FRANCHISEE ASSOCIATIONS TO THE RESCUE – USING ASSOCIATIONS AND ADVISORY COUNCILS TO AVOID JOINT EMPLOYER RISK AND ENHANCE THE BRAND

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Appendix 1

Biographies
I. INTRODUCTION

Nearly 40 years ago, a federal district court in Michigan was called upon to determine whether a group of 12 breakaway franchisees of AAMCO, who were members of the AAMCO Dealers Association, were engaged in a tortious conspiracy. Although the franchisees were ultimately held liable for $412,000 in damages, the case is remembered more for its first impression examination of the legitimacy of an independent franchisee association.\(^1\)

The court determined that as long as the Association did not engage in price fixing or other directly anti-competitive activities, it constituted a lawful vehicle to discuss legitimate business concerns. In so holding, the court added a constitutional dimension to its reasoning, stating that, \(... (f)ranchisees, like all persons in the United States, enjoy the right pursuant to the First Amendment of the United States Constitution to assemble, subject only to those exceptions specifically provided for by statute. Although a franchisee cannot combine with a competitor to fix prices, 15 U.S.C. §1, for example, franchisee gatherings, and joint activities which do not violate the law cannot, standing alone, be actionable.\)

Thirty years later, the Federal Trade Commission issued its Disclosure Requirements and Prohibitions Concerning Franchising, which, among many other changes, require that franchisee organizations that are not created, sponsored or endorsed by the franchisor must be disclosed in Item 20 of the disclosure document, provided they are incorporated or otherwise organized under state law and annually request inclusion.\(^2\) This imprimatur of legitimacy reflected the evolution of thinking in franchising on the role of independent franchisee associations. Here, the FTC was not only endorsing the notion that franchisee associations play a crucial role in presale due diligence by prospective franchisees\(^3\), but that they can and do play a constructive role in a franchise system.

This paper will explore how independent franchisee associations (Associations) and franchise advisory councils (FACs) can and do play a constructive and vital role in franchise systems, not only as a means of reducing joint employment liability and related risks, but also in meeting the internal and external challenges that every franchise system faces on an often constant basis, incentivizing further franchisee investment in the brand, elevating franchisee buy-in and minimizing franchisee discontent and the attendant risk of litigation.

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\(^2\) 16 C.F.R. §436.5(t)(8)(i).

\(^3\) In its Statement of Basis and Purpose, the FTC stated, “The disclosure of trademark specific franchisee associations-both those sponsored or endorsed by the franchisor and independent franchisee associations-will greatly assist prospective franchisees in their due diligence investigation of the franchise offering, thereby preventing misrepresentations in the offer and sale of franchises.” 72 Fed.Reg. 15507.
II. BUILDING BLOCKS

In franchise systems, there are primarily two types of entities through which franchisees, as groups, interact with and communicate with their franchisors. These entities are known as FACs and Associations.4

A. Franchise Advisory Councils

Generally speaking, a FAC is formed by the franchisor to share thoughts on topics identified by the franchisor, which may include then-current issues the system is facing, material system updates proposed by the franchisor or, in the case of systems with regularly scheduled FAC/franchisor interaction, predetermined topics such as marketing. Members may be elected, but more typically members are appointed by the franchisor. A FAC is funded by the franchisor and communications to the system relating to the FAC (and, in particular, any ‘alignment’ between the FAC and franchisor) are made by the franchisor. Accordingly, the common perception is that the FAC is controlled by the franchisor. Furthermore, in some systems, the role of this body is limited in its scope, permitted only, for instance, to deal with issues related to advertising and marketing.

B. Independent Franchisee Associations

Unlike FACs, Associations are independent from the franchisor. They exist as separate entities, funded by their membership, with their own governing rules and often their own legal counsel. A well-organized Association will have an established infrastructure, including a method of communicating directly to the system through regular publications or other means. Membership is voluntary (upon the payment of periodic dues) and is typically limited to natural persons designated by franchise owners to represent such owners at meetings. Although membership is limited, it is not uncommon for attendance at Association meetings to be open to multiple persons from within a franchisee organization. Dues may be assessed based on the number of franchises operated by the member, often times up to a maximum amount set out in the bylaws or membership agreement of the association entity. All of the typical corporate formalities will apply, such as annual meeting, quorum, and voting requirements. The Association sets its own agenda and has unfettered communications with its franchisee constituents. The Association will elect a board of directors who control the activities and are responsible for the governance of the association. The board of directors may appoint an executive director and other officers to be responsible for the affairs and administration of the Association. Most Associations are set up as non-profit entities at the state level although they are not eligible for tax exempt status at the federal level.5

C. Pros and Cons of FACs and Associations

As mentioned above, FACs are generally loosely structured and are supported by the franchisor. As such, they are capable of being assembled and disbanded by the franchisor at its

4 Note that the FTC itself highlighted the material differences between FACs and Associations by mandating the disclosure of all FACs in Item 20, but mandating the disclosure of Associations only if they are incorporated or otherwise organized under state law and annually request inclusion in the franchisor’s disclosure document. See 16 C.F.R. §436.5(t)(8).

discretion. FACs may be particularly useful when the system is presented with an issue requiring specialized knowledge (for example, technology upgrades). Since members may be appointed by the franchisor, the franchisor has the opportunity to hand-pick franchisees with the most relevant experience or insight. Of course, the downside is that rank and file franchisees may perceive members selected by the franchisor to be favored and less inclined to be critical of the franchisor. They may also perceive the franchisor’s communications relating to the FAC to be biased. While a FAC can provide valuable, on the ground insight into the opportunities and challenges of a system, the more common perception among franchisees is that the FAC serves as a “rubberstamp” of the franchisor’s agenda and is often not representative of the wants and needs of the entire franchise system.

By contrast, Associations are self-funded (or, in some cases, partially funded with the franchisor reimbursing for certain costs and/or vendors providing consideration for advertising placed in the association’s publications and attendance at Association sponsored trade shows) and comprised of volunteer or elected members of the franchisee community. Consequently, Associations are outside of the control of the franchisor. As such, they are perceived to offer more honest feedback, both in support and criticism of the franchisor. An Association may attain a higher level of support from its owner members and be in a better position to obtain a seat at the table when it comes to interacting in a meaningful way with the franchisor. Well run Associations will be freethinking and look for opportunities to be proactive in terms of the future of the brand (for example, introducing potential brand initiatives and participating in strategic planning discussions) versus simply responding to the franchisor’s agenda or occupying the more traditional role of providing feedback with respect to system challenges and airing the grievances of rank and file members.

1. Not all FACs and Associations Are Created Equal

Both franchisors and franchisees can align behind the premise that diversity is key to an effective FAC or Association. Diverse Associations and FACs will have leadership that is representative of the various regions in which the brand operates and will be inclusive of single unit operators, multi-unit operators, large operators, veteran operators, new-to-the-system operators and multi-brand operators. Diversity is necessary to prevent Association leadership from focusing on narrow or special interests and to provide insight into how new initiatives will impact the system as a whole. Diversity also lends itself to balance. Inquisitive new-to-the system franchisees may challenge the traditional way of doing things while veteran franchisees can share war stories in support of an established course of action, policy or procedure. Multi-brand operators are able to share best practices across industries. Single unit operators are often the closest to the day-to-day operations of the business and serve as a great resource for providing feedback on initiatives to drive operations excellence. Large operators typically have their eye on the big picture and provide value when it comes to evaluating return on investment. Some Associations have commissioned professionally designed and administered surveys of their franchisee communities to insure that their agendas and initiatives reflect the concerns of their members.

Common impediments to the effectiveness of an Association include the failure of members to routinely elect new leadership, the disproportionate expenditure of resources and energy on grievances and succumbing to the human tendency to resist change simply for the sake of just that, resisting change! The re-election of the same board of directors year after year can result in the Association promoting stale agendas and the increased potential for reigning board members to become self-serving (i.e., promoting agendas that are personally attractive without objectively considering the best interests of the system). Associations that rally around
conflict or oppose everything put forth by the franchisor without exploring compromise, serve as a drain on the system and will be resisted by the franchisor, resulting in fewer opportunities for the Association to be proactively involved in innovation.

