FUNDAMENTALS 201

GUARANTIES AND OTHER FRANCHISEE OWNER UNDERTAKINGS: NEGOTIATION, DRAFTING, AND ENFORCEMENT ISSUES

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October 15 – 17, 2014
Seattle, WA

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### TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>II. GUARANTIES AND OTHER UNDERTAKINGS – PURPOSE AND GOAL</td>
<td>1</td>
</tr>
<tr>
<td>A. Guaranties</td>
<td>1</td>
</tr>
<tr>
<td>1. Spousal Guaranties</td>
<td>3</td>
</tr>
<tr>
<td>2. Related Entity Guaranties</td>
<td>4</td>
</tr>
<tr>
<td>3. Other Parties to Guaranties and Undertakings</td>
<td>5</td>
</tr>
<tr>
<td>B. Non-Competition, Non-Disclosure and Confidentiality Obligations</td>
<td>5</td>
</tr>
<tr>
<td>C. Other Personal Undertakings</td>
<td>6</td>
</tr>
<tr>
<td>1. Arbitration</td>
<td>6</td>
</tr>
<tr>
<td>2. Powers of Attorney</td>
<td>6</td>
</tr>
<tr>
<td>3. Franchisee Questionnaire</td>
<td>7</td>
</tr>
<tr>
<td>4. Lease</td>
<td>7</td>
</tr>
<tr>
<td>5. Indemnification and Release of Franchisor</td>
<td>7</td>
</tr>
<tr>
<td>6. Transfer Restrictions</td>
<td>7</td>
</tr>
<tr>
<td>III. NEGOTIATING GUARANTIES:</td>
<td>7</td>
</tr>
<tr>
<td>ALTERNATIVES TO FULL GUARANTIES</td>
<td>7</td>
</tr>
<tr>
<td>A. Limited Financial Guaranties</td>
<td>8</td>
</tr>
<tr>
<td>B. Net Worth Covenants and Debt Load Restrictions</td>
<td>8</td>
</tr>
<tr>
<td>C. Other Forms to Recover Franchisee's Debt</td>
<td>9</td>
</tr>
<tr>
<td>D. Non-Financial Performance Guaranties</td>
<td>9</td>
</tr>
<tr>
<td>IV. INTERNATIONAL CONSIDERATIONS IN OWNER UNDERTAKINGS</td>
<td>10</td>
</tr>
<tr>
<td>A. Guaranties and Undertakings in the International Context</td>
<td>10</td>
</tr>
</tbody>
</table>
B. Enforcement in the International Context ..........................................................10

V. ENFORCEMENT OF AND DEFENSES TO PERSONAL GUARANTIES ..........11
A. Equitable Defenses to Enforcement of Guaranties ..........................................12
B. Statute of Frauds: Must Sign to Bind? ............................................................14
C. No Proper Notice ............................................................................................17
D. Scope of the Guaranty: Not All Debt Included .............................................18
E. Defenses/Claims of the Franchisee Company ................................................19
F. Lack of Consideration .....................................................................................21
G. Breach of Franchisor's "Duty" to Guarantors ..................................................22

VI. ENFORCEMENT OF NON-COMPETES AND OTHER COVENANTS ........23
A. Enforcement Against Franchisee Owners Who Executed Non-Competes .........23
B. Enforcement Against Non-Signatories ............................................................26
C. Contempt: Enforcement of Injunctions Against Non-Signatories of Non-Competes .................................................................28
D. Enforcement of Arbitration Provisions Against Non-Signatories .................29

VII. CONCLUSION .....................................................................................................29

VIII. BIOGRAPHIES ..................................................................................................31

SAMPLE FORM – SIMPLE GUARANTY .................................................................. TAB A
I. INTRODUCTION

In negotiating a franchise agreement, the parties have the same ultimate goal—the franchisor wants to add a new location and the franchisee wants to open a new location. The parties’ shared goal quickly diverges, however, when the franchisor conditions the deal on binding third parties—usually the individual franchisee owners or related entities—to the franchise agreement or aspects of it. While the franchisor considers this to be nothing more than a prudent business practice, the franchisee (and certainly the third parties to be bound) views this as a request for a blank check from non-parties. As a result, some of the toughest negotiations usually center on whether, and the way in which, these third parties will be bound. It is common for the franchisor to seek both financial and performance guaranties or agreements from franchisee owners and, to a lesser extent, certain other third parties. The performance agreements usually relate to noncompetition, confidentiality, and transfer obligations of the franchisee. While a perfect world for the franchisor would include full financial and performance commitments, in some limited circumstances, the franchisor may entertain alternatives to traditional full guaranties. International transactions create added complexities to this issue.

This paper will discuss the basics in both financial and performance personal guaranties and undertakings, points to consider when negotiating matters related to personal liability, and case law developments and other enforcement issues.

II. GUARANTIES AND OTHER UNDERTAKINGS – PURPOSE AND GOAL

A. Guaranties

Black's Law Dictionary defines a guaranty as a "collateral agreement for performance of another's undertaking." A guaranty, like any contract, requires mutual assent, adequate consideration, definiteness and a meeting of the minds. Under most states' statute of frauds, a guaranty must be in writing, signed by the guarantor(s) and delivered to the creditor. Because the guaranty cannot exist without a primary debt obligation, if the primary obligation has been fully satisfied, is void or is illegal, a guaranty of the debt may be deemed unenforceable.

Within the realm of guaranties, there are many varieties. The two general categories are performance guaranties and financial guaranties. Under a performance guaranty, the guarantor commits to the performance of the franchisee, which virtually always includes financial performance. Financial guaranties are commitments to the financial obligations of the franchisee. Within financial guaranties, the variations can generally be classified into two types: a parallel arrangement for payment in the first instance (known as absolute guaranties) and those creating a secondary obligation for collection of amounts due (known as conditional guaranties). A guaranty is absolute when it imposes an obligation on the guarantor to pay in the event of a default by the company under the relevant agreement or arrangement. If there are no limitations or conditions set forth in the contract, the guarantor may be called upon to pay

the debt of the company without first having to seek collection of the debt from the company. A conditional guaranty, on the other hand, requires some condition to be satisfied prior to triggering the guarantor’s liability. A common condition is the requirement to undertake to collect the debt from the company, including litigation, before the guarantor becomes liable for the obligation.²

In the franchise context, a discussion of personal guaranties generally means unconditional performance (including financial performance) guaranties. The franchisor almost without exception will seek a personal guaranty from the franchisee owner(s) that the individual(s) will answer for the company’s obligations if the franchisee (as the initially liable party) fails to pay either the franchisor and/or the franchisor’s affiliates.³ There can be little doubt that such an agreement negates at least some of the reasons that franchisees (and other business owners) are cautioned to create corporate entities in the first place. Nevertheless, requiring the individual owner(s) to pay debts of the corporate franchisee serves several purposes.

First, it provides the franchisor with some financial safeguards because in many cases the franchisee is a newly-created company that has little assets (and, many times, little experience). A guaranty reduces a franchisor’s risk in this regard because it can collect any unpaid debts of the franchisee from the personal assets of the franchisee owner, increasing a franchisor’s profitability. Second, requiring the franchisee owner to execute a personal guaranty makes certain that the individual has some “skin in the game.” A company without a personal guarantor and with few (or no) other assets could easily close up shop during bad times and leave all of its creditors without any recourse. It is far more likely that an individual who knows that he will answer for his company will be incentivized to keep the business running—and running responsibly. Finally, in many cases, the decision to grant a franchise is based upon the franchisee owner (and due diligence performed on that individual). Requiring a personal guaranty helps to ensure this individual will remain active with the franchise location.

→Practice Tip. A franchisee owner being asked to sign a personal guaranty should understand the depth and breadth of such an agreement. For instance, the guaranty agreement may require the individual owner to pay the debts incurred not only to the franchisor, but also to any affiliated entities.

In some cases, a franchisor may ask all owners to sign personal guaranties regardless of ownership. In other cases, only majority owners, owners with a certain threshold of ownership, or owners who actually operate the unit will be required to provide a personal guaranty. A franchisor may require a full performance guaranty from the primary owners along with non-compete agreements from those involved in the operation of the business. The specific requirements of any franchisor will depend on the franchise system and its legal and business interests.

² This concept is similar to a “collection guaranty,” which is typified by a guarantor’s promise that if the creditor cannot collect the claim with due diligence, usually after suit (and exhaustion of remedies) against the debtor, the guarantor will pay the creditor.

³ Attached as Tab A is a sample form guaranty.
If there are several owners signing personal guaranties, they are co-guarantors, whose liability is (unless specified otherwise) joint and several. Joint liability means that the co-guarantors are each liable for the full amount of the guarantied debt, regardless of their actual ownership interest in the company. As a result, the franchisor can pursue one of the guarantors solely for the full amount of the debt. This would leave the pursued guarantor (who pays the full liability) to seek reimbursement from the co-guarantor(s).

Additionally, guaranties generally include a provision that the franchisor can reach various types of arrangements with the franchisee to settle or reduce amounts owed to the franchisor, but the franchisor is still entitled to pursue the guarantors for the full outstanding debt. Therefore, a guarantor should at all times work closely with the franchisee entity to ensure that any settlement or arrangement with the franchisor does not adversely affect the personal guarantor (or at least not without the guarantor understanding the exposure under such a scenario).

Along the same lines, it is unlikely that a franchisor will allow an individual who has personally guaranteed the debts of the franchisee entity to be released from that obligation during the term of the franchise agreement, even if the individual is no longer affiliated with the company (unless the franchisee is able to present a replacement guarantor of similar creditworthiness). This issue may also arise in the context of a spouse who is asked to execute a personal guaranty solely because of his/her marital status to one of the franchisee owners. If the couple divorces, for instance, the spouse of the individual owner has no continuing involvement or affiliation with either the franchisee owner or the company (indeed, may never have had one with the company). Rather than (or in addition to) negotiating with the franchisor for a release of the personal guaranty, the spouse may fair better seeking an indemnification from the franchisee owning spouse.

