraudulent conduct).

[5] See, e.g. *Danann Realty Corp.v . Harris*, 5 N.Y.2d 317, 184 N.Y.S.2d 599 (1959), see also *Barnes v. Berger King Corp.,* Bus. Franchise Guide ¶10,932 (S.D. Fla., March 29, 1996); *Carousel's Creamery, LLC v. Marble Slab Creamery, Inc.,* Bus. Franchise Guide (CCH) ¶12,748 (Tex. App. 2004) (fraud claim not precluded where integration provision did not specifically negate the alleged false statements); *Travelodge Hotels, Inc. v. Honeysuckle Enter.,* 357 F.Supp. 2d 788 (D.N.J. 2005) (parol evidence was not prohibited where merger and integration clause was not specific to the alleged misrepresentation); *Commercial Prop. Inv., Inc. v. Quality Inns Int'l., Inc.,* 938 F.2d 870 (8th Cir. 1991) (integration and disclaimer clauses would only negate a fraud claim where they explicitly stated the facts contradicting the alleged misrepresentation); *Prince Heaton Enter., Inc. v. Buffalo's Franchise Concepts, Inc.,* 117 F.Supp.2d 1357 (N.D.Ga. 2000) (reliance not reasonable where parties' agreement contained a merger clause that expressly negated the alleged misrepresentations).

[6] *Governara v. 7-Eleven, Inc*., 2014 WL 4476534 (S.D.N.Y. 2014); *JM Vidal, Inc. v. Texdis USA, Inc*., 764 F. Supp. 2d 599 (S.D.N.Y. 2011) (citing Morris and Rand v. CM Franchise Sys., Inc., 2009 WL 667227, at *3 (Wash.Ct.App. Mar. 16, 2009); *Ellering v. Sellstate Realty Sys. Network, Inc*. 801 F.Supp.2d 834, 845 (D.Minn. 2011); *WW, LLC v. Coffee Beanery, Ltd.*, 2013 WL 4602845 (D. Md. Aug. 28, 2013); *Avon Hardware Co. v. Ace Hardware Corp*., 2013 IL App (1st) 130750, 998 N.E.2d 1281, *appeal pending* (Jan Term 2014). See also *McDonald v. Friedman*, 2004 WL 3397805 at *8-9 (D. Md. Feb. 3, 2004) *aff'd,* 128 F. App'x 949 (4th Cir. 2005) (citing (*Cooper v. Berkshire Life Ins. Co.*, 148 Md. App. 41, 810 A.2d 1045 (2002) *cert. denied,* 373 Md. 407, 818 A.2d 1105 (2003) (in fraud action, plaintiff cannot reasonably rely on oral statements that contradict the terms of insurance policy he was purchasing); *Md. Environmental Trust v. Gaynor,* 370 Md. 89, 98–99, 803 A.2d 512 (2002) (in negotiating terms of environmental easement, clear language of letter to plaintiff precluded reliance on earlier, inconsistent statements); *Call Carl, Inc. v. B.P. Oil Corp.,* 554 F.2d 623, 630–31 (4th Cir.1977) (finding that an oral representation that contract would only be terminated with good cause cannot be relied upon in face of clear right to terminate without good cause set forth in contract); *Mellon Bank Corp. v. First Union Real Estate Equity & Mort. Inv.,* 951 F.2d 1399, 1406 (3d Cir.1991) (in transaction negotiated by two sophisticated businessmen, oral promises that directly contradict the written agreement cannot reasonably be relied upon); *Carlock v. Pillsbury Co.,* 719 F.Supp. 791, 829 (D.Minn.1989) (concluding that a party cannot reasonably rely on allegedly fraudulent representations of sales revenues of other franchisees where such representations are directly contradicted by the terms of an applicable offering statement); *Rosenberg v. Pillsbury Co.,* 718 F.Supp. 1146, 1152 (S.D.N.Y.1989)).

[7] See *Danann Realty Corp. v. Harris*, 5 N.Y. 2d 317, 184 N.Y.S.2d 599 (1959); *Citibank N.A. v. Palpinger*, 66 N.Y.2d 90, 495 N.Y.S.2d 309 (1985); *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 980 N.Y.S.2d 21 (1st Dept. 2014); *HSH Nordbank AG v. UBS AG,* 95 A.D.3d 185, 941 N.Y.S.2d 59 (1st Dept. 2012); *Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc.*, 382 F.Supp. 2d 411 (S.D.N.Y. 2003).

[8] *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 785 (2d Cir. 2003); see, also, *Mfrs. Hanover Trust Co. v. Yanakas*, 7 F.3d 310 (2d Cir. 1993).

[9] *Emfore Corp. v. Blimpie Associates, Ltd.* 51 A.D.3d 434, 860 N.Y.S.2d 12 (1st Dept. 2008); *Olivieri v. McDonald's Corp.*, 678 F.Supp. 996 (E.D.N.Y. 1988).

[10] Mr. Kaufmann's law firm represented 7-Eleven, Inc. in the *Governara* litigation.