D. The Role of Confidentiality Agreements

Whether the franchisor or its parent entity is a publicly traded company or privately held, engaging in transparent dialogue with a FAC or Association presents confidentiality considerations for the system. If the franchisor is publicly traded, the franchisor not only needs to be concerned with the leakage of information that would provide an advantage to competitors (for example, upcoming marketing campaigns, product innovation or market analyses), it will also be concerned with the dissemination of material, non-public information. Accordingly, suggested best practices include development of a standard form of confidentiality agreement to be signed by any FAC or Association member that will be engaged in regular meetings with the franchisor. Among other things, a typical form of confidentiality agreement will help the franchisee collaborator to recognize confidential information, contain a non-disclosure requirement, and include an affirmative notice obligation if the franchisee becomes aware of the misuse or misappropriation of confidential information. A sample form of confidentiality agreement has been attached as Appendix 1.

Some franchisors require that members sign a new form of confidentiality agreement each year, whether or not the brand’s franchise agreement contains adequate language to address confidentiality and regardless of whether the franchisee member has signed the franchisor’s form in prior years of service. The rationale for this belt and suspenders approach is to keep confidentiality as a primary consideration among members.

E. How and When to Commence Communications

There are several schools of thought regarding the appropriate time and the appropriate manner to involve FACs and Associations with respect to issues the system is facing and/or to give the franchisor feedback on system updates or other implementations proposed by the franchisor. On the one hand, if shared too soon, the franchisor may be ill-equipped to answer questions and inspire the confidence necessary to gain the support of the FAC or Association. On the other hand, if the FAC or Association is brought in after the majority of key decisions have been made, the franchisor may not only fail to benefit from relevant and helpful input the franchisees may provide, but the franchisor will also have to sell the change to the system on its own without the benefit of an endorsement from the FAC or Association.

There seems to be a perception (perhaps, more than a perception, more like a conviction) among some franchise attorneys that the formation of a FAC or Association during troubled times is a ‘bad thing’ for the brand. Certainly, franchise owners may be most apt to organize an association during a rocky patch in the franchisee-franchisor relationship in order to confront the franchisor with their complaints or demands, often through litigation against the franchisor, but it may also be a time when the brand as a whole may benefit most from collaboration in the form of open and transparent communications.

Domino’s provides an example of how the creation of a FAC during troubled times turned out to be positive for the brand. In 1995, Domino’s was facing litigation with its franchisees who claimed that the brand was unfairly profiting from supplies sold to the franchisees. To settle the pending lawsuit, Domino’s introduced transparency to its supply chain business and agreed to a profit sharing arrangement with respect to profits above a certain threshold. Possibly more
importantly for the long term success of the brand, the then-current head of marketing and product development for the franchisor simultaneously formed a FAC to focus on the growth of the business. The FAC was instrumental in the rollout of the Domino’s Heatwave® bag, an innovation that kept pizzas hot during delivery and served to propel the business forward.6

Of course, as with most things, the formation of an Association or FAC in advance of turbulence and as a proactive measure to support the growth of the brand is preferred. The next section delves into ways to effectively forge a collaborative relationship.

III. LAYING THE GROUNDWORK FOR A COLLABORATIVE RELATIONSHIP

A. Recognition of the Association

*It was in the fall of 2007 that we came together. Things were not going well. Guest traffic and market share were declining – restaurant profits were anemic. Guest satisfaction was worst in class. And you, our franchisees, were frustrated. We were beaten down – but not beaten. We were failing – but not a failure. But had we allowed ourselves to go forward without change – we would have been both beaten and failed as a chicken QSR chain. Instead – we made the decision to lead bold change – and together we transformed our brand. We created our Roadmap that cited the fundamentals of a great restaurant company. It had four pillars at the time – Build the Brand, Run Great Restaurants, Make More Money, and Accelerate Quality Restaurants. We then began DOING our plan.*7

During the Popeyes 2016 International Franchise Conference, Cheryl Bachelder, then CEO for Popeyes, reflected on the important role that the Popeyes International Franchisee Association (PIFA), played in the turnaround for Popeyes. Ms. Bachelder joined Popeyes in 2007 at a time when the company had gone through four CEOs in seven years and her position had been offered to two other candidates, both of whom politely turned it down. It was a period when same store sales growth was negative and average unit volumes were approximately $400,000 lower than they were by 2016. At that time, the franchisor’s relationship with PIFA was strained to the point of franchisees showing up uninvited at Popeyes board meetings.

So why the turnaround? Collaboration. The Popeyes leadership team not only recognized PIFA as a necessary partner in the turnaround, it went so far as to identify franchisees as its top priority – above shareholders and even above the QSR chain’s guests. Beginning in 2007, the franchisor and PIFA began a journey marked by collaboration that would propel the brand forward.

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7 Cheryl Bachelder, former CEO of Popeyes Lousiana Kitchen, Inc., 2016 Popeyes International Franchise Conference.
B. Success Through Relationship

Simply put, a “relationship” is the way in which two or more people or groups talk to, behave toward, and deal with each other. Collaboration and ultimately success result when both the franchisor and the FAC or Association put the time and effort into building a transparent and genuine relationship. Conversely, when the relationship is defined by a prolonged frustration that a franchisor has not been listening to franchisee concerns, is unwilling to address specific issues, or is perceived as self-serving, incessant conflict often impedes the system from moving forward to implement initiatives crucial to the long-term health of the system.

**PROVEN STRATEGIES FOR ESTABLISHING COLLABORATIVE RELATIONSHIPS**

1. Regular meetings (quarterly has proven successful for some systems) that are scheduled and planned well in advance;

2. Attendance and active participation by the franchisor’s executive leaders;

3. FAC/Association representation that is diverse (i.e., a mix of seasoned and newer franchisees from different regions that represent single unit operators and multi-unit operators, potentially with regional representatives elected by franchisees within a region);

4. A commitment from both groups to keep discussions positive and focused on relevant issues;

5. Collaboration with respect to setting agendas and confirming minutes;

6. Open and transparent communications;

7. Accountability (for example, acknowledgement of the difficulties experienced by franchisees when the roll out of a new brand standard has not gone as planned);

8. Tracking, timely follow-up, and report-outs with respect to franchisee suggestions that the brand agrees to pursue;

9. Orientation for new FAC/Association representatives; and

10. Inclusion of FAC/Association representatives in the brand’s new franchisee orientation programs.

In addition to the above strategies for creating a collaborative relationship, a small number of franchisors are testing the waters to determine the viability of having franchisees serve on the franchisor’s board of directors. In March of this year, Nation’s Restaurant News (NRN) reported that both Bojangles’ Inc. and Famous Dave’s of America Inc. have franchisee operators that serve on their boards. NRN further reported that CKE Restaurants Inc. (Carl’s Jr., Hardee’s) has had franchisees on its board for years. Proponents of the idea (more typically franchisees) argue that

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board participation is warranted given the level of franchisee investment in the company and the brand. They also maintain that it would bolster the effectiveness of the board by including someone familiar with the day-to-day challenges of the system and would help to eradicate the “us versus them” mentality experienced by some brands.

Opponents to the idea of adding franchisees to serve on the franchisor’s board point out that the role of the board is to protect the interests of the shareholders (at least in the case of companies like Bojangles’ and Famous Dave’s which are publically traded), and the interests of the shareholders and franchisees are not aligned. McDonald’s Corp. would seem to agree. Earlier this year Segal Marco Advisors, an investment firm that holds (as trustee) approximately 5,100 shares of McDonald’s stock, advanced a proposal that would enable franchisees to elect their own board member. McDonald’s responded by seeking affirmation from the Securities Exchange Commission (SEC) that it could exclude the proposal from the items to be voted on at the company’s 2017 annual shareholders meeting. The SEC declined to offer a no action letter and McDonald’s appealed. Regardless of the outcome of the appeal, passage of the proposal by existing shareholders seems unlikely given the opposing interests of the two constituent groups. Consider, for example, the common scenarios whereby franchisees lobby the franchisor to increase its investment in the brand, offer incentives and lower fees in contrast to the strict edicts of Wall Street whereby the franchisor is held accountable for its general and administrative expenses and maximizing profit.

The problems associated with a franchisee seat on the board of directors of the franchisor are heightened in those circumstances where the same person is an officer or director of the association. It is difficult to see how such a person could simultaneously carry out his or her fiduciary duties to both the franchisor and the Association. Suppose, for example, that while sitting on the board of the franchisor, the franchisee learns that the franchisor has hired an investment banker and is exploring a merger with or a sale or purchase of all or substantially all of its assets to a competitor of the brand. Or suppose that while attending a meeting of the Association, the franchisee listens to a presentation from counsel to the Association, which is explicitly described as subject to the attorney-client privilege, and which relates to an initiative that the Association would prefer not to share with the franchisor. Although material, these conflicts do not appear to be irreconcilable so long as the appropriate forethought is applied, along with full disclosure and waiver of the potential conflicts.