Finally, a guaranty typically survives the death of the individual and continues to be a potential liability of the individual’s estate until such time as it is released. There is no obligation on the franchisor to release the individual’s estate from liability and the franchisor may elect to do so only in the event that a new guarantor can be found to step into the deceased guarantor’s shoes.

➤Practice Tip. While franchisors usually take the position that the guaranty is not negotiable or that they have not negotiated it for others, options may exist to satisfy the franchisors concerns short of a full guaranty, including an alternative arrangement to a personal guaranty or a limited guaranty. These are discussed in more detail below.

1. **Spousal Guaranties**

Many franchisors require a guaranty not only from the owner of the franchisee but also from his or her spouse. The principal driver of a spousal guaranty is the treatment of assets of a married couple under relevant state law.

Tenancy by the entirety is a type of joint ownership between married couples and it is the most common form of home and other asset ownership between spouses. One of the

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4 For a full treatment of this subject, see Ronald A. Giller, et al., Yours, Mine, Ours, and Theirs: The Role of Spousal Guaranties and Consents in the Franchise Relationship, 33 FRANCHISE L.J. 71, No. 1 (Summer 2013).
biggest benefits of tenancy by the entireties is that the creditors of only one spouse cannot execute on property owned in this form to satisfy a debt, including a judgment. Only creditors of the couple may attach and sell jointly owned property. Thus, in states with tenancy by the entirety, if a franchisee owner can negotiate to sign a personal guaranty by him or herself, but without his or her spouse’s signature, then their home and other assets may be shielded from execution in the event of a default. A franchisor dealing in one of these states may, therefore, push to obtain a guaranty signed by both spouses so as to potentially reach marital property that would otherwise be unreachable.

Other states have community property rights, meaning that spouses legally share almost all assets and liabilities acquired during the marriage. Accordingly, with some exceptions, regardless of how property is titled in these states, property belongs to both spouses. This also means that a judgment creditor of one spouse may be able to file a lien against real property that is jointly titled with an otherwise non-liable spouse. It is important to note that not all community property states will allow a creditor to file a lien on joint property where only one spouse is a judgment debtor. There are also homestead exemptions in certain states.

Finally, the Equal Credit Opportunity Act ("ECOA") prohibits creditors from discriminating against applicants for credit on the basis of their being in certain protected classes, including marital status. The effect of the ECOA is that if a franchise applicant is creditworthy and the applicant’s spouse is not an officer or director of the company, the non-franchisee spouse cannot be forced to sign any sort of guaranty. Of course, if the spouse is also an owner or otherwise involved in the franchise these restrictions do not apply. Even if a spousal financial guaranty is not permitted under ECOA, the franchisor may still require that the spouse agree to the confidentiality and non-compete obligations of the franchisee.

2. Related Entity Guaranties

A related entity—in lieu of, or in addition to, a personal guaranty from an individual—may be asked to guaranty the debts and performance of the franchisee company. In some instances, the individual franchisee owners may prefer this arrangement because it alleviates

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5 Tenancy by the entirety jurisdictions include Alaska, Arkansas, Delaware, District of Columbia, Florida, Hawaii, Maryland, Massachusetts, Mississippi, Missouri, New Jersey, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Wyoming. The following states allow tenancy by entirety for real estate only: Illinois, Indiana, Kentucky, Michigan, New York, North Carolina, and Oregon.

6 Currently, community property states and jurisdictions include: Alaska (if the spouses signed an agreement to share assets as community property), Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.

7 For instance, Arizona Revised Statute § 25-214(C)(2) requires joinder of both spouses on any “transaction of guaranty, indemnity or suretyship” to bind community property and has been interpreted by courts as follows: “The plain words of this statute have been construed to mean that the community is not bound by any guaranty that is not signed by both spouses, even though the guaranty was for a business that benefitted the marital community.” Vance-Koepnick v. Koepnick, 197 Ariz. 162, 163 (Ariz. Ct. App. 1999).


9 See Giller, supra note 4, citing 12 C.F.R. § 202.7(d)(1) (2013) (“A creditor shall not require the signature of an applicant’s spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor’s standards of creditworthiness for the amount and terms of the credit requested.”).
the risk to their personal assets. There are several types of guaranties involving related companies. A downstream guaranty is a guaranty by a parent company for the obligations of its subsidiary. In this scenario, the franchisor will look to the parent company to “back up” the debt of a subsidiary company due to the parent company’s superior assets and financial condition. An upstream guaranty is a guaranty by a subsidiary company for the obligations of its parent corporation. While less common, a franchisor may require an upstream guaranty when the franchisee’s (parent corporation’s) only assets are the stock of a subsidiary or the franchisor relied on the financial position of the parent to meet its qualification standards. A cross-stream guaranty is a guaranty among affiliated corporations. Many times the affiliated companies' stock are both owned by the same parent. Guaranties from related entities are more likely to be required by the franchisor if the entity that owns or leases the real estate or other significant assets is different from the franchisee or from a multi-unit owner holding its franchises in separate entities.

3. Other Parties to Guaranties and Undertakings

It is worth noting that some franchisors may also require personal guaranties or other undertakings (i.e., non-competes) from officers, directors or the primary operator.

B. Non-Competition, Non-Disclosure and Confidentiality Obligations

Without any doubt, the franchisor’s most valuable asset is the confidential information associated with its concept and the ability to prevent others from discovering and/or using that information in another business. This goal is frequently protected by franchisors using three specific (and inter-related) agreements: 1) non-compete agreements, 2) non-disclosure agreements, and 3) confidentiality agreements. These are the most common performance guaranties sought from franchisee owners. The reason for this is simple—in their absence, a franchisee’s agreement not to compete upon expiration or termination of its franchise agreement could be a hollow promise if the underlying owners could simply create a new entity and begin competing immediately upon closing the franchised location. Thus, to ensure the effectiveness of these terms of the franchise agreement, the franchisor requires the franchisee owners (and usually operators) to be personally bound. These covenants may be obtained by the franchisor by having the individual execute the franchise agreement (in a separate line for the individual), a full performance guaranty, or a stand-alone document. A stand-alone document is more common in those cases where the covenant obligations extend to persons beyond those providing a full guaranty or may be used by the franchisor to emphasize the undertaking.

A non-compete agreement (or covenant not to compete, in some jurisdictions) is an agreement by the franchisee owners (and the franchisee company or other individuals) that they will not enter into a similar, competing business during or after the termination, expiration or transfer of the franchise agreement. A non-disclosure agreement and a confidentiality agreement are essentially the same and both require that the person not disclose the franchisor’s confidential information.

Prior to revealing any confidential information, a franchisor will likely seek some sort of confidentiality or non-disclosure agreement from the franchisee and/or its owners. Even if a franchise relationship does not result, it is understandable for the franchisor to obtain such an agreement at the outset.
In order to be enforceable in many jurisdictions, a non-compete agreement must be reasonable in terms of time, scope, and geographic area restrictions. Additionally, a non-compete agreement will only be enforced to the extent that it protects a legitimate business interest of the company. Accordingly, it is fairly common to have a non-compete that prevents a franchisee company and its owners from owning/operating a competing (or even similar) business within a specified number of miles from any location operating under the franchisor’s name for a period of years from the termination, expiration or transfer of a franchise agreement. While these types of agreements were initially disfavored in the law, they are now common and generally enforceable. They are so common, in fact, that in addition to binding the franchisee owners, franchisors now typically seek such an agreement from those individuals who attend training and/or will actually be running the franchised location on a day-to-day basis, notwithstanding their lack of ownership in the franchisee company. This practice certainly makes sense because it restrains the person who actually has received and uses the franchisor’s confidential information on a regular basis. On the other hand, enforcement against a franchisee owner who is merely an investor and not involved in the day to day operations may be more difficult. Indeed, while the “passive investor” owner argument is quickly rebuffed by courts in the financial guaranty area of law (see below), such a defense may be more successful in the context of non-competes. This is so because if the "passive investor" (or "silent partner") never received the franchisor’s confidential information in the first place nor ran the franchised operations (so that he or she had access to the confidential manual or business practices), there is absolutely nothing for the non-compete to protect.

C. Other Personal Undertakings

1. Arbitration

Arbitration provisions continue to be prevalent in franchise agreements. Accordingly, a franchisor will likely require that franchisee owners individually—like the entity—consent to any and all disputes being decided through the arbitration process rather than a court. To the extent that such an agreement is not specifically obtained from the individuals, a franchisor may be unable to invoke the arbitration provision against them. This is especially true in some states that have statutes that require specific language be included in the agreement to make the arbitration provision enforceable.

2. Powers of Attorney

Franchisors may also seek powers of attorney for franchisee owners that allow the franchisor to control such things as telephone numbers and domain names associated with the franchised location. While technically these items are not personal to the individual, it is not

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11 For an excellent and detailed discussion of covenants against competition, see COVENANTS AGAINST COMPETITION IN FRANCHISE AGREEMENTS (Michael R. Gray & Natalma M. McKnew, eds., ABA Publishing 3rd ed. 2012).

12 See, e.g., Teramar Corp. v. Rodier Corp., Bus. Franchise Guide (CCH) ¶ 9337 (Ohio Ct. App. Apr. 20, 1987) (Reversing arbitration award against individual because it was not clear that the individual understood that when she executed the franchise agreement containing an arbitration provision that she was accepting arbitration both for herself and the company).

13 For example, Missouri requires that a specific sentence appear in all capital letters directly above the signature line, ensuring that the arbitration provision is not missed by the signor. Mo. Rev. Stat. § 435.460.
uncommon for the franchisor to ask both the franchisee and its owner(s) to execute such a document.

3. **Franchisee Questionnaire**

   Franchisors routinely require both franchisee companies and their individual owners to fill out questionnaires related to representations and other pre-contract conduct by the franchisor. No doubt that these questionnaires are being sought in response to fraud and other claims commonly raised by disgruntled (or terminated) franchisees. Franchisee owners completing and executing such documents should expect that these documents may be used against them individually and the franchisee company if they later seek to raise claims related to pre-contract conduct of the franchisor.

