SETTLEMENTS AND RELEASES IN FRANCHISE DISPUTES: HOW TO MAKE SURE IT’S OVER WHEN IT’S OVER

Martin G. Gilbert
Stryker, Tams & Dill LLP

and

Allan P. Hillman
Shipman & Goodwin LLP

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SETTLEMENTS AND RELEASES IN FRANCHISE DISPUTES:  
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INTRODUCTION

Lawrence Peter "Yogi" Berra is not a franchise lawyer, as far as we know. Many commentators, however, considered him to be one of the Yankees' "franchise players" in the late forties and fifties, when the World Series always seemed to be "the Yankees against a team to be named later."

Legal expert or not, Yogi is credited in lore with pointing out "it's not over 'til it's over." He may have been waxing poetic about "America's favorite pasttime" -- then baseball -- but equally he could have been ruminating on the subject of this paper -- settlements.

Settlement agreements, like the franchise relationships they address, must anticipate a wide range of potential problems. We discuss in this paper documenting and enforcing settlements with confidentiality and non-disparagement clauses, non-compete, intellectual property protection, releases, covenants not to sue, consent judgments and liquidated damages, as well as disclosure obligations and the impact of state franchise laws on releases.

I. HOW CAN YOU PROTECT YOUR SETTLEMENT?

In many respects the settlement of a franchise dispute is no different than any other settlement. The dispute may or may not have gone so far as litigation. But, in either event a franchisor and a franchisee have concluded that the better course is to go their separate ways. At this state in the franchisor-franchisee relationship, the terms of settlement are usually a matter of negotiation. What a franchisor wants and what a franchisor can get may be entirely different subjects. Nonetheless, a franchisor should not begin with the assumption that the settlement is nothing more than a payment of money and general releases. As the franchise agreement was designed to anticipate and protect many interests in the franchise relationship, so too should a franchisor seek to protect interests which survive the settlement. The following are a number of provisions which anticipate post-settlement conduct, and therefore might find their way into a settlement agreement.

A. Confidentiality Clauses

A successful franchise network relies upon transparency. While there may be some nuances of contract, in the main franchisees suppose that they are treated equally by their franchisor. Yet, the settlement of a franchise dispute often entails different treatment of the settling franchisee. Whether the treatment be outright money, forgiveness of debt or some other favorable consideration, the franchisor may not want the terms of settlement to be broadcast to the rest of the network. The franchisor may also seek to make the confidentiality obligation unilateral to the franchisee, arguing that since the franchisee is leaving the system it has no interest in keeping the settlement secret. But, where the settlement terms are not

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1 This paper concerns itself with settlements which are also separations between a franchisor and a franchisee. Settlements which continue the relationship have an entirely different set of characteristics and are better reserved for another paper.
favorable to the franchisee, it may insist that the confidentiality obligation be mutual. In any event, first on a franchisor’s checklist of clauses to include in a settlement agreement should be some form of confidentiality clause.

In its most basic form, a settlement confidentiality clause is an agreement to keep the terms of the settlement secret. The clause can be as simple as:

Neither [franchisor] nor [franchisee] will disclose any information about the terms or effects of this settlement, except as necessary to enforce the agreement.

A variation makes clear that the clause applies to agents:

[Franchisor] and [franchisee] represent and agree that they will keep each and every term of this Settlement Agreement completely confidential, and neither [franchisor], [franchisee], nor their attorneys, agents or representatives will publish, publicize or disseminate or cause to be published, publicized or disseminated, in any manner, information relating to the substance or content of, this Settlement Agreement to any person.

However, in many cases the franchisee is usually a business organization and the people who might be doing the talking may or may not be within that organization. Of course, strangers to the settlement agreement cannot be bound by its terms. But, expanding the confidentiality clause to put the onus on the franchisee to communicate the confidentiality obligation to others at least creates an affirmative duty on the franchisee. With it comes the ability to enforce a breach of that duty. The provision might look like this:

[Franchisee] and its attorneys agree not to divulge the contents of this Settlement Agreement to any person and agree to keep the contents of this Settlement Agreement in strict confidence. If the contents of this settlement are already within the knowledge of the [franchisee’s] family, friends, attorneys, partners or associates, [franchisee] and its attorneys will instruct such individuals that the contents of the settlement are not to be divulged to anyone else and that to do so would violate the terms of the settlement.

Sometimes, despite good faith efforts on the part of both the franchisor and the franchisee, word of the settlement leaks out. Questions may be asked seeking to