IV. GOOD RELATIONSHIP ARE GOOD FOR BUSINESS

Regardless of the path to get there, the benefits of a relationship marked with “give and take,” trust and transparency are measurable in dollar signs. As in the case of Popeyes, collaboration can affect the turnaround of a distressed system. In an article published by the Harvard Business Review in October of 2016, the former CEO of Popeyes reflects upon a pivotal point in time when restaurant profits were negligible and the franchisor asked PIFA to support a 1% increase in advertising fund contributions (something the franchisor could not require under the terms of its then-current franchise agreements). PIFA agreed so long as the franchisor would invest $6 million. Despite the fact that the economy was heading for recession and the investment would lower earnings, the Popeyes board of directors approved the investment. As a result of the additional 1% contributed by franchisees and the $6 million contributed by the franchisor, the brand was able to put in place a national advertising program that kick-started the initial recovery.

\[10\] Id.
of the brand. From 2006 to 2015, Popeyes market share increased over 10% and franchisee profitability went from negligible to over 22%.

In the case of Popeyes, the decisions on the part of both the franchisees and franchisor to invest the additional funds was not a blind leap of faith. The decisions were logical conclusions drawn by each party after achieving a mutual understanding of the issues facing the system. As time went on and the recovery continued, the collaborative relationship between PIFA and the franchisor continued and franchisees were incentivized to increase their investment in the brand. By 2016, domestic new store development had climbed to over 120 units per year, of which over 90% of units were developed by existing Popeyes franchisees. Additionally, as result of elevated franchisee buy-in during 2006-2015 timeframe, the system was able to complete a reimage to a new prototype (complete with new signage/trademarks) and add new back-of-the-house systems.

V. CHALLENGES TO MAINTAINING EVEN THE BEST OF RELATIONSHIPS

Franchisors will tell you that when it comes to the franchisor/franchisee relationship, there is no emotional bank account into which a franchisor can make deposits and receive credits. “In franchising you’re only as good as yesterday’s results.” Trust may be short-lived, especially in the event of material turn-over in the structure of the franchisor’s leadership team. Where there is disagreement, it is still up to the franchisor to make a decision and move forward. If, however, the end result follows a collaborative process where the FAC/Association was given an opportunity to voice concerns and offer suggestions or alternatives, franchisee discontent is typically mitigated, reducing the attendant risk of litigation.

VI. FRANCHISE AGREEMENT COLLABORATIONS

A number of franchise systems have engaged in negotiation and collaboration with FACs and Associations over the terms and conditions of their franchise agreements. These negotiations have, generally speaking, been prompted by significant internal and external challenges to the system, including those posed by competition, evolving customer preferences and regulatory changes. In the end, the resulting bargain has tended to defuse tension and controversy within the system and provide a foundation for moving forward on a more concerted basis. Some examples follow.

A. Jackson Hewitt Inc.

The Jackson Hewitt tax preparation franchise system, the second largest tax-preparation chain in the United States, was facing two primary external challenges in 2008 and 2009. First, market leader H&R Block was increasing its share of the tax return business, due in part to powerful advertising and marketing, at the expense of company-owned and franchised Jackson Hewitt locations. Second, regulatory and other challenges to refund anticipation loans were impinging on cash flow.


12 Id.

13 In compliance with Forum policies, the authors disclose that Mr. Karp is counsel to each of the independent associations referred to in this subsection.
The Jackson Hewitt franchise system engaged in two primary internal initiatives in an effort to stem this tide. First, the franchisor proposed that the franchisee community vote on whether it wished to be represented by a FAC formed by the franchisor or by its Association, first formed in 1999. The franchisor agreed to be bound by the outcome of the vote. Representatives of the franchisee community agreed to conduct such a vote, which resulted in a supermajority of franchisees electing representation by the Association. This resulted in a merger between the Association and the FAC and the emergence of a new entity called the Independent Council of Jackson Hewitt Franchisees, Inc. (ICJHF).

Second, representatives of the franchisor and ICJHF then engaged in a year-long negotiation and collaboration over a new franchise agreement which was designed to incentivize existing franchisees to stay in the system and to expand the number of offices they operated. These negotiations involved multiple face-to-face meetings and more than 30 redlined drafts were exchanged. By letter dated December 8, 2010 addressed to the California Corporations Commissioner, the franchisor stated that “Jackson Hewitt and representatives of our franchisees' franchise association have recently concluded negotiations on the form of a new franchise agreement, which Jackson Hewitt is in the process of rolling out to new and existing franchisees.”

The resulting new franchise agreement was offered to each franchisee in the system as an early renewal opportunity, and as an inducement to purchase or open new locations. One of its primary features included an institutionalized and contractual role for ICJHF in the design, implementation and oversight of system standards and the review of a variety of reports and accountings. In addition, it created a series of financial payments that were designed to incentivize franchisees to reinvest in the system.

On the collaboration side, the new franchise agreement provided for a series of subject matter committees in the areas of marketing, financial products, technology, operating standards and the like. Each committee consists of senior executives of the franchisor and representatives chosen by the ICJHF. While the franchisor holds a majority of the member seats on each committee and thus is always in a position to impose its will on the franchisee representatives, there can be powerful incentives to reach a consensus in advance of formal voting. In addition, the new franchise agreement required advanced disclosure of (a) the material terms of any proposed or anticipated merger or acquisition involving the franchise system, (b) revenue derived from required purchases by franchisees, (c) system changes necessitated by developments in statutory or regulatory law or judicial orders or judgments, and (d) costs associated with system changes, including changes to office appearance requirements.

ICJHF was designated as an endorsed Association for the purposes of Item 20 franchise disclosures. In addition, the franchisor agreed to provide updated lists of contact information for all consenting franchisees in the system, to make specified payments to the Association on a quarterly basis to defray the costs of the operation of the Association, and to treat the Association as an intended third-party beneficiary of specified provisions of the new franchise agreement.

Finally, the new franchise agreement reflected significant financial incentives that would be paid to franchisees after each tax season based on their growth in revenue and in the number

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15 See 16 C.F.R. §436.5(t)(8)(i).
of federal tax returns prepared by them. ICJHF was the designated recipient of an annual report including a detailed statement of the calculations of the incentive payments due to franchisees in the system. These incentives provide benefits for both the franchisor and the franchisees, both of whom would benefit by increases in the number of tax returns prepared and the revenue generated by franchisees. The franchisor received additional benefits, including that substantially all of the franchisees in the system became signatories to the same form of franchise agreement. Moreover, it provided economic incentives for franchisees to grow their businesses, which would increase royalty income to the franchisor and provide additional funds for advertising and marketing.


Dale Carnegie is one of the true legacy franchise systems. Its founder, Dale Carnegie, began teaching adult continuing education programs in 1912 and started offering sponsor license agreements in 1930. The company began offering franchises in 2000. There are 190 Dale Carnegie franchisees that operate in 90 countries and deliver training in 25 different languages.

The Dale Carnegie franchise community in the United States was growing modestly and there was a large contingent of international franchisees. The system was characterized by long-term franchise agreements, but there were many different forms of franchise agreements in place. In addition, with the advent of Internet-based training, a consensus needed to be developed as to how the system would adapt and how the revenue from that channel of distribution would be shared. The International Dale Carnegie Franchisee Association (IDCFA) and the franchisor agreed that a new form of franchise agreement should be hammered out so that the system could move forward in a concerted fashion.

The process began with the creation of a term sheet negotiated by the franchisor and IDCFA, which achieved agreement in principle regarding the core business issues facing the system. This included incentives for growth and performance, early renewal opportunities, more uniform worldwide operating standards, Internet-based training, revenue targets and provisions regarding servicing customers who have offices in multiple franchise territories.

After the term sheet was agreed upon, counsel for the Association, and franchisor’s both in-house and outside counsel worked on major revisions to the franchise agreement. The goals were to conform to the term sheet and create other provisions which would amplify the cooperation and collaboration between IDCFA and the franchisor. Another goal was to make the franchise agreement more user-friendly and easier to navigate, increase the use of plain English and reduce the overall length of the document.