4. **Lease**

   A landlord certainly may request that a franchisee owner execute a personal guaranty related to the franchised location. What may not be so readily apparent is that a franchisor may also require the individual owner to guaranty the rental payments and other obligations under the lease directly to the franchisor (specifically, where the franchisor also holds the head lease and subleases the premises to the franchisee either directly or through a related entity). Franchisee owners should be aware of, and understand, this additional obligation.

5. **Indemnification and Release of Franchisor**

   It is also common for franchisors to require franchisee owners to agree to be bound by indemnification provisions found either in the franchise agreements or in separate agreements. Similarly, franchisors will likely seek general (usually non-mutual) releases from the individual owners of the franchisee upon renewal of the franchise relationship. Again, these are commonly sought personal undertakings, the ramifications of which the individual owners should understand prior to simply executing the documents. These provisions are not commonly waived by the franchisor.

6. **Transfer Restrictions**

   Another personal undertaking of franchisee owners relates to the restrictions on transfer almost universally found in franchise agreements. The franchise owners commit not to transfer their ownership in the franchise or franchisee entity without the franchisors prior approval (which typically requires the franchisee and proposed assignee to meet certain conditions).

III. **NEGOTIATING GUARANTIES: ALTERNATIVES TO FULL GUARANTIES**

   It goes without saying that franchisors will typically seek full performance guaranties from franchisee owners. In response, these individuals may be able to negotiate less than, or offer alternatives to, full performance guaranties. Alternative options to a full performance and

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14 In some cases, by the time the franchisee owner receives the franchise documents, the franchisor may have already tailored its guaranty requirements to fit the specific facts of the transaction (for example, by requiring a personal guarantee only from a majority owner, etc.).
financial guaranty may satisfy the concerns of the franchisor, yet be more palatable to the franchisee owners. Of course, in attempting to negotiate limitations to a full guaranty, it is important to understand the context and circumstances of the franchise system, investment, and transaction. The following alternatives may not be realistic options depending upon the facts specific to the transaction at hand. For example, a franchisor may be more willing to entertain an alternative if dealing with a larger, well-established company (especially in the hotel industry) than a franchise system with an owner-operator requirement. While it is always worthwhile for a franchisee owner to approach the conversation about an alternative to a guaranty, a franchisee owner should expect to make some level of personal commitment and should not expect that a franchisor will agree to any of the below limitations.

A. **Limited Financial Guaranties**

Limited financial guaranties have become more common and can be tailored to the specific factual situation of the franchisee. For instance, to the extent that the franchisor seeks personal guaranties from all of the franchisee owners, the franchisee owners could propose to guaranty the financial obligations of the franchisee up the percentage of their ownership interest. This spreads the risk around to all of the individual owners, rather than placing all of the potential debt of the franchisee on one (possibly even minority) owner. Another way of limiting the guaranty is by attempting to shorten the timeframe of the obligation. If the franchisor’s main concern is that a new franchisee (potentially with absolutely no experience) could fail, that failure usually occurs within the first few years of operation. Once the franchisee has established itself over the course of several years, the probability that it will fail is less. Therefore, the franchisor may accept a guaranty that is limited to, for example, only the first five years of the franchise agreement. Rather than a limited guaranty based on the calendar, a limited guaranty may be premised upon and automatically terminate upon reaching a certain level of sales, net worth, EBITDA threshold or other trigger which would provide the franchisor comfort that the franchisee is on financially solid ground (so as to lessen the need for a guaranty).

Along the same lines, it may be possible to negotiate a guaranty with a monetary cap. In this way, the franchisor knows it has a certain amount of money guaranteed and there is a limit or maximum amount for which the individual guarantor may be responsible. Finally, a limited guaranty may be negotiated with certain carve outs. For instance, an individual may be able to carve out seizure of his primary residence to satisfy any debts of the franchisee.

→ **Practice Tip.** If negotiating a limitation on a personal guaranty on behalf of a franchisee, keep in mind that a narrowly tailored limitation based on a unique or special circumstance is more likely to be considered by a franchisor.

B. **Net Worth Covenants and Debt Load Restrictions**

In lieu of personal guaranties, a franchisor may accept net worth covenants and/or debt load covenants. Basically, these covenants require the franchisee and/or its parent company or

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15 It is not uncommon for a franchisor to seek personal guaranties only from the principal owner and not minority owners, which has a similar effect.

16 The same result may be reached in some states where the law does not allow satisfaction of a judgment by property owned jointly by a husband and wife and one spouse does not execute a personal guaranty. Additionally, some states have homestead exemptions, but these laws vary widely.
owners to maintain a certain minimum net worth. This arrangement typically requires that the franchisee (or other contracting party) provide to the franchisor written certification and sufficient supporting documentation to allow the franchisor to confirm that the franchisee's net worth is at a level equal to or exceeding the required minimum net worth required by the franchisor. To the extent that a certification is not timely made or that the net worth is less than that required by the agreement, the franchisee is deemed to be in default of each and every agreement with the franchisor, allowing the franchisor to terminate or take any other appropriate action against the franchisee.

C. Other Forms to Recover Franchisee's Debt

Besides limited guaranties, a variety of which are discussed above, the parties could negotiate other forms of collateral to stand in the place of a personal guarantor. A franchisee could, for instance, agree to set aside an escrow account with a specified sum of money to be used if the franchisee is unable to satisfy its obligations to the franchisor. Similarly, the franchisee could obtain a standby letter of credit from its financial institution that the franchisor could draw against for unsatisfied debts of the franchisee. These alternatives are more commonly accepted in international transactions, particularly when dealing with well established, well capitalized master franchisees. Careful attention should be paid to mechanics – set up, how money is withdrawn, when the escrow or letter of credit terminates, how termination is accomplished. For escrow, considerations include obligation to replenish money taken out, a trigger (such as net worth) where the escrow can be removed and how often is that reviewed.

While these alternatives may obviate the requirement that an individual execute a personal guaranty in favor of the franchisor, a financial institution issuing a letter of credit would likely require an individual to execute a personal guaranty on the letter of credit. Additionally, there are usually substantial fees associated with having a standby letter of credit. Accordingly, while this alternative may initially appear to be more favorable than a personal financial guaranty, the requirements of the financial institution may yield the same result in the end analysis (other than the fact that the letter of credit would have a cap) and cost the franchisee owner a yearly fee to maintain.

D. Non-Financial Performance Guaranties

Discussed in greater detail above, a franchisor may be willing to completely forego financial guaranties (which would only require the franchisor to prove a breach of the payment obligations under the franchise agreement) to the extent that a franchisee owner will guaranty performance obligations of the franchisee (such as non-compete agreements and the like). At first blush, this arrangement appears to substantially limit exposure of the individual owner's pocketbook. However, the individual owner may end up in exactly the same place financially if the franchisor can prove that the franchisee breached certain performance covenants that resulted in monetary damage to the franchisor. For instance, if the franchisor can establish that the franchisee has violated the non-competition provision of the franchise agreement, the individual guarantor will still be liable for the monetary damages established by the franchisor. Accordingly, the individual franchisee owner should understand the ramifications of entering into even performance guaranties.
IV. INTERNATIONAL CONSIDERATIONS IN OWNER UNDERTAKINGS

A. Guaranties and Undertakings in the International Context

Personal guaranties and undertakings in the international context are in many ways similar to those in the domestic context. The primary difference being that it is more common to accept alternatives. Alternatives are more common in the international context because franchisors are often dealing with larger, established companies who may already be operating in a related business. In light of this fact, a franchisor may be more willing to accept alternatives to personal guaranties. The alternatives may include one or a combination of: a cap on a personal guaranty, a corporate guaranty from a parent or affiliate, an equity/capitalization commitment, a letter of credit or bank guaranty or a deposit. While not commonly used in the franchise sector, another alternative in the international context is trade credit insurance. Trade credit insurance is an insurance product that reduces the risk associated with collecting international payments. With a trade credit insurance policy, if the foreign buyer is unable to pay, the insurer will pay the insured a percentage of the amount owed.

Additionally, many times the reality of international transactions is that an alternative is a necessity to getting a deal done. For example, in the Middle East it is common for businesses to be owned by members of the royal family, but also highly unlikely that the family will agree to execute personal guaranties. However, the key operators may agree to a non-disclosure and non-compete agreement and the parent company (presumably well capitalized) may agree to provide a limited guaranty, deposit or letter of credit. This combination addresses the two key reasons for a typical franchisor’s personal guaranty requirement—ensuring payment of amounts owed and protecting the franchisor’s intellectual property and system.

B. Enforcement in the International Context

In the international context, enforcement of guaranties and non-competes raises additional complexities. These include additional formalities in execution, the effect of mandatory local law and dispute resolution procedures. For instance, in many jurisdictions there are additional formalities that need to be completed for a guaranty to be enforceable. In Alberta, Canada, for example, a personal guaranty must be notarized. In addition, elements of mandatory local law will supersede the terms of the agreement. Unlike in the United States, enforcement of personal covenants in most foreign jurisdictions is more difficult and the limitations more strictly construed. This is particularly true with respect to non-competes. Dispute resolution procedures also impact enforcement of guaranties in the international context. In drafting guaranties or crafting other alternatives, an understanding of the dispute resolution procedures in the local jurisdiction as well as in the cross-border context is critical. For example, many franchisors prefer to resolve disputes in their home jurisdiction and may be

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17 A full discussion of these topics is beyond the scope of this paper. For additional information on negotiating international transactions and enforcement in the international context, see FUNDAMENTALS OF INTERNATIONAL FRANCHISING, FORUM ON FRANCHISING (Richard M. Asbill & Steven M. Goldman, eds., ABA Publishing 1st ed. 2001).


19 For an excellent and detailed discussion of covenants against competition, see COVENANTS AGAINST COMPETITION IN FRANCHISE AGREEMENTS (Michael R. Gray & Natalma M. Mcknew, eds., ABA Publishing 3rd ed. 2012).
inclined to provide for exclusive jurisdiction. However, if the assets of the master franchisee or its guarantors are not in the United States (which they likely are not), enforcing a judgment is challenging. Not all countries enforce foreign judgments, although many countries are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.\textsuperscript{20} This is less of an issue if the franchisee has provided a letter of credit – the franchisor can simply draw on the letter of credit to satisfy the judgment (assuming, of course, that this is permitted by the terms of the letter of credit).