[11] The *Governara* court explained: "Although decisions of intermediate state appellate courts must be carefully considered as 'helpful indicators of how the state's highest court would rule,' federal district courts may diverge from them when 'convinced by other persuasive data that the highest court of the state would decide otherwise.' In this case, the principle enumerated by the New York Court of Appeals

in *Danann* should control: 'parties who specifically disclaim reliance upon a particular representation cannot subsequently claim reasonable reliance upon it." *Id*. at *6 (citations omitted).

[12] *Doctor Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1914).

[13] *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

[14] 522 U.S.3 (1997).

[15] *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S.36 (1977).

[16] 551 U.S. 877 (2007).

[17] *Burger King v. E-Z Eating 41 Corp.*, 572 F.3d 1306 (11th Cir. 2009).

[18] *Id.* at 13-14.

[19] *National Franchisee Association v. Burger King Corporation*, 715 F.Supp. 2d 1232 (S.D.Fla. May 20, 2010).

[20] *National Franchisee Association v. Burger King Corporation*, Slip Copy, 2010 WL 4811912 (S.D. Fla, November 19, 2010).

[21] *Id*. at 9.

[22] Khan, 522 U.S. at 22.

[23] *National Franchisee Association*, 715 F.Supp. 2d at 1245, fn 7.

[24] 10-CV-3303, 2012 WL 2872634 (C.D. Ill. July 12, 2012).

[25] *Stuller, Inc. v. Stake N Steak Enterprises, Inc.*, 11-2656, 2012 WL 3631632 (7th Cir. Aug. 24, 2012).

[26] International Franchise Association, *Franchise Opportunities Guide*, Spring/Summer 2014, at 10-11 (citing IHS Global Insight).

SPEAKER BIOGRAPHIES

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Melanie Bootes is Senior Counsel at KFC Corporation in Louisville, Kentucky. Prior to becoming Senior Counsel in 2011, she served in a number of legal roles at KFC since 2003, advising on a broad range of legal issues, including marketing and advertising, regulatory matters, product development/QA, franchising matters and litigation. Melanie began her legal career in 1999 as a litigation associate with the law firm of Greenebaum Doll & McDonald (now Bingham Greenebaum Doll) in Louisville.

Melanie received her B.A. degree in Political Science from Clemson University in Clemson, South Carolina and her J.D. from the Louis D. Brandeis School of Law at the University of Louisville, *cum laude*. Prior to becoming a lawyer, Melanie scheduled programming for school groups at the United States Holocaust Memorial Museum in Washington, D.C., and worked as an editor at the International Association of Amusement Parks and Attractions in Alexandria, VA.

She is dedicated to mentoring the next generation of leaders in business and she often presents on the topics of confidence and career development. She is passionate about running and writing fiction and fully intends to complete the next great American novel by 2020.

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Mr. R. Scott Toop, Esq., has been Senior Vice President, Secretary and General Counsel of The Wendy's Company since January 17, 2012. Mr. Toop served as an Executive Vice President and General Counsel at Tim Hortons Inc. from 2009 to January 2012. He served as head of legal affairs and was responsible for developing of Tim Hortons Inc. He served as the Vice President and Associate General Counsel of Yum! Brands, Inc. from December 2005 to August 2009 and also served as its Assistant Secretary. Mr. Toop served as Vice President and General Counsel of Kentucky Fried Chicken from 1997 to November 2005. Until 1997, he held various senior-level legal positions at PepsiCo, Inc., where he served as Vice President and Division Counsel, Kentucky Fried Chicken; International Counsel; and attorney for Pepsi-Cola Bottling Group. He practiced corporate law as an associate at Donovan Leisure Newton & Irvine. Mr. Toop holds a Juris Doctor degree and Master of Business Administration degree, both from Duke University, as well as a Bachelor of Arts degree from Hamilton College.

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David J. Kaufmann is a founding member and senior partner of New York City's Kaufmann Gildin & Robbins LLP.

David - - partner-in-charge of Kaufmann Gildin's franchise team - - is nationally acclaimed as one of America's foremost franchise lawyers. David has been featured in *The Best Lawyers in America* under the heading "Franchising-New York City" in every edition of that publication since its inception. He was named the inaugural "New York Area Franchise Lawyer of the Year" by *New York* magazine. And *Franchise Times* inducted David into its "Legal Eagle Hall of Fame" (as an attorney who has been dubbed a "Legal Eagle" by that publication each and every year since that honor was first awarded) and named him "one of the very best U.S. attorneys in franchising."

David authored the New York Franchise Act (New York's franchise statute) while serving as Special Deputy Attorney General; serves as an advisor to the organization of federal and state officials responsible for devising and coordinating franchise regulatory activity nationwide - - the NASAA (North American Securities Administrators Association) Franchise Project Group; served as a member of the Governing Committee of the American Bar Association Franchise Forum; served as Chair of the New York State Bar Association Franchise Law Committee; is the *New York Law Journal's* Franchise Columnist; authors the Franchise Practice Commentary appearing in *McKinney's New York Statutes*, which is routinely relied upon by federal and state courts determining franchise disputes involving the New York Franchise Act; and, authored the International Franchise Association's treatise on franchise law, entitled *An Introduction to the Law of Franchising*.

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