The resulting franchise agreement was rolled out at a general meeting of all franchisees, both domestic and international; representatives of the franchisor were specifically invited to be present. The fact that the agreement had been finalized in such a businesslike and cooperative fashion served to energize the franchisee community and provide newfound optimism in the joint efforts of the parties to move this legacy brand forward. It also benefited the franchisor by giving


it new tools to enforce brand standards and having all or substantially all of their franchisees on the same form of agreement. A summary of more than 35 material changes to the franchise agreement was presented on December 6, 2016. A new franchise disclosure document incorporating these changes was issued on December 23, 2016.18

Among those changes included the following:

- initial franchise fees correlated to the potential revenue of the franchisee;
- limitations on changes that could be made to the training curriculum;
- additional territorial protections for franchisees;
- carefully defined revenue targets based on publicly available data;
- service delivery and revenue sharing with respect to customers with more than a specified number of employees or a specified level of expected or potential revenue;
- criteria for territory expansion;
- a progressive royalty rate tied to the extent to which the franchisee exceeded their revenue target;
- extended dates for compliance with computer specifications;
- franchisee involvement in determining compliance with system standards;
- subject matter committees to consult and collaborate with the franchisor regarding system specifications and standards;
- evergreen renewals with materially reduced renewal fees and limitations on the changes that could be made to the franchise agreement upon renewal;
- protections for franchisees upon transfer, including transfer fee discounts;
- guarantees that translation of materials into other languages would not be a profit center for the franchisor;
- limits on required financial reporting; and
- ownership of customer lists.

The franchisor agreed to continue its collaborative relationship with IDCFA that started upon its formation in the 1960s. The franchisor also agreed to encourage all franchisees to become members, to endorse the Association and provide contact information for all franchisees to the IDCFA. As this paper went to press, the new agreement was being rolled out to all franchisees in the system.

C. Wilbert Funeral Services, Inc.

Wilbert Funeral Services, Inc. is a nationwide licensor of funeral vault manufacturers, with 192 licensees in the United States and Canada. Each licensee has a manufacturing facility that uses technology and specifications from Wilbert to fabricate funeral vaults which are sold to funeral homes and similar facilities. In addition, there are more than 60 sub-licensees. Many illustrious and prominent people are buried in their vaults.19

18 See https://www.wdfi.org/apps/FranchiseSearch/MainSearch.aspx?W7chLupbe6bdxbpVm%2fkqw0dkQvMT4ktvLJPhnHMeMxD7QnzvMgFXCFU%2f4PX2pmKGnajhCApd48Iquc5IEcXb32RcHEzwvpq3lZ5wAW9OoZIN2ImcM56GMQ%3d%3d (last visited May 29, 2017).

19 See http://www.wilbert.com/about/history/ (last visited May 29, 2017).
The Wilbert Manufacturers Association (WMA) was formed in 1944 to act as an association of Wilbert licensees. Among its many functions is to represent the licensees in the renewal of their 10 year license agreements, all of which are timed to expire on the same date.

In 2013, after the company had been purchased by a large player in the funeral industry, a proposed license agreement was presented to the licensee community. After that, a prolonged negotiation over the terms and conditions of the renewal license agreement ensued, which concluded in May 2015 with an agreement which was endorsed by WMA. This included numerous drafts and face-to-face meetings. This new license agreement was presented at a general convention of Wilbert Funeral Services, Inc. and representatives of the licensor who had played a role in the negotiations were invited to participate.

The primary features of this negotiated license agreement included the following:

- deletion of the business judgment rule in favor of a mutual covenant of good faith and fair dealing;
- elimination of multiple references to sole and absolute discretion in the hands of the licensor;
- a 10 year term;
- renewal agreements which must be substantially similar to the expiring agreements;
- commercially reasonable minimum sales requirements;
- limits on the designation of core products required to be manufactured;
- standards for granting licensees the right to deliver outside of their territories;
- limits on the right of the licensor to sell funeral vaults inside the territory of the licensee;
- limitations on the use of competitive brands that may be acquired by the license or in the territory;
- standards for acceding to customer preferences on the choice of licensee;
- standards for support of the licensee to be provided by licensor;
- limits on changes to the territory upon renewal;
- standards for the issuance of changes in specifications;
- protection of licensor confidential information;
- pricing of items purchased from the licensor;
- limits on the period of the time during which records must be maintained;
- minimum notice for inspection by the licensor;
- standards for approval of transfer;
- cure periods for defaults;
- limits on the scope of indemnification by the licensee; and
- streamlined dispute resolution provisions

The negotiated agreement received widespread approval within the licensee community, allowing all stakeholders to turn their attention to their businesses. The agreement provided incentives for franchisees, whose business operations are necessarily very capital intensive, to continue to invest in and grow their businesses.

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D. Massage Envy, Inc.

Massage Envy is a three-tier system, with regional developers who are responsible for recruiting franchisees, managing local advertising cooperatives and providing training, support and oversight of unit franchisees. According to its website, Massage Envy has the highest average unit volume in the industry at its more than 1,100 locations.21

In 2011 and 2012, the franchisor and the Independent Association of M.E. Regional Directors, Inc. (IAMERD) had competing concerns. The franchisor desired that regional developers perform additional services that were arguably not required by the terms and conditions of the regional developer agreements then in place in the system. IAMERD and their constituent regional developer members were also concerned about the fact that their regional developer agreements limited them to a single 10 year renewal term.

After considerable discussion, an agreement was negotiated between the franchisor and IAMERD, whereby each party achieved a material portion of their goals.

The franchisor received the endorsement of IAMERD to a document entitled “Regional Operations Standards Review” (ROSR), which contained five leadership pillars with specific tasks, goals and responsibilities to be carried out by regional developers in their regions. These pillars included market development, quality assurance, labor supply, brand growth and operational excellence. Each pillar and the tasks specified under them contained specific points that could be awarded for compliance. These operation standards were the subject of extended discussion and negotiation. Regional developers were required to report their compliance on a quarterly basis, which would then be scored by the franchisor and a rolling total of ROSR points awarded.

The regional developers achieved the opportunity to extend the terms of their regional developer agreements, by receiving two additional years of term for each year during which the standards were exceeded, and one additional year for each year during which the standards were met, for an overall maximum of 10 additional years of term. This had the effect of potentially doubling the available renewal terms available to regional developers.

Each regional developer was given the opportunity to sign an addendum to their regional developer agreement which memorialized terms and conditions of the ROSR. The addendum required that the scoring be conducted in a good faith and nondiscriminatory fashion, based only on the criteria specified in the ROSR. In addition, in the event of a transfer by the regional developer, the transferee would receive the benefit of all additional years of term that were earned by the transferor. Finally, the franchisor agreed that the scores achieved or not achieved under the ROSR would not be a basis to deny renewal or to terminate the agreement for cause. The additional years of term represented an additional commitment of time, effort and money by the regional developers, which benefited the franchisor, permitting it to continue to delegate a wide range of duties to the regional developers, including franchise sales and recruitment and the supervision, training and oversight of unit franchisees.

As regional developers’ initial terms expired, rather than sign a new regional developer agreement, the franchisor agreed that the initial agreement could be extended through an addendum. The form of this addendum was also the subject of negotiation between the franchisor and IAMERD, and included provisions regarding the good faith negotiation of minimum development obligations for regional developers that would apply after the first five years of the renewal agreement.

This is an example of a franchisor and an Association assessing the needs and goals of the other party and finding a common vehicle to give each party at least a portion of what they sought.

E. Popeyes Louisiana Kitchen

Any discussion regarding the franchise agreement in the Popeye’s system must begin with an examination of the culture of that franchise system. One barometer of that culture can be found in the description of its now former CEO, Cheryl Bachelder, as noted above.22

Ms. Bachelder’s executive experience dated to 1995 with Domino’s, a chain which had been plagued by dispute between the franchisor and its franchisees regarding the supply chain. Ms. Bachelder was instrumental in resolving the business dispute by creating an audited system which was more transparent and which shared profits above a certain threshold with the franchisees. During Ms. Bachelder’s tenure at Domino’s, in 1998, Domino’s was sold to Bain Capital for $1.1 Billion.

Upon being appointed CEO of Popeyes, Ms. Bachelder was greeted by a franchisee community that was deeply dissatisfied and an anemic stock price. She and her team decided to focus on unit level profitability in a fashion that never been done before in the system.

This change of focus, together with the agreement to increase the advertising contribution, noted above, provided the foundation for an ongoing positive and constructive relationship between the franchisor and its franchisee community, with benefits to both the franchisees and also to the ownership of the franchisor. During Ms. Bachelder’s tenure, the number of franchise units grew by 33% and the stock price rose by nearly 400%.