\textbf{Practice Tip:} Work closely with experienced local counsel to understand the limits and issues with respect to guaranties, non-competes and other covenants to craft an alternative that is both acceptable to the client and enforceable in the local jurisdiction.

V. ENFORCEMENT OF AND DEFENSES TO PERSONAL GUARANTIES

A guaranty is a contract and, more specifically, a contract of suretyship. Because the surety (guarantor) may not necessarily be directly involved in the primary relationship between the franchisee and the franchisor, the law has developed to permit additional defenses to guarantors in certain circumstances, including equitable defenses. As the cases below indicate, however, the "passive investor" defense is really non-existent. Notwithstanding those additional defenses, "a guarantor's rights and obligations are dependent upon what the parties contracted to do. In other words, a guarantor's liability to a creditor is determined by 'the intention of the parties to the contract of guaranty as gathered from the language, read in the light of attendant circumstances . . .' as is true for any contract."\textsuperscript{21}

While it should be obvious, as a threshold matter, personal guaranties from the franchisee owners are most likely to be enforced when the individuals execute unambiguous agreements requiring the personal guarantor to pay the debts of the franchisee company.\textsuperscript{22}

\textbf{Practice Tip:} To make the personal obligations as clear as possible to the franchisee owner, the franchisor may wish to have the individual execute one or more separate documents that clearly set forth the obligations, rather than (or in addition to) an additional signature line for the individual on the franchise agreement.

Additionally, it is worth including a personal jurisdiction provision in the guaranty so as to avoid altogether the threshold battle over the location of the substantive fight. In \textit{Choice Hotels International, Inc. v. Madison Three, Inc.}\textsuperscript{23} the Court grappled with the issue of personal jurisdiction over the individual guarantor defendants. The Court explained:

First, the guaranty provides that Choice may join a suit against Madison, its licensee, with a suit against the individual defendants who executed the

\textsuperscript{20} NewYorkConvention.org (last visited Aug. 28, 2014).

\textsuperscript{21} \textit{Sim Fryson Motor Co.}, 2010 WL 2651450.

\textsuperscript{22} In \textit{ConocoPhillips v. 261 East Merric Road Corp.}, 428 F. Supp. 2d 111 (E.D.N.Y. 2006), the licensor argued that the "Key Person Clause" to the Supply Agreement constituted a personal guaranty. The Court found otherwise, stating that "[n]one of the language in this agreement provides a basis for plaintiffs' assertion that the Key Person Clause 'is equivalent to a personal guaranty of debts.'"

\textsuperscript{23} 23 F. Supp. 2d 617 (D. Md. 1998).
guaranty. Although this provision certainly does not compel the conclusion that the individual defendants could reasonably foresee being hauled into a Maryland court, *prima facie*, that language supports the assertion that the individual defendants had notice that a lawsuit under the guaranty could be litigated here. Second, and more importantly, the guaranty was given in consideration and as an inducement for the license agreement with Madison. In an earlier case presenting a similar challenge by guarantors of a Choice licensee, another judge of this court found this factor persuasive. . . . Even if the individual defendants are, as they claim to be, mere passive investors in the corporate licensee, insofar as they induced Choice to enter into the license agreement with Madison by furnishing their personal guarantees, they have "transacted business" within the contemplation of the Maryland Long Arm Statute. The guaranty, like the license agreement, was accepted by Choice in Maryland.

While the outcome in this case favored enforcement of the personal guaranty in the same court specified in the franchise agreement, these initial arguments could have been avoided with the inclusion of a personal jurisdiction provision in the guaranty agreement itself.

A. Equitable Defenses to Enforcement of Guaranties

Equitable defenses may be asserted by the guarantors in an enforcement action. In *Century 21 Real Estate LLC v. Perfect Gulf Properties, Inc.*,24 the guarantors—who were "silent investors" of the franchisee—did not "dispute that they executed personal guaranties of the franchise agreements; that they executed the DAN [a forgivable loan]; or that Plaintiff property terminated the franchise agreements due to nonpayment of franchise fees."25 Nevertheless, the guarantors did assert several defenses in response to the franchisor’s motion for summary judgment: misrepresentation, waiver, estoppel, laches, and failure to mitigate, which they claimed raised issues of fact that precluded summary judgment. First, with respect to the forgivable loan (under which the guarantors were jointly liable), the guarantors argued that the franchisor misled them by failing to advise them of the franchisee’s financial condition at the time they jointly executed the DAN (many years after the original franchise agreements) and, specifically, that at the time the DAN was entered into, the franchisee did not meet the pre-funding conditions of the DAN. The Court found that if anyone misled the guarantors, it was the individual operating the franchisee.

The guarantors additional defenses of estoppel and failure to mitigate were similarly found to be unavailing to prevent entry of summary judgment. The Court recognized that estoppel could be asserted in these circumstances: "[T]o establish equitable estoppel, [the Guarantor Defendants] must show that [Plaintiff] engaged in conduct, either intentionally or under circumstances that induced reliance, and that [the Guarantor Defendants] acted or changed their position to their detriment."26 Here, the evidence did not even establish that the franchisor dealt with the guarantors. Instead, the facts indicated the guarantors dealt directly with the individual running the franchisee, foreclosing this defense. The guarantors also argued that the franchisor failed to mitigate its damages because the franchisor knew that the

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25 Id. at *3.
26 Id. at *5.
franchisee could not meet the conditions of the DAN such that it should not have been funded in the first place. The Court found, however, that because the doctrine of mitigation of damages arises *after* a contract has been breached, it was inapplicable under the facts alleged.

With respect to the personal guaranties, the guarantors also alleged waiver, laches, and failure to mitigate. The Court explained: "Waiver is the voluntary and intentional relinquishment of a known right. An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights. The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference." The guarantors argued that the franchisor waived its right to enforce the guaranties because the franchisee had been in default under the franchise agreements for several years and instead of terminating the agreements, the franchisor continued to extend the agreements and allowed the franchisee to acquire new ones. The Court held these facts simply did not substantiate a waiver of the terms of the franchise agreements or the guaranties.

The guarantors also argued that the doctrine of laches barred enforcement of the guaranties. "Laches is invoked to deny a party enforcement of a known right when the party engages in an inexcusable and unexplained delay in exercising that right to the prejudice of the other party. The key factors to be considered in deciding whether to apply the doctrine are the length of the delay, the reasons for the delay, and the changing conditions of either or both parties during the delay." The guarantors contended that the franchisor extending the agreements (when it could have terminated them) substantially increased the value of the liquidated damages provision of the initial franchise agreements, prejudicing the guarantors due to the increased liability to them (from the franchisor extending the years on the franchise agreements). While this argument may have been the most compelling, the Court nevertheless found that the franchisor had the right—but not the obligation—to terminate the franchise agreements upon default two years prior to the filing of the lawsuit. However, the Court found that this conduct did not establish inexcusable or unreasonable delay in exercising its termination rights. Additionally, the Court found that the guarantors did not have a reasonable belief that the franchisor had abandoned its rights with respect to the guarantors because the guarantors (per their own facts) did not know the financial condition of the franchisee (and, thus, could not know that the franchisor was not enforcing its rights). The Court's view of the guarantors may be summarized as follows: the guarantors "could have protected their own interests by being diligent in keeping apprised of the affairs of the business entities whose obligations they had agreed to guaranty rather than signing whatever documents were placed in front of them without requiring any reports as to the performance of the business . . . ."

Similarly, in *Nissan Motor Acceptance Corp. v. Sim Fryson Motor Co.*, the Court found that a guarantor was not alleviated of his obligations simply because "he did not participate in or contribute to the Dealership's default on its various agreements . . . [because] he was terminated from the Dealership" prior to the default. The Court found that the language of the guaranty was "facially unqualified." Because the guaranty did not include any conditions other

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27 *Id.* at *6.

28 *Id.* at *6.

29 *Id.* at *7.

than the Dealership’s default, the guaranty was an absolute guaranty that "is immediately enforceable against the guarantors whose signature it bears." Accordingly, the individual's "lack of fault" was found to be "irrelevant to the enforceability of the Guaranty Agreement as signed." 

B. Statute of Frauds: Must Sign to Bind?

While it may seem elementary, the way in which individuals execute the franchise agreement and other collateral documents (including the guaranty) will control the way in which (and if) they are bound. In Groth v. Ace Cash Express, Inc., the franchisor sued the individual franchisee owners seeking to enforce the personal guaranty which the franchisor contended that they assumed through an assignment of the franchise agreement. The individuals argued that the assignment did not bind them personally as guarantors. Specifically, the individuals argued that the statute of frauds, which doctrine requires "that a promise to pay the debt of another be in writing and signed by the party making the guaranty," prevented enforcement against them.

The alleged-guarantors "contend[ed] that the guaranty language in the Empire assignment cannot bind them as a personal guaranty because they signed the contract on behalf of [the company], not in their individual capacities." Because it was "undisputed that the [company] assignment is a contract among the [relevant companies], and that [the individuals] signed it on behalf of the [franchisee company] as its partners," the relevant issue was whether the "signatures on behalf of [the company] could also bind them individually to the purported personal guaranty referenced in the [company] assignment." Earlier cases in this jurisdiction had found that signing an agreement once and only in one’s corporate capacity could also bind him/her in his/her individual capacity depending upon the language of the agreement. For instance, if the agreement specifically stated that "the undersigned agree to personally guarantee . . . payment of any charges," signing once and only in a corporate capacity nevertheless binds the individual personally. The Court also recognized, however, that one signature generally denoted that an individual was signing only in one capacity (either corporate or personally). Because in this case there was only one signature and no unequivocal language that the individuals' signatures also served to bind them personally, "the alleged personal guaranty was not signed by the parties making it, as required by the Statute of Frauds," such that the trial court erred in granting summary judgment in favor of the franchisor and denying summary judgment in favor of the individuals.