In explaining her approach, Ms. Bachelder stated,

The Popeyes turnaround has become a case study in what happens when leaders think about serving others- in this case, our franchisees. Leadership is an active stewardship, not a practice that is solely for your personal benefit. The test of our leadership is simple: are the people entrusted to our care better off?

On a practical level, the franchisor and PIFA have for more than 10 years had a standing committee that discusses proposed changes to the franchise agreement and the franchise disclosure document on an annual basis. A timeline for the review and modification of these documents is provided to the committee and the committee meets multiple times to discuss the proposed modifications. On a number of occasions, provisions have been inserted into the

franchise agreement at the request of PIFA leaders. Once that process has been completed, redlined changes to the franchise agreement and the disclosure document are provided to PIFA's legal counsel for review and comment prior to finalization.

A similar process has been engaged in with respect to material policies and procedures of the franchisor, particularly those relating to transfers, relocation and impact studies based on the proximity of proposed new locations. Typically, when the franchisor has proposed changes to these policies, a redlined version is provided to counsel for review and comment, resulting in well vetted policies and procedures that consider the interests of all stakeholders.

Finally, the system-wide beverage supply contracts, which are a vital concern to the franchisee community, have been negotiated on a joint basis, by PIFA and the franchisor. This has included review and comment regarding requests for proposals, access to analyses of competing bids from beverage manufacturers and joint negotiation of the beverage supply contracts. This thoroughly transparent process has given the franchisee community a high level of confidence that they are getting the lowest possible cost of goods sold and that the other benefits of the supply arrangement are equivalent to those provided to company-owned locations. The result, in contrast to the protracted litigation in the Domino’s system over the supply chain, is that the Popeyes system has not experienced controversy regarding the beverage supply arrangements.

F. Collaboration Can Provide Inoculation

It is the authors’ collective experience that material changes in any franchise system have the possibility of creating friction, conflict and even litigation. While the typical franchise agreement may reserve broad areas of discretion to the franchisor in promulgating such changes, a franchisor that relies solely on its contractual and financial power to impose change is far less likely to get franchisee support and buy-in for the change, and more likely to generate disputes.

An early bankruptcy case provides specific support for this approach. In a 1998 decision of the U.S. Bankruptcy Court in the Central District of California, the court was presented with a claim by a franchisee of the Sizzler Steak House chain that a change in the franchisor’s marketing emphasis violated the implied covenant of good faith and fair dealing. The franchisor had approximately 600 locations in its system, each of which had a grill and a buffet court. Each component of the restaurant had differing results and the franchisor decided to focus less on the buffet court and more on the grill concept. However, before implementing this shift, the franchisor submitted its marketing studies to the National Sizzler Franchisee Association, which issued a report supporting the change, providing detailed and specific reasons for doing so.

The court held that the Franchisor did not violate the implied covenant of good faith and dealing, which it characterized as requiring a party vested with discretion to do so reasonably, with proper motive and not arbitrarily, capriciously or in a manner inconsistent with the reasonable

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23 Queen City Pizza, Inc. v. Domino’s Pizza, Inc., 124 F.3d 430 (3d Cir. 1997).

expectations of the parties. The learning from this decision is that if a franchisor consults with the designated representatives of its franchisee community, and shares with them the data and information that it used in order to make a decision to materially change a component of the franchise system, it cannot possibly have acted in bad faith when it proceeds transparently and collaboratively.

Another example of this can be found in the operation of the Independent Hardee’s Franchisee Association (IHFA) and its relationship with its franchisor. The board of IHFA meets quarterly with representatives of the franchisor, including its chief executive officer, who discusses often highly confidential developments, plans and potential system changes for discussion and review. Presentations by franchisor executives with subject matter responsibilities include those relating to advertising and marketing, supply chain costs, restaurant design and specifications, remodel plans and the like. In this particular system, the franchisor, in collaboration with representatives of IHFA, engaged in a prolonged study of the efficiency of one particular component of the restaurant’s operation. Periodic reports were provided to IHFA as the project progressed, which included significant data regarding alternate design proposals and even videos of tests conducted of various redesign alternatives. In the end, the finished product had the complete confidence of not only the franchisor representatives involved, but also of representatives of IHFA, which resulted in prompt adoption of and compliance with the new designs.

G. System Changes and Initiatives Resulting in Litigation

Franchising has also experienced many decided cases where significant system changes have resulted in protracted, expensive litigation. While franchisors have prevailed in many of these cases, one can argue that winning such a battle does not mean success in the overall campaign to induce franchisees to invest their capital in the effort to expand the franchisor’s brand. These cases illustrate what can happen when system change or initiative is implemented in other than a collaborative fashion or without serious effort to obtain franchisee buy-in.

In a case decided in 1998, the Southern District of Florida examined an implied covenant of good faith and fair dealing claim asserted by a franchisee of Hot ‘N Now, Inc. The franchisee claimed that PepsiCo had purchased this franchise system and “... used the franchise as an experiment to improve the operations of PepsiCo owned Taco Bell restaurants.”. The plaintiff alleged that the franchisor had destroyed the business by materially altering the fast food concept that he purchased. While the franchisor pointed to the language in the franchise agreement that gave it discretion to make decisions regarding the direction of the franchise system, the court nevertheless found that whether it breached the implied covenant of good faith and fair dealing was a question of fact that should be resolved by the jury. Ultimately, the franchisor prevailed, but there is no evidence that the Hot ‘N Now system survived.

In EA Independent Franchisee Association, LLC v. Edible Arrangements International, Inc., an Association representing more than 170 franchisees presented claims involving mandatory purchases from an undisclosed affiliate of the franchisor, undisclosed fees associated with a mandatory online ordering system and associated computer software, new rules requiring longer hours of operation and purchases of goods and supplies from designated vendors. The


District Court of Connecticut denied the franchisor’s motion to dismiss on the basis that the Association, which had apparently only recently been formed in order to pursue the litigation, lacked standing.

Another dispute involving system-wide policies and procedures was litigated in the matter of Great Clips, Inc. v. Levine.\textsuperscript{27} That franchisor instituted a rule requiring that franchisees charge a single price for all haircuts and also mandated that the price be an even dollar amount. The franchisor did not specify what the price should be, however. The court found that the pricing policy did not violate applicable antitrust laws, nor did it trespass on the implied covenant of good faith and fair dealing.

Franchisor mandated pricing policies was the subject of a Seventh Circuit decision in 2012. A five unit franchisee of Steak N Shake Enterprises, Inc., who had been in the franchise system for more than 70 years, balked at the franchisor’s insistence that he adopt their menu and pricing policies. The plaintiff brought a declaratory judgment action against the franchisor asking the court to determine that the franchisor did not have the authority to force this change. Although the franchisor initially agreed not to seek enforcement of the policy during the pendency of the lawsuit, it later changed its mind and threatened the franchisee with termination. The franchisee then sought and received a preliminary injunction against the termination of his franchise agreements. The franchisor appealed and the Seventh Circuit affirmed.\textsuperscript{28}

Carvel Corporation v. Noonan was an appeal from a jury verdict in favor of three franchisees who claimed that the franchisor’s supermarket program tortiously interfered with their relationship with their customers, by inducing those customers not to buy its products from the franchisees, but from the supermarkets.\textsuperscript{29} The verdicts were reversed on appeal, holding that the franchisor’s conduct “which did not constitute a crime or an independent tort and was not aimed solely at harming franchisees, was also not the sort of egregious wrongdoing that might support a tortuous interference claim in the absence of such an independently unlawful act or evil motive.”\textsuperscript{30}

Another system wide pricing issue was the subject of highly publicized litigation in the Burger King chain in 2009 and 2010. The plaintiff was an association comprised of approximately 75% of Burger King’s individual franchisees. The original class action complaint sought to rescind the Burger King mandate that the retail price of the double cheeseburger could not be more than $1.00. The complaint was later amended to include similar claims for other food products. The association alleged that Burger King did not have the authority under the franchise agreements to impose these prices, but that even if it had such a right, it exercised it in violation of the implied covenant of good faith and fair dealing. In holding for the franchisor, the court’s theory appeared to be that a mandatory loss leader is a legitimate business strategy, stating:

\begin{quote}
Plaintiffs rely principally on their allegation that franchisees could not produce and sell (these products) at a cost less than $1.00, and
\end{quote}

\begin{itemize}
\item[\textsuperscript{28}] Stuller v. Steak N Shake Enterprises, Inc., 695 F.3d 676 ( 7th Cir. 2012)
\item[\textsuperscript{29}] Carvel Corporation v. Noonan, 3 N.Y.3d182, 818 N.E. 2d 1100 (New York 2004).
\item[\textsuperscript{30}] 3 N.Y. 3d at 189.
\end{itemize}
therefore that franchisees 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 why a firm selling multiple products may choose to set the price of a single product below cost.31

In another case involving Domino’s Pizza, Inc., the Eighth Circuit reviewed the decision of the District Court of Minnesota’s denial of the franchisor’s motion to dismiss a contract claim involving the franchisor’s proprietary computer system created specifically for all its United States stores.32 The District Court had found that the franchise agreements did not allow the franchisor to require franchisees to purchase the computer system in question. This judgment was reversed on appeal, based on the conclusion that the District Court had read the applicable provisions of the franchise agreements too narrowly.

Our point in reviewing these decisions goes well beyond the merits of the cases and the soundness of the decisions. Each of these cases involved disputes regarding system-wide specifications, policies and requirements which resulted in expensive, time-consuming and counterproductive litigation, irrespective of its outcome. For every franchisor, their best customer for the next franchised location to be developed is an existing franchisee. Today, franchisees have many choices for where they next invest their available capital. Forcing system change, in the absence of discussion, disclosure and an attempt to reach common ground, may result in a short-term litigation victory but irreparable long-term damage to the relationship between the franchisor and its franchisee community.

Note that in at least two of these examples, the franchisor prevailed in litigation with their franchisees but then found it necessary to take very substantial steps to repair the relationship due to the ill will created by the contentious litigation. As noted above, Cheryl Bachelder, during her time at Domino’s Pizza, notwithstanding the company’s success in defeating the claim in court, decided that it was still necessary to find a way to divide the supply chain pie more equitably with the company’s franchisees.

Perhaps an even more noteworthy example occurred when in 1998 the Fourth Circuit reversed a $590 million judgment against Meineke and its then corporate parent arising out of allegations concerning the administration of its advertising fund. The opening line of the decision reads as follows: “This is a case study in the tensions that can beset the franchisor franchisee relationship.”33 Following that reversal, Meineke agreed to negotiate the terms and conditions of its franchise agreement with a representative group of franchisees.

Finally, as we will address in greater detail in the next section, the joint employment cases necessarily focus on the extent to which the a franchisor has or does not have the authority to make hiring, firing, wage and staffing decisions with respect to employees of their franchisees. However, in many of the joint employer cases, and in filings by the National Labor Relations Board, there is often a lengthy examination of the myriad ways that the typical franchise

32 Bores v. Domino’s Pizza, Inc., 530 F. 3d 671 (8thCir. 2008).
agreement exerts control over nearly all aspects of the operation of a franchise location. To the extent that a franchisor engages in negotiation over the terms and conditions of those franchise agreements, or the terms and conditions of policies which govern certain aspects of the relationship, or the nature, extent, cost and benefit of changes to system standards, specifications or policies, it may reduce the likelihood that a court will focus on that pervasive control, and thus the risk that it will permeate its decision regarding joint employment or vicarious liability.

VII. SUPPORT IN THE LAND OF JOINT EMPLOYER CONCERNS

It is no secret in the franchising community that the past few years have seen a number of lawsuits and changing standards regarding joint employer liability. With these developments has also come concern among many franchisors about how to avoid crossing the line from a franchisor-franchisee relationship into a joint employer relationship. For franchisors wishing to provide true turnkey business opportunities to their franchisees, and to ensure that franchisees are complying with applicable laws in all areas of their businesses, this balance has become a difficult one to perfect, particularly as it relates to employment, human resources, and day-to-day operational issues. Many franchisees originally purchase franchises specifically because they expect to be provided with guidance on all aspects of their businesses, including the hiring, training, discipline and firing of employees, as well as other day-to-day issues. However, many franchisors are now hesitant, or will refuse, to provide any guidance on these types of issues in order to avoid a joint employer designation. Franchisees, then, may be left without proper guidance in these important aspects of business operations, and those franchisees without the funds to hire private consultants or attorneys may end up violating the law, which in turn may reflect negatively on the entire franchise system.

This difficulty creates an opportunity, however, for enhanced collaboration between franchisors and Associations to provide meaningful support to franchisees, while avoiding the threat of joint employer liability for the franchisor. Where Associations can provide this information and training to franchisees, the system will benefit from informed franchisees who are able to pool their (and perhaps even the franchisor’s) resources into providing and attending professional trainings to help franchised businesses operate efficiently and lawfully.

34 For example, in its originally published McDonald’s Fact Sheet, the NLRB states, “Our investigation found that McDonald’s USA, LLC, through its franchise relationship and its use of tools, resources and technology, engages in sufficient control over its franchisees, operations, beyond protection of the brand, to make it a putative joint employer with its franchisees, sharing liability for violations of our Act.” Available at http://web.archive.org/web/20150112130023/http://www.nlrb.gov/news-outreach/fact-sheets/mcdonalds-fact-sheet (last visited on July 30, 2017).
A. Areas of Concern

Cases such as Browning-Ferris, Freshii, and Ochoa have provided some insight for franchisors into the type of involvement in franchisees’ businesses that could trigger a joint employer label for the franchisor. For example, in the Freshii case, the NLRB looked at several factors in determining that the chain didn’t play a significant role in human resources issues like discipline, hiring or firing employees of franchisees, and suggested some best practices for franchisors.

In that case, while the franchisor provided guidance on human resource matters, the franchisee had the power to decide whether to adopt the franchisor’s personnel policies, and the franchisee had, in fact, created its own employee handbook with its own personnel policies. In addition, the franchisor had no involvement in hiring, firing, disciplining or supervising the franchisee’s employees, nor was it involved in their compensation or work schedules. The franchisor’s pre-opening training programs dealt primarily with restaurant operations, and not employment matters. The franchisor’s monthly field reviews were limited to inspecting the franchisee’s adherence to the franchisor’s mandatory brand standards. Finally, despite the franchisee’s request for advice on its employees’ organizing efforts, the franchisor remained silent and did not instruct the franchisee on how to respond.

Freshii and similar cases since then, provide valuable guidance for franchisors as to areas in which they should consider taking a hands-off policy when it comes to the operation of the franchises by their franchisees. These cases, however, do little to resolve issues arising from the need of franchisees to obtain advice or guidance and take action on employment and labor matters.

B. Associations to the Rescue

This dead zone of support and guidance for franchisees can, and arguably should, be filled by Associations. Associations can be leveraged by franchisors to find the sweet spot between providing employment and human resources support to franchisees and joint employer peril.

In a recent Franchise Law Journal article, Drafting Franchise Agreements After Patterson v. Domino’s: Avoiding the Minefield of Vicarious Liability and Joint Employment, the authors pointed out quite a few areas where franchisors should step back from providing mandatory advice or guidance to franchisees. Instead, the authors recommended either providing suggestions or guidelines that are neither stated to be nor implied to be mandatory and/or referring franchisees out to third party advisors, including attorneys and consultants. For example, regarding employee training, the authors point out that “[m]ature franchise systems with independent franchisee associations should consider establishing training programs conducted under the auspices of the association.” They further note, regarding employment matters, “...
franchisors should reconsider providing sample employee manuals to be distributed to franchisee’s employees; imposing personnel policies or procedures on the franchisee; and becoming involved in the hiring, firing, scheduling, compensation, review, discipline, promotion, demotion, or other supervision of franchisees’ employees. Some franchisors have moved in the direction of instead approving third party human resource companies to provide guidance to franchisees.38 The authors also point to the importance of obtaining third party advisors who are experts in employment and human resources matters, noting that “[f]ranchisees should [] be instructed early in the relationship to secure the services of their own labor and employment law/human resources advisor. Some franchise systems have designated outside vendors to provide these services to franchisees on an optional basis.”39 The implementation of these types of services and assistance to franchisees can often be done effectively under the umbrella of the Association.

1. Collective Knowledge

The first way that Associations may fill this knowledge gap is simply by tapping into the combined knowledge of its franchisee members. Associations can create value for their members by creating member advisors to provide information to other franchisees about best practices for day-to-day operations. This might include issues like money management, store closing procedures, security, and delivery driver routing and guidelines. More experienced franchisees can offer themselves to newer members to answer these types of issues on which franchisors may be hesitant to advise. In turn, the Association may be able to provide valuable feedback from these interactions to the franchisor on best practices to include in voluntary brand standards manuals.