31 Id. at *5.
32 Id.
34 Id. at 210.
35 Id.
36 Id. at 210.
37 Id.
38 Id. at 210.
Similarly, in *Warren-Connolly Company v. Saphin*, a distributor sought to hold the president of the dealer, who executed the license agreement, personally liable for the debts that could not be paid by the dealer company after it was adjudicated bankrupt. The distributor claimed the president was individually liable because the license agreement contained a provision that stated: "The undersigned, officer of the dealer corporation, personally and individually guarantees payment of all obligations incurred by the dealer corporation pursuant to this agreement." The president executed the agreement only one time under the company's name. All other paragraphs of the agreement related exclusively to the "parties" set forth at the beginning of the agreement (the two companies). The issue was whether "paragraph six of the agreement and defendant's signature as president of the corporation constituted a personal guarantee enforceable against the defendant." Contrary to what the Court in *Groth* reasoned above, the Court found that this factual scenario did not create personal liability on the president of the company. The Court reached the following conclusion:

the contract was made between plaintiff and the dealer corporation. The defendant was not stated to be a party thereto. An attempt is being made to predicate liability upon an obscure sentence in a contract bearing the inscription at the top in bold type "AUTHORIZED DEALER FRANCHISE AGREEMENT." All of the provisions except the paragraph in question relate to the duties and obligations of the contracting parties. The original Statute of Frauds was enacted for the prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subordination of perjury. The procedure here followed would in effect thwart the purpose of the statute.

Essentially, the Court found that the contract was not signed by the individual (on behalf of himself), but only signed by the company. As such, the signature of the party to be bound was missing and, as required by the statute of frauds, indispensable for an enforceable guaranty.

In *Upshaw v. Southern Wholesale Flooring Company*, the guarantor argued she executed the personal guaranty in her corporate capacity only—not in her individual capacity—and, therefore, was not personally liable for the debts of the company. The Court disregarded the guarantor's argument that when she executed the guaranty, she did so in her corporate capacity and placed the letters "sec" after her name. The Court found the guarantor's testimony to be parol evidence and the letters after her name on the contract to be "a mere word description" and did not alter the plain language of the guaranty.

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40 Id. at 392.
41 Id. at 393.
42 Id.
43 Id. at 393.
45 Id. at 752.
The Florida Court in *BP Products North America v. Super Shop #701*, explained similarly: "if a document's clear purpose is to impose a personal guarantee, the signature of a corporate principal can personally bind that principal even if he adds his corporate title to his signature."\(^{46}\) Here, BP argued that the dealer's principal was personally liable for the debts of the dealer. Two documents were relevant to the dispute—the Dealer-Supply Agreement and the Rider. The Rider identified the company as the "Dealer" and the principal as the "Dealer-Principal." Further, the Rider included a provision that the "Dealer-Principal personally guarantees payment of the debts, if any, owed to BP by the Dealer incident to the Dealer’s use of the facility in connection with the Supply Agreement and any dealings with BP relative thereto."\(^{47}\) The Rider contains three signature blocks, including ones for the Dealer and the Dealer-Principal. The evidence indicated some initial confusion over the documents that resulted in a second set of contract documents being prepared and presented for signature. At that time, the principal apparently executed the Rider only on the Dealer line—not the Dealer-Principal line, which remained blank. Because the trial court found that this execution created an ambiguity as to whether the principal intended to be personally bound, the court allowed extrinsic parole evidence to determine the intent of the parties.\(^{48}\) While "a close question" because of evidence going both ways, the Court concluded that the principal had personally guaranteed the debts of the Dealer although he had not signed in his individual capacity: "The evidence reveals that 1) BP never intended to accept contracts with Super Stop as the Dealer without a personal guaranty by Mr. Qureshi, 2) BP never accepted any version of the contracts without the guaranty, and 3) BP specially told Mr. Quresi (via Linda Proctor) at the time of signing of the Rider that he must be personally liable if Super Stop is considered the Dealer."\(^{49}\) The Court found that the parties' intent was to personally bind the individual to the obligations of the franchise company.

In *Michael Distributing Company v. Tobin*,\(^{50}\) the individual defendant argued that the trial court failed to apply the statute of frauds "since the promise made by Defendant Tobin was to answer for the debt of another, and was not in writing."\(^{51}\) The facts of the case established that the individual defendant promised the supplier that if it continued to deliver "additional lumber and building materials to permit the continued construction of the houses, he would personally supply funds to the defendant corporation to pay plaintiff for the supplies."\(^{52}\) Building materials continued to be delivered. The Court explained that a "recognized exception to the statute occurs, however, when the oral promise is made for a consideration beneficial to the promisor, so that it appears that he gave the promise merely for his own pecuniary or business advantage. In such case it is deemed an original obligation of the promisor and need not be in

\(^{46}\) *Id.* at *23.

\(^{47}\) *Id.* at *11.

\(^{48}\) *Id.* at *23.

\(^{49}\) *Id.* at *27.


\(^{51}\) *Id.* at 664.

\(^{52}\) *Id.* at 658.
Accordingly, the Court had to examine the "main purpose" or "leading object" of the promisor in order to determine the enforceability of an oral guaranty. The Court held that "the purpose of the statute of frauds was to prevent, not effectuate, wrong. Were it not for the statute, verbal contracts of the type in question would be upheld, since they have both promise and consideration." The Court found that as the 51% owner of the company, the defendant had a very direct and personal interest in the success of the business. "From the evidence it reasonably could be concluded that the pecuniary benefit which he might hope to reap from the success of the housing project was the main object of his promise. The finding that defendant agreed to pay the amount due through the corporations rather than to plaintiff directly does not necessarily require an inference of suretyship," such that the statute of frauds did not bar the action.

There can be no doubt that the way in which the personal guaranty is executed will control its enforceability. In _General Electric Capital v. Schwegmann Giant Super Markets_, the Court held that a spouse had not bound herself to be obligated for the debts of the business although she signed an acknowledgement of the personal guaranty that stated: "I hereby acknowledge that my husband, John F. Schwegmann, is acting on behalf of the marital community." The Court found that although the husband could encumber community assets, he could not encumber his spouse's separate property and that her acknowledgement "does not commit her to a personal guaranty" of her separate property.

C. No Proper Notice

In _Nobel Lodging, Inc. v. Holiday Hospitality Franchising, Inc._ the individual guarantors argued that the franchisor was required to provide notice of default under the agreement. The relevant language read: "Upon default by the Licensee and notice from Licensor, the undersigned will immediately make each payment and perform each obligation required of Licensee under the License." The Court found this language did not constitute a condition precedent to collecting under the guaranty. Rather, the Court held:

this sentence simply adds a specific guaranty obligation onto the guarantors' shoulders. "Upon default by the Licensee and notice from Licensor," i.e., in the event [franchisee company] defaults and Holiday so notifies the guarantors, then

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53 Id.
54 Id.
55 Id. at 666-667.
56 Id. at 499.
57 Id.
59 Id. at 499.
60 Id.
the guarantors become themselves obligated to ‘immediately’ make the payments and perform the obligations of [franchisee] under the license agreement. If such an event does not happen, i.e. Holiday fails to notify the guarantors, then this specific ‘immediacy’ requirement of personally and actually performing [franchisee’s] obligations is not triggered. Rather, in that event, the guarantors simply remain liable under the general guaranty obligation for Nobel’s failure to punctually meet its obligations set forth in the license agreement.\footnote{Id. at 483.}

Accordingly, there was no notice obligation that the franchisor violated to prevent entry of summary judgment against the guarantors.

\section*{D. Scope of the Guaranty: Not All Debt Included}

While not disputing the execution of a personal guaranty, a guarantor may nevertheless argue that the scope of the guaranty does not include the specific debt sought. This was the case in \textit{Wendy’s International, Inc. v. Saverin}\.\footnote{337 F. App’x 471 (6th Cir. 2009).} There, the district court found that the guarantor was individually liable for all the obligations not fulfilled by the franchisee. On appeal, the guarantor argued that he was not personally bound to pay all amounts owed by the franchisee company because his personal guaranty did not include certain unpaid rent and bakery obligations. Specifically, the guarantor claimed he did not guaranty ”separate lease agreements” (although they were set out in an exhibit to the Agreement he guarantied) and that the Agreement was not prospective (such that he did not became liable for future debts). The Sixth Circuit found these arguments unavailing. First, the Court noted that the Forbearance Agreement specifically defined the franchise company to include the guarantor individually. Moreover, the Agreement specifically reserved to Wendy’s “all of its rights ‘to pursue WenAmerica and Guarantor’ for all ‘other outstanding amounts.'”\footnote{Id. at 478.} Because of this broad, catch-all language, the Court found the rent that became due after the date of the Agreement was guaranteed by the individual.\footnote{See also Sunoco, Inc. v. Great Road Auto, Inc., Civ. Action No. 06cv12302–NG, 2010 U.S. Dist. LEXIS 102708, at *17 (D. Mass. Sept. 28, 2010) (Holding: “A plain reading suggests that the term ‘any other . . . obligations’ of JW Service to Sonoco encompasses their obligations under the Dealer Supply Franchise Agreement.”).}

Similarly, in \textit{Carolina Place Joint Venture v. Flamers Charburgers, Inc.} \footnote{551 S.E.2d 569 (N.C. Ct. App. 2001).} a landlord sued the franchisor for rent owed and for the remainder of the terminated lease term. The franchisor filed a third-party complaint against the individual guarantor under the franchise agreement. The guarantor denied that he had an obligation to personally guaranty the franchisor’s rental obligations to the landlord. The trial court entered summary judgment in favor of the franchisor and the guarantor appealed. The guarantor argued that the franchise agreement, by its terms, did not incorporate the terms of the sublease agreement between the franchisor and the franchisee, making the personal guaranty inapplicable to the debt at issue. The Court looked to the language of the guaranty, which specifically provided that the guarantor ”will personally guarantee ‘unconditionally to Franchisor the full, faithful and punctual performance, fulfillment}
and observance of all of the obligations and liabilities of the Franchisee to Franchisor."66 The Court added: "we are convinced that at the time the documents were executed, the parties intended that they be construed together. All of the documents were merged into one document, the Franchise Agreement, as indicated by the consecutive page numbers in the Franchise Agreement and the Table of Contents."67 Accordingly, the Court found that "the Franchise Agreement containing the personal guarantee and the sublease should 'be construed together in determining what was undertaken,' thus resolving any ambiguity that might arise if these documents were read alone." The Court also found that "the language 'all of the obligations and liabilities'" in the personal guaranty created an obligation that the guarantor pay all of the franchisee company's debts.68