2. Go to the Experts

For employment and human resources matters, Associations should consider hiring professional consultants or attorneys to provide advice to members. Human resources consultants may provide advice on issues such as: employee engagement and customer service; hiring, firing and other sticky human resources issues; online job posting and applicant tracking; and labor management for businesses like restaurants utilizing point of sale systems. Labor and employment attorneys can also be consulted to provide wage and hour compliance training to franchisees.

3. Win-Win-Win

This expanded role of the Association creates benefits for all parties involved. The franchisee benefits from access to instruction and guidance from more experienced franchisees, as well as professional attorneys and consultants, on difficult issues that often arise during the operation of a business. The franchisor benefits from having well-informed franchisees that are receiving, or at least have access to, expert guidance on important issues such as employment and human resources matters. While franchisors may not want to provide advice on these issues, when violations of employment or discrimination laws arise, for example, these can reflect poorly on the entire franchise system. Finally, the provision of these types of services benefits the Association by allowing it to provide a valuable service to both franchisee and franchisor, cementing its position as a positive force in the franchise system. By working with franchisors to

38 Id. at 209.
39 Id. at 218.
avoid joint employer liability while advising franchisees on compliance with laws and best practices, Associations can increase their worth to the franchisor and their association members.

C. Real World Examples

This concept of greater involvement by Associations in aspects of the franchise relationship that for the franchisor may be joint-employer infested waters has been put into practice by a number of franchise systems already. In more established systems, Associations are providing both protection to franchisors and valuable services to franchisees for aspects of their business operations of which it would be legally safer for the franchisor to steer clear.

1. Subway’s Amended Deal with DOL

Expanding upon a relationship started in 2012, wherein Subway has made available a platform for the United States Department of Labor (“DOL”) to provide training and resources to franchisees, and after a number of wage and hour claims at Subway’s company-owned stores and franchised outlets, Subway entered into a voluntary compliance agreement with DOL in July 2016.\(^{40}\) Pursuant to this agreement, Subway and the DOL agreed to work together to provide “compliance assistance and training materials” for franchisees; develop “compliance support for franchisees through data-sharing and technology”; host “meetings to share information, evaluate compliance trends, and solve problems”; communicate to franchisees “about responsibilities to comply with the investigative process”; and emphasize to franchisees the “consequences for FLSA noncompliance.” DOL Wage and Hour Division Administrator David Weil at the time reported that the two sides in the negotiations each had non-negotiable goals, which the settlement sought to meet. Subway’s goal was to avoid any possible added risk of Fair Labor Standards Act joint employer liability. DOL’s goal was to keep its enforcement authority over Subway’s franchisees.

This agreement should signal to franchisors that they do have skin in the game when it comes to wage and hour compliance of their franchisees. However, there remains a question as to how Subway can properly provide the type of promised training, assistance, and oversight discussed above without treading into dangerous joint employer territory. The answer for Subway may be to involve their Association in providing this support, which some other systems have begun to do successfully, as shown by the 7-Eleven example below.

2. 7-Eleven Wage and Hour Seminars

One possible solution to the Subway conundrum discussed above, and an example of this type of cooperation, can be found in the 7-Eleven franchise system. In that system, 7-Eleven, Inc. (“SEI”) agreed to work in conjunction with the National Coalition of Associations of 7-Eleven Franchisees (the “National Coalition”) to provide training and legal advice to franchisees regarding wage and hour issues.\(^{41}\) Commencing in 2016, the National Coalition, employed the services of a national labor and employment law firm to provide training for franchisees in the form of presentations at the Association board meetings and conventions, franchisee owner meetings,


and articles written in the Association’s newsletter. Furthermore, the law firm is available to
regional owners’ groups for one-hour seminars on labor and employment matters specific to the
states in which those owners operate their businesses.

To make these services even more appealing to the members of the association, the
seminars and other advice are being provided free of charge to franchisees, with the franchisor
footing the bill. Furthermore, the attorney-client privilege in meetings and seminars with the
employment and labor law attorneys run only between the attorneys and the relevant franchisee,
meaning that franchisees may ask questions and speak openly with these advisors without fear
of retribution or other negative backlash from the franchisor. To remove fear of franchisor
involvement in these interactions even further, the franchisor is not informed in any way of the
identities of the franchisees attending the seminars or meetings.

Today, nearly a dozen such seminars have been conducted in various cities around the
country. Franchisee input indicates that the seminars fulfilled a demonstrated need for a qualified
advice and that franchisees were very satisfied and grateful for the opportunity to attend. While
this identical model of providing wage and hour seminars to franchisees may not work perfectly
for all franchise systems, all franchise systems could benefit from the use of the Association as a
safe zone for franchisees and a vehicle for providing these valuable services.

VIII. CONCLUSION

The authors of this paper may not all agree on whether it is in the best interest of a
franchise system to delete the business judgment rule from the franchisor’s form of franchise
agreement, require renewal agreements to be substantially similar to expiring agreements, or
limit the number of required core products or services. In fact, they may or may not agree on the
point where healthy collaboration gives way to stalemate and other inefficiencies. Quite likely,
neither will many franchisors and franchisee representatives. That doesn’t matter. It is the authors’
collective experience that the collaborative process, premised on transparent and genuine
communications (complete with differences of opinion), lends itself to a better result for both
franchisors and franchisees (for example, the financial rewards, inoculation from protracted and
expensive litigation and innovative solutions – all as discussed above).

It seems that the authors are not alone in their experiences or opinions either, as the
franchise industry has progressed significantly since the federal district court in Maryland first
examined the legitimacy of associations. A quick search of the internet will produce a plethora of
articles espousing the virtues of collaboration between franchisors and associations, some from
the investment perspective,42 some from the purchasing perspective,43 and others, such as the
case in the joint employer context discussed above, from the perspective of adaptation and
innovative solutions. It is the hope of the authors that the current trend will continue, especially in
the context of solution based adaptations that spot-light the franchising industry as a leader from
a profitability and image perspective.


CONFIDENTIALITY AGREEMENT

THIS CONFIDENTIALITY AGREEMENT (the "Agreement") is made as of ______________, 201__ by and between the undersigned member of the _____________ [franchisee association] [franchise advisory council] ("MEMBER") and ____________________ ("Franchisor").

1. Purpose. MEMBER wishes to participate in meetings and discussions in which Confidential Information (as hereinafter defined) may be disclosed to MEMBER. MEMBER may be furnished such information by FRANCHISOR or its agents and representatives, or by other members, for the purpose of advancing discussions related to the ________ system. MEMBER may receive Confidential Information from FRANCHISOR in between regularly scheduled meetings via email, internet access, telephonically, or through other communications.

2. Definitions. As used in this Agreement:

"Confidential Information" means:

(a) any information in any form that relates to Franchisor’s business (and that of its parent, subsidiaries and affiliate companies, suppliers and customers), that is not generally known, including not generally known to ______________ franchisees that are not members of the [franchisee association] [franchise advisory council]. Examples include, but are not limited to, product or service specifications or strategies, marketing plans, employee information, pricing information, financial information, information relating to business plans, information relating to proposed changes to the ________ franchise system, brand initiatives, supply chain information, franchise data and evaluation, contracts, research, recipes, formulas, processes, technology, technical documentation and any other know-how or information which is identified as confidential at the time of disclosure or shortly thereafter; and

(b) any memorandum, analysis, compilation, summary, interpretation, study, report or other document, record or material that contains, reflects, interprets or is based directly or indirectly upon any information of the type referred to in clause “(a)” of this definition (collectively, “Analyses”).

Confidential Information does not include information which the MEMBER can show: (i) was in MEMBER’s possession at the time of disclosure as shown by MEMBER’s files and records immediately prior to the time of disclosure; provided that the source of such information was not bound by a confidentiality agreement with respect to such information or was not otherwise in violation of any applicable legal requirement with respect to the disclosure of such information; (ii) prior to or after the time of disclosure, becomes generally available to the public, not as a result of any inaction or action of MEMBER; (iii) is approved in writing for release by Franchisor; or (iv) is independently developed by MEMBER.