E. Defenses/Claims of the Franchisee Entity

If the franchisee is not liable to the franchisor, neither is the guarantor. Therefore, it is common for the guarantors to assert defenses of the franchisee under the franchise agreement. In the Novel Lodging case discussed above, the guarantors argued that the franchisor violated the covenant of good faith and fair dealing and tortiously interfered with the franchisee's business by refusing to consent to the transfer of the franchisee to a third party. Because the franchise agreement allowed the franchisor to take the actions that it did, the Court found that the guarantors could not establish liability on the part of the franchisor to alleviate them from their obligations under the guaranty.69

Similarly, in Parker Hannifin Corp. v. Bradshaw,70 the plaintiff sought to strike defenses asserted by the guarantors, including bad faith, estoppel, breach of contract, and violation of antitrust law.71 The plaintiff argued that the unconditional guaranties prohibited such defenses. The guarantors asserted that "notwithstanding their execution of unconditional guaranties of [company's] debts, their claims that plaintiff, as [company's] creditor, behaved 'willfully, wrongfully and tortuously toward [company], constitutes a valid defense to payments of the debts."72 The Court found that the agreement at issue was an unconditional guaranty "whereby the guarantor agrees to pay or perform a contract on default of the principal without limitation. It is an absolute undertaking to pay a debt at maturity or perform an agreement if the principal does not pay or perform."73 The Court further found that as "a general matter, when an action is

66 Id. at 571.
67 Id.
68 Id. at 572.
69 Id. at 484.
71 Id. at *3.
72 Id. at *8.
73 Id. at *12.
brought to enforce an unconditional guaranty contract, a court will only recognize the defenses of payment and performance. Thus, payment under the guaranties cannot be avoided through invocation of defenses of equitable estoppel or bad faith, or through allegations of violations of antitrust laws, unless it can be shown that enforcement of the guaranty would itself further the alleged violation.”

Interestingly, the Court explained that the guarantors could “pursue separately their remedies, if any, for plaintiff's allegedly unlawful conduct.”

A similar result was reached in McDonald's Corp. v. Robert A. Makin, Inc. In this action to collect overdue franchise fees, the Court held that the "alleged wrongs of plaintiffs do not constitute affirmative defenses to defendants' non-payment of franchise fees" because "defendants may not use their counterclaims to avoid judgment for the amounts already due under the franchise agreement."

In National School Reporting Services, Inc. v. National Schools of California, the general partners of the defendant company did not dispute that they executed personal guaranties and that there was subsequent non-payment. Instead, the defendant guarantors argued that the license agreement was actually a franchise agreement that required registration pursuant to California law. The guarantors reasoned that because the license agreement and the note were unlawful, the guarantors were not liable because the principal obligor was not liable. The Court held that assuming arguendo "that the Defendants are correct in their assertion that the License Agreement is a franchise agreement, the proposed link between the unenforceability of the underlying franchise agreement and the Note and Guarantees is a tenuous one." The Court explained that "if the License Agreement were found to be a franchise agreement, it does not follow that it has an unlawful purpose—in fact, contracting a franchise is completely lawful. The alleged unlawfulness is found in the Plaintiff's failure to meet the procedural requirement of franchise registration, not in its purpose. Accordingly, the Defendants' argument fails on its face."

While the guarantors argued that rescission of the alleged franchise agreement was warranted, which would necessarily void the guaranty. However, the Court found that because the guarantors were aware that the license agreement could be a franchise agreement and made the conscious decision to continue the relationship (and benefit thereby), the guarantors were estopped from rescinding the alleged franchise agreement, resulting in valid and enforceable guaranties.

In a very interesting argument, the guarantor in Wendy's International v. Saverin, argued that the judgment entered against him should be offset to reflect the benefits conferred upon the

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74 Id. at *13.
75 Id. at *14.
76 653 F. Supp. 401, 403 (W.D.N.Y. 1986).
78 Id. at 130.
79 Id.
80 Id.
81 Id. at 131.
franchisor by reason of the franchisee company’s (and the guarantor’s) default.\footnote{ld. at 479.} The guarantor reasoned that "had he performed his duties under the applicable agreements, Wendy's would not have had the opportunity to open profitable, company-owned restaurants in St. Louis or to refranchise the restaurants in Central Illinois."\footnote{ld.} The Court explained that when "a defendant's breach of contract causes damages, but also confer[s] some benefit upon the plaintiff, the doctrine of offsetting damages calls for the amount of the plaintiff's damages to be reduced by the amount of the benefit received."\footnote{ld.} However, in this case, the Court refused to offset Wendy's "actual losses" with "hypothetical profits over time." Beyond speculation, the Court found that any profits Wendy's made at the company-owned stores would be "due to its own efforts, not to [the guarantor's] breach."\footnote{ld.}

F. Lack of Consideration

For any contract to be binding, there must be consideration. Consideration is the benefit of the contract and the most common form of consideration is payment (in kind or in cash) for the subject matter of the contract, whether it be rights, goods, services or otherwise. In the case of a guaranty, the consideration is usually the agreement of the franchisor to enter into the franchise agreement to a third party (the franchisee business).

In Century 21 Real Estate Corp. v. CLTM Associates, Ltd.,\footnote{No. 02 C 1735, 2003 WL 288951 (N.D. Ill. Feb 10, 2003).} the guarantors argued that they were "not individually liable for any sum due under the Franchise Agreement because, as there was no consideration for the Guaranty of Payment and Performance they executed, it is unenforceable as a matter of law."\footnote{ld. at *6.} The franchisor argued that the franchise agreement constituted the necessary consideration. The Court explained that "[i]f a guaranty lacks consideration, it is merely an unenforceable gratuitous promise."\footnote{ld.} Accordingly, the Court reasoned that if the guarantors did not execute the Guaranty at the same time as the franchise agreement "and as part of the same agreement, then the guaranty "must be supported by separate consideration moving to the guarantor or the renunciation of something substantial by the guarantee."\footnote{ld.} Interestingly in this case, the franchise agreement (and personal guaranty) was entered into 14 months after the franchisee began operating the franchise. At the time the franchisee began operating, no personal guaranty was requested. Because the franchisor could not establish that the franchise agreement executed 14 months after beginning operations "differed in any respect that would amount to sufficient consideration for the Guaranty," the Court held that the franchisor "has not established there was consideration for [the guarantors] to execute the Guaranty," and denied summary judgment in the franchisor's favor.

\footnote{Id. at 479.}
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In *Kawasaki Motors Corp. v. Navratil*, the guarantors argued that there was no consideration for a second guaranty entered into after the original one. The Court, however, disagreed because the franchisor submitted an affidavit that stated that credit would not have been extended to the franchisee without the execution of the personal guaranties. The Court viewed this as reasonable consideration. Along the same lines, the guarantors also argued that the only way the second guaranty was valid was if it constituted a novation of the first guaranty. By making this argument, the guarantors sought to limit their liability to the $100,000 liability cap set forth in the second guaranty. Because the Court did not find any agreement between the parties to extinguish the original guaranty, the Court found that both guaranties continued to exist. Accordingly, the Court upheld the guarantors' liability under both guaranties.

**G. Breach of Franchisor's "Duty" to Guarantors**

In *Kawasaki Motors v. Navratil*, the guarantors attempted to argue that the franchisor owed the guarantors a duty of disclosure of any facts which increased the guarantors' risk. Guarantors argued that the right of the Kawasaki to inspect the inventory and records of the franchisee was also a duty to protect the security of the guarantor. While the Court recognized that fraud (including concealment) on the part of the creditor which induces the guarantors to enter into an agreement renders a personal guaranty unenforceable, the guarantors were arguing no such set of facts. Instead, the guarantors argued that inspections conducted after entering into the guaranty by the franchisor's agent, which uncovered wrong-doing, should have been reported to the guarantors. The Court adopted the Restatement of Security rule as follows:

Where before the surety has undertaken his obligation the creditor knows facts unknown to the surety that materially increase the risk beyond that which the creditor also has reason to believe that these facts are unknown to the surety and has a reasonable opportunity to communicate them to the surety, failure of the creditor to notify the surety of such facts is a defense to the surety.

Following this rule, the Court found that there was "no duty imposed on the creditor to conduct an investigation for the surety's benefit."

The guarantors also argued that the franchisor impaired collateral by inadequately monitoring inventory and releasing titles, such that the guarantors should be released from the guaranties. The Court disagreed, finding that the guaranties specifically addressed the ability of the franchisor to take numerous actions regarding collateral at any time, without affecting the guarantors' obligations.

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90 *Id.* at *12.

91 *Id.* at *13.

92 *Case No. 5-84-26, 1985 Ohio App. LEXIS 9104 (Ohio Ct. App. Oct. 9, 1985).*

93 *Id.* at *8.

94 *Id.*

95 *Id.* at *12.
VI. ENFORCEMENT OF NON-COMPETES AND OTHER COVENANTS

A. Enforcement Against Franchisee Owners Who Executed Non-Competes

Despite the fact that non-compete agreements are commonly required by franchisors and executed by franchisee owners and/or affiliates, those binding themselves to these types of agreements continue to fight their enforcement. In *Bad Ass Coffee Company of Hawaii v. JH Enterprises*, the individual owners executed non-competes. After the expiration of the franchise agreement, they immediately de-identified the coffee shop from the franchised concept and re-opened in the same location with a new name. When the franchisor sought to enforce the non-compete against the individuals, they argued that while the franchise agreement was a legally binding contract, the non-compete was not enforceable due to lack of consideration because the non-compete agreements were executed months after the franchise agreement. The Court quickly disregarded this argument because the non-compete agreements stated that they were part of the same transaction as the franchise agreement and that the parties understood that the individuals' willingness to execute the non-competes was part of the inducement to the franchisor to grant the franchise. Interestingly, the Court pointed to the self-serving testimony of the franchisor that it would not have granted the franchise without an "understanding" that the individuals would execute personal non-compete agreements.

The Court found the "fact that the written documents reflecting the complete agreement of the parties was not signed at the same time does not negate the true intent of the parties not the exchange of consideration for the contract and obligations undertaken as part of the same transaction." The individuals also argued that the non-compete was not reasonable in terms of protecting the franchisor's goodwill. Specifically, the individuals argued that "the language of the covenants not to compete can be read to restrict activities that are wholly unrelated to [franchisor's] goodwill." The Court quickly dismissed this claim as well, finding that "courts avoid reading covenants not to compete in a manner that would render them unreasonable." Under Florida law (one of the possible applicable laws in this case), the Court could "modify the restraint" if it determined that the non-compete was "overbroad." Accordingly, the Court found that it was unlikely that the individuals could succeed in convincing a Court that the non-compete agreements were unenforceable, granting an injunction in favor of the franchisor and restraining the franchisee owners from operating the competing coffee shop.

96 Forum papers and books have been written on this subject in the franchise context. See, e.g., Michael R. Gray and Jason M. Murray, *Enforcement of Covenants Against Competition*, ABA Forum on Franchising (Orlando 2005). As such, this paper will only briefly review the topic of non-compete enforcement.


98 Id. at 1245.

99 Id. at 1245.

100 Id. at 1246.

101 Id.

102 Id. at 1247.
Florida law on the ability to modify restrictive covenants is similar to other states that allow courts to modify or "blue pencil" restrictive covenants which are unreasonable or otherwise unenforceable as drafted so as to make the covenants enforceable. In *Novus Franchising, Inc. v. Superior Entrance Systems, Inc.*, the post-term covenant not to compete extended to "you [franchisee company], your Owners [and] the Personal Guarantors, and the members of your and their Immediate Families . . . " and sought to restrain competing "or similar" business in multiple geographic areas.\(^{103}\) Applying Minnesota law, the District Court explained that "the covenant over-reaches as to whom, where, and when the covenant might apply."\(^{104}\) As such, the Court struck the provision "members of your and their Immediate Families" and found "the appropriate geographic limit on competition is exactly the same size and shape as the customer base serviced by [company] in and around Superior, Wisconsin."\(^{105}\)

While limiting these provisions, the Court enforced the temporal period of the restraint as written, running the restriction on competition from the time of compliance therewith. As such, the Court found the individual owner through his continued association with a competing company was in breach of the covenant, "delaying the start date of his two-year non-compete" and finding he would "only be in compliance with the covenant not to compete when either (1) he completely divests all financial interest in and connection with [competing entity] or (2) when [competing company] ceases to perform auto glass repair."\(^{106}\) Not only did the Court enforce the non-compete against the individual owner (and, by extension, the individual's new competing company), the Court made certain that the franchisor received the benefit of the full two year non-compete period.

Although the Court in *Novus Franchising v. Superior Entrance Systems* refused to enforce the non-compete provision against family members, striking that clause from the provision, a District Court in Minnesota actually enforced the same provision.\(^{107}\) Enforcement of a provision this broad would potentially reach individuals completely uninvolved in the franchise operation. While the franchisor's argument (and concern) is that the franchisee owner will merely transfer his or her business knowledge to a family member who would then compete without restriction, such a far-reaching non-compete provision appears beyond what many courts would enforce as necessary to protect the franchisor's legitimate business interests. Nevertheless, it is important for franchisee owners to recognize that executing a non-compete with this language may actually bind their uninvolved family members.

While some courts have the ability to blue-pencil (though are not obligated to use that power), other courts may simply render overly broad non-compete provisions unenforceable. In


\(^{104}\) Id. at *2.

\(^{105}\) Id.

\(^{106}\) Id. at *3.

\(^{107}\) *Novus Franchising, Inc. v. AZ Glassworks, LLC*, Civil No. 12–1771 (MJD/TNL), 2013 WL 1110838 (D. Minn. Mar. 18, 2013). It is important to note that this case involved a default judgment, so no one argued against enforcement of the non-compete provision as overly broad and unreasonable.
Outdoor Lighting Perspectives Franchising, Inv. v. Harders, the franchisor sought to enforce a non-compete provision against a franchisee owner who had been actively involved in the franchise operation for ten years. After an extensive discussion on the topic, the Court denied the franchisor’s request for an injunction to enforce the non-compete provision against the individual. The Court explained initially that the franchisor—as the party seeking to enforce the non-compete provision—bears the burden of establishing its reasonableness.\(^{109}\) The franchise agreement allowed the franchisor to reduce the scope of the post-term non-compete restrictions. The franchisor, "[i]n apparent recognition of the problematic nature of the 100 mile buffer provision," submitted an affidavit indicating it was not seeking enforcement of this part of the non-compete—only limitations within the individual's former territory. Even as modified, the Court found the non-compete provision was unreasonable as to geographic scope in light of the fact that it prohibited the individual from engaging in an outdoor lighting business within the territory assigned to any of the franchisor's affiliates. The franchisor's affiliates admittedly engaged in businesses completely unrelated to outdoor lighting.\(^{110}\) Accordingly, the Court held that the "restriction is excessively broad given that [franchisor] has no legitimate reason for precluding Defendants from competing with franchisees or affiliates of Plaintiff which are not engaged in the outdoor lighting business."\(^{111}\) The Court also found that "the agreement prohibits Defendants from engaging in activities which do not involve an impermissible degree of competition with Plaintiff's legitimate business interests," affirming the trial court’s conclusion that the franchisor "had no likelihood of success on this particular claim on the merits."\(^{112}\) While the franchisee prevailed on aspect of the case, at the time of this decision, the franchisor’s petition remained pending for monetary relief against the franchisee and franchisee owner related to other breaches of the franchise agreement.

\rightarrow **Practice Tip:** When drafting restrictive covenants in franchise agreements, franchisors may want to reserve the right to reduce the scope of non-compete provisions, effectively allowing the franchisor to blue-pencil the provision even in states that would not allow such a modification by the court. However, franchisors should keep in mind that courts may nevertheless render overly broad or unreasonable provisions unenforceable.

Finally, even if franchisee owners do not contest the reasonableness of non-compete provisions, they may raise other defenses to enforcement. For instance, in Total Car Franchising Corp. v. L & S Paint Works, Inc.,\(^{113}\) the individual argued that he was not utilizing any confidential or trade secret information or technology of the franchisor but, rather, "he is simply painting cars in the same manner it [sic] did before entering the Franchise Agreement."\(^{114}\) The Court found that this defense did not end the inquiry because the non-

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\(^{109}\) Id. at 264.

\(^{110}\) Id. at 265.

\(^{111}\) Id.

\(^{112}\) Id. at 268.

\(^{113}\) 981 F. Supp. 1079 (M.D. Tenn. 1997).

\(^{114}\) Id. at 1081.
compete provision was broader than prohibiting competition using the franchisor's method or technology, restraining any paint work whatsoever. Additionally, the court found that the individual's testimony that "he never learned anything from his training is not convincing." As such, while the Court was "sympathetic" to the individual's "difficulty at having to restrict the conduct of his small business," the Court found that the franchisor was likely to succeed in proving breaches of the non-compete and confidentiality provisions so that a preliminary injunction was warranted.116

B. Enforcement Against Non-Signatories117

Courts across the country have enjoined not just former franchisees, but those working in concert with them to evade the franchisees’ post-termination obligations, even if the individuals never signed a non-competition provision.118 As one court has explained:

A non-signatory may be bound by a covenant not to compete based on his or her particular relationship to a business, or, as pertinent here, when he or she assists a signatory to violate the covenant. A non-signatory to a covenant will be bound because a covenanter will not be allowed to do through others what he or she could not do directly.119

In McCart v. H & R Block, Inc.,120 a tax preparation franchisor brought suit to enjoin a former franchisee’s husband from violating the restrictive covenant contained in his wife’s franchise agreement. The court noted that "the rule that a stranger to a covenant may be enjoined from

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115 Id. at 1083.

116 Id.

117 In light of the paper and presentation by Emma Cano et al., Unsigned Obligations: When Are Non-Signatories Bound?, which will be presented at the 37th Annual Forum on Franchising in Seattle (Workshop W-2), this paper provides only a brief overview of unsigned obligations.


aiding and assisting the covenanter in violating his covenant is supported by an overwhelming weight of authority. Indeed, the court explained that:

If this Court were to enjoin June only and allow Robert to continue the tax preparation trade at the same site and with the same customers the Court would be ignoring the business realities of the situation, frustrating the proper purpose of paragraph 11 of the contract, and affording June McCart indirect competition and benefit in specific violation of the contract terms.

A similar result was reached in Tanfran, Inc. v. Aron Alan, LLC. Here, a deceased franchisee’s estate continued operating tanning salons after the expiration of the franchise agreement. Tanfran alleged that the corporate franchisee assigned its assets to a trust, which in turn formed a new limited liability company to operate the competing businesses. Tanfran sought a preliminary injunction against all defendants, even those that had not signed the franchise agreement itself. In response, the defendants argued that there was no basis for enforcing the non-compete provisions against them because they were not parties to the franchise agreement and did not otherwise agree to be bound by the non-compete provisions. The trustee (on behalf of the trust) further argued that it was a creditor of the franchised business and had done no more than obtain its collateral and assign it to the new limited liability company. They also argued that they were not acting in concert with the former franchisee to avoid its obligations under the franchise agreements.

The court disregarded the sham transaction and entered a preliminary injunction against all defendants. Discussing cases from around the country that have enforced restrictive covenants in franchise agreements against non-signatories, the court found that all defendants should be enjoined. As the court explained:

The Trust and Miracle acted with Aron Alan to violate the franchise agreements by using the former franchise telephone numbers to direct business to Miracle and by failing to assign those numbers to Tanfran or cease using them; by using the franchise customer lists; and by using Tanfran’s operations manuals and proprietary software. Moreover, by their joint conduct, Aron Alan and the Trust acted to foreclose Tanfran from exercising its right under the franchise agreements to purchase Aron Alan’s business assets, even though Tanfran’s counsel expressed Tanfran’s interest in doing so…In short, to allow the Trust and Miracle to continue the tanning business would be tantamount to permitting Aron Alan to violate the non-competition agreements. Thus, the court will extend the injunction to the Trust and Miracle.

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121 Id. at 760.
122 Id. at 762.
124 Id. at *1-2.
125 Id. at *5.
126 Id. at *8.
Similarly, in Victory Lane Quick Oil Change, Inc. v. Darwich,\(^{127}\) a terminated franchisee sold the assets of his business to his brother, who began operating the same type of business at the site of the formerly franchised location.\(^{128}\) Because the facility’s landlord would not approve a transfer of the lease, the franchisee’s corporate entity remained the tenant of record for the location.\(^{129}\) The franchisor claimed that the franchisee and his corporate entity had breached the franchise agreement’s post-termination covenant against competition. The Court agreed, despite the franchisee’s insistence that he did not have any interest in his brother’s business.\(^{130}\) This Court found the lease issue alone to be dispositive of that question, explaining that:

As the tenant, Darwich Brothers was allowing Saline Quick Lube to occupy the same locations as the former Victory Lane franchise. Accordingly, Darwich Brothers is arguably ‘connected with,’ has an ‘interest in,’ or is ‘assisting any person or Entity engaged in any Competitive Business’ in violation of section 21.3 of the franchise agreement.\(^{131}\)

Because the parties had already stipulated to judgment against the brother and his corporate entity, the court granted summary judgment to the franchisor on its breach of contract claim against the franchisee.\(^{132}\)

While as a rule non-signatories under most circumstances will not be held liable for obligation of another, courts in equity may fashion remedies to prevent a wrong-doer from circumventing its legal obligations.

C. Contempt: Enforcement of Injunctions Against Non-Signatories of Non-Competes

In Ohio State Waterproofing, Inc. v. North Coast Waterproofing, Inc.,\(^{133}\) the court considered a motion for contempt arising out of a former franchisee’s breach of a preliminary injunction. The court enjoined Michael Rusk and his company North Coast Waterproofing from operating a basement waterproofing business.\(^{134}\) Just days after the injunction was issued, Michael Rusk’s brother purchased the assets of North Coast Waterproofing and formed a new


\(^{128}\) Id. at *2.

\(^{129}\) Id.

\(^{130}\) Id. at *6.

\(^{131}\) Id. at *6-7.

\(^{132}\) Id.


\(^{134}\) Id. at *2-3.
company to operate the same type of business.\textsuperscript{135} No money exchanged hands as part of the sale, and Michael Rusk’s brother performed no due diligence concerning the business he purchased.\textsuperscript{136} The new corporate entity then continued operating out of the same location as the formerly franchised business, employing the same individuals.\textsuperscript{137} The court granted the franchisor’s motion for contempt, finding that the transaction at issue was a sham sale designed to evade the terms of the injunction.\textsuperscript{138}

D. Enforcement of Arbitration Provisions Against Non-Signatories

At issue in \textit{Mac Tools v. Diaz}\textsuperscript{139} was whether the wife of a distributor, who had not signed the distributor agreement containing the arbitration provision, could be compelled to arbitrate the dispute that had arisen between the manufacturer and distributor. The wife had invested personal funds in the distributorship and was part of the acquisition, but did not sign the distributor agreement. After the distributor terminated the distributorship, alleging that the business failed due to the manufacturer, the wife filed an action against the manufacturer seeking to assert claims of the distributor (including fraud) as an "investor." The manufacturer filed a motion to compel arbitration. The Court found that the wife’s failure to sign the distributor agreement was not dispositive of the issue as courts have recognized at least five theories for binding non-signatories. The manufacturer argued that the wife was estopped from avoiding arbitration, especially in light of the fact that she sought to bring claims (and obtain benefits) under the distributor agreement. The Court agreed, finding that the facts surrounding the acquisition, along with the wife’s claims, would make it inequitable to permit the wife to litigate her claims in court when the company and her husband would be bound to arbitrate substantively indistinguishable claims.

The Court in \textit{Teramar Corp. v. Rodier Corp.},\textsuperscript{140} declined to enforce an arbitration provision in a franchise agreement against the individual owner, actually reversing an arbitration award. The Court found credible the individual’s argument that she did not understand when she executed the franchise agreement containing an arbitration provision that she would be personally bound by it (as opposed to the franchisee company).

VII. CONCLUSION

Guaranties are an important protection for the franchise system as a whole. While there are circumstances where an alternative or limitation may be considered, negotiations surrounding personal guaranties will depend largely on the context of each individual transaction. A franchisor should carefully consider what the company seeks to protect by

\begin{itemize}
  \item \textsuperscript{135} \textit{Id.}
  \item \textsuperscript{136} \textit{Id.}
  \item \textsuperscript{137} \textit{Id.}
  \item \textsuperscript{138} \textit{Id. at *7-8.}
  \item \textsuperscript{139} No. 2:11–cv–940, 2012 WL 1409395 (S.D. Ohio Apr. 23, 2010).
  \item \textsuperscript{140} No. 51934, Bus. Franchise Guide (CCH) ¶ 9,337 (Ohio Ct. App. Apr. 20, 1987).
\end{itemize}
obtaining personal guaranties and other obligations from the individual franchisee owners to
determine whether it is appropriate to tailor its normal requirements to meet those overall goals.

Enforcement actions of personal guaranties against individual franchisee owners, especially with respect to financial guaranties, are generally successful. Indeed, many such cases are decided on summary judgment notwithstanding defenses to enforcement raised by the individuals. Therefore, it is prudent for individual franchisee owners to attempt to limit or otherwise reduce their individual exposure or, at a minimum, be sure that they understand the ramifications of the obligations they will undertake.
PERSONAL GUARANTEE AND AGREEMENT TO BE BOUND PERSONALLY BY THE TERMS AND CONDITIONS OF THE FRANCHISE AGREEMENT

In consideration of the execution of the Franchise Agreement by us, and for other good and valuable consideration, the undersigned, for themselves, their heirs, successors, and assigns, do jointly, individually and severally hereby become surety and guarantor for the payment of all amounts and the performance of the covenants, terms and conditions in the Franchise Agreement, to be paid, kept and performed by the franchisee, including without limitation the arbitration and other dispute resolution provisions of the Agreement.

Further, the undersigned, individually and jointly, hereby agree to be personally bound by each and every condition and term contained in the Franchise Agreement, including but not limited to the non-compete provisions in paragraph 10.D, and agree that this Personal Guarantee will be construed as though the undersigned and each of them executed a Franchise Agreement containing the identical terms and conditions of this Franchise Agreement.

The undersigned waives: (1) notice of demand for payment of any indebtedness or nonperformance of any obligations hereby guaranteed; (2) protest and notice of default to any party respecting the indebtedness or nonperformance of any obligations hereby guaranteed; and (3) any right he/she may have to require that an action be brought against the franchisee or any other person as a condition of liability.

In addition, the undersigned consents and agrees that: (1) the undersigned’s liability will not be contingent or conditioned upon our pursuit of any remedies against the franchisee or any other person; and (2) such liability will not be diminished, relieved or otherwise affected by franchisee’s insolvency, bankruptcy or reorganization, the invalidity, illegality or unenforceability of all or any part of the Franchise Agreement, or the amendment or extension of the Franchise Agreement with or without notice to the undersigned.

It is further understood and agreed by the undersigned that the provisions, covenants and conditions of this Guarantee will inure to the benefit of our successors and assigns.

FRANCHISEE: __________________________ (insert name of entity)

PERSONAL GUARANTORS:

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**Alison (Ali) McElroy** is Chief Legal Officer and SVP Strategic Relationships for Lift Brands, Inc. She is responsible for overseeing the global legal and franchise administration functions for all Lift Brands subsidiaries, including the SNAP FITNESS and YOGAFIT franchise systems, franchise investments and all commercial divisions. Ms. McElroy has spoken at numerous programs on franchising and international business and is the author of several publications on franchising, including serving as co-author of the “International Franchising” chapter in the ABA’s *Franchise Law Compliance Manual* (Second Edition). Ms. McElroy is a member of the American Bar Association Forum on Franchising and currently serves as Chair of the Corporate Counsel Committee. She is a current council member and past chair of the Minnesota State Bar Association Section of International Business Law. Ms. McElroy received the Certified Franchise Executive designation from the International Franchise Association in 2009. Ms. McElroy was previously in private practice in Minneapolis, MN with the law firm Faegre & Benson LLP (now Faegre Baker Daniels). Ms. McElroy received her B.A. from the University of Notre Dame and her J.D. from the University of Minnesota Law School.

**Nicole S. Zellweger** is a partner with Stinson Leonard Street LLP in its St. Louis, Missouri office, where she concentrates her practice in the areas of franchise and business litigation, usually representing franchisees. Ms. Zellweger has spoken at numerous programs on franchising and is the author of several publications on franchising, most recently as the co-author of "Assessing Materiality – What to Include and When to Amend" at the 2012 Forum on Franchising. Ms. Zellweger has been recognized multiple years as a *Franchise Times* Legal Eagle and was honored by the ABA Forum on Franchising in 2011 with the Chair’s Future Leader Award. She has been active with the Forum since 2005, serving on the Forum's Women's Caucus and assisting with the Newcomers' Night. Ms. Zellweger is licensed to practice law in the states of Missouri, Illinois, and Kansas and many federal courts located therein, including the Eighth Circuit Court of Appeals. Ms. Zellweger graduated law school Order of the Coif from Washington University in St. Louis and received an AB from the University of Georgia and a masters degree from Yale University.