“Person” shall mean any individual, corporation, limited liability company, partnership, or other business entity, tribunal or governmental authority.
3. **Nondisclosure of Confidential Information; No Liability.**

   (a) MEMBER agrees to maintain in trust and confidence the Confidential Information disclosed to MEMBER hereunder, and to not use such Confidential Information for MEMBER’s own personal use or for any purpose except to carry out internal discussions related to MEMBER’s role with the [franchisee association] [franchise advisory council] as it relates to the __________________ system. Subject to Section 4 below, MEMBER will not disclose any Confidential Information to third parties outside of internal discussions related to the __________________ system. MEMBER agrees to take all reasonable measures to protect the secrecy of the Confidential Information and to prevent it from falling into the public domain or the possession of Persons other than those Persons authorized to have any such information, which measures shall include the highest degree of care that MEMBER utilizes to protect its own confidential and privileged information. MEMBER agrees to notify FRANCHISOR promptly in writing of any misuse or misappropriation of Confidential Information which may come to MEMBER’s attention.

   (b) The obligations of MEMBER apply individually, and without regard to whether or not MEMBER continues to be involved in the __________________ system.

4. **Mandatory Disclosure.** In the event that MEMBER becomes legally compelled under federal, state or local laws or in a proceeding before a court, arbitrator or administrative agency to disclose (A) any portion of the Confidential Information, or (B) that such Confidential Information has been made available to MEMBER, then such MEMBER will provide FRANCHISOR with prompt advance notice (to the extent permitted by law) of such legal compulsion and its intent to disclose any Confidential Information, and shall delay disclosure, if and to the extent practicable, until FRANCHISOR has an opportunity to seek a protective order or other appropriate remedy or to waive compliance by MEMBER with the relevant provisions of this Agreement.

5. **Return of Materials.** Promptly upon request by FRANCHISOR, MEMBER shall deliver to FRANCHISOR any written Confidential Information and all copies or modifications thereof within MEMBER’s possession and control. Any Confidential Information and any modification thereof that is not returned to FRANCHISOR shall as soon as practical be destroyed and no copy thereof shall be retained. MEMBER shall, upon request by Franchisor, certify in writing that such destruction has occurred. Notwithstanding the return or destruction of Confidential Information pursuant to this Section 5, MEMBER will continue to be bound by the confidentiality obligations and other obligations under this Agreement.

6. **Term.** The covenants and commitments of MEMBER in this Agreement shall survive and shall continue for a period of three (3) years after the date of final disclosure of Confidential Information hereunder.

7. **Waiver and Amendment.** No failure or delay by FRANCHISOR in exercising any right, power or privilege under this Agreement will operate as a waiver thereof, and no single or partial exercise of any such right, power or privilege will preclude any other or future exercise thereof or the exercise of any other right, power or privilege under this Agreement. No provision of this Agreement can be waived or amended except by means of a written instrument that is validly executed on behalf of each of the parties and that refers specifically to the particular provision or provisions being waived or amended.
8. Governing Law and Jurisdiction. This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of _______ (without regard to principles of conflict of laws).

9. Remedies; Severability. MEMBER shall indemnify and hold harmless FRANCHISOR against and from, any damage, loss, claim, liability or expense (including legal fees and the cost of enforcing FRANCHISOR’ rights under this Agreement) arising directly or indirectly out of or resulting directly or indirectly from MEMBER’s unauthorized use or disclosure of any Confidential Information or any other breach of this Agreement. MEMBER agrees that the obligations hereunder are necessary and reasonable to protect FRANCHISOR, the ______________ system, and other franchisees of the ___________ system, and expressly agrees that monetary damages may be inadequate to compensate the affected party for any breach by MEMBER of any covenants and agreements set forth herein. Accordingly, MEMBER agrees and acknowledges that any such violation or threatened violation may cause irreparable injury to FRANCHISOR and/or other franchisees of the ___________ system and that, in addition to any other remedies that may be available, in law, in equity or otherwise, FRANCHISOR shall be entitled to obtain injunctive relief against the threatened breach of this Agreement or the continuation of any such breach, without the necessity of proving actual damages.

10. Material Non-Public Information. MEMBER hereby acknowledges that it is aware that United States and Canadian securities laws prohibit any person who has material non-public information about ___________ from purchasing or selling shares of __________________________. Individual agrees to comply with all applicable laws in this regard.

11. Counterparts; Entire Agreement. This Agreement may be executed in any number of counterparts, each of which shall be an original, but all of which together shall constitute one and the same instrument. Delivery of an executed counterpart of a signature page to this Agreement by facsimile, electronic mail and any other electronic transmission (including PDF) shall be effective as delivery of a manually executed counterpart of this Agreement. Subject to ongoing confidentiality obligations arising under any ______________ franchise agreement to which MEMBER is bound, this Agreement constitutes the entire agreement between MEMBER and FRANCHISOR regarding the subject matter hereof and supersedes any prior agreement between the parties with regard to the specific subject matter hereof.
IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first above written.

FRANCHISOR

____________________________________
By:__________________________________
Name:_______________________________
Title:_______________________________

MEMBER

Print Name:_________________________
Erin E. Conway

Erin Conway is a partner at Garner & Ginsburg, P.A. in Minneapolis, MN. She focuses her practice on assisting franchisees and dealers resolve their disputes with franchisors. Erin has assisted franchisees in all stages of their franchise relationships, including reviewing franchise agreements and franchise disclosure documents for prospective franchisees, drafting franchise agreement addenda, negotiating agreement changes with franchisors, and helping franchisees exit their franchise relationships as smoothly as possible.

Erin currently serves as an editor of The Franchise Lawyer, has had multiple articles published in the Franchise Law Journal, and presented at the American Association of Franchisees and Dealers 2017 Franchisee Leadership Summit. In 2016, she was awarded the American Bar Association Forum on Franchising’s Chair’s Award for Substantial Written Work for an article she co-authored on joint employer and minimum wages issues. In 2013, Erin received the Rising Scholar Writing Competition Award from the Forum for an article on the enforcement of disclaimer provisions in franchise documents.

Erin is a 2012 graduate of the University of Minnesota Law School, where she served as an editor of the Minnesota Law Review. She did her undergraduate work at Duke University.
Eric H. Karp

Eric H. Karp serves as counsel to numerous franchisee associations and has represented franchisees throughout the country in myriad franchise issues.

He has been selected for inclusion in The International Who’s Who of Franchise Lawyers, as a Legal Eagle by Franchise Times, one of America’s Leading Franchise Lawyers by Chambers USA, and a New England Super Lawyer by Boston Magazine.

Since 1996, Mr. Karp has served on the Franchise Project Group of the Franchise and Business Opportunities Committee of the North American Securities Administrators Association. He has been a presenter at the ABA Forum on Franchising and the IFA Legal Symposium, served as the Editor-In-Chief of The Franchise Lawyer from 2008 to 2010, is Chair of the Forum’s Governing Committee.

Mr. Karp served on the Board of Directors of the American Franchisee Association for ten years. He also served as Chair of the AFA Model Responsible Franchise Practices Act Committee, was the principal author of the Model Act and served as the Program Chair of the 1999 AFA Franchisee Legal Symposium. He was Co-Chair of the 2009 Annual Meeting of the American Association of Franchisees & Dealers and served on the AAFD’s Fair Franchising Standards Committee.

In June, 1994 Mr. Karp testified before the U.S. House Small Business Committee on "Self Regulation of Franchising: The IFA Code of Ethics" and was an elected delegate to the 1995 White House Conference on Small Business.

Mr. Karp is a graduate of Boston University and Boston University School of Law.
Brenda Beerman Trickey

Brenda Trickey serves as Head of Legal for Popeyes Louisiana Kitchen, Inc. Popeyes was founded in New Orleans in 1972 and is the world's second largest quick-service chicken concept (based on the number of units). Popeyes has over 2,600 stores in 48 states and 25 countries. Popeyes distinguishes itself with a unique “Louisiana” style menu that features spicy chicken, chicken tenders, biscuits, fried shrimp, red beans and rice and other quick-service menu items. Prior to joining Popeyes in 2009, Brenda served as Vice President & Senior Counsel with Marriott International, Inc., in Bethesda, Maryland. Prior to her position with Marriott, she was a partner at McGuire Woods, LLP, in Charlottesville, Virginia. Brenda received her JD with Honors from the University of North Carolina at Chapel Hill and her B.A. in Political Science with Criminal Justice Concentration from North Carolina State University. She resides in Atlanta, Georgia where she is actively involved mentoring high risk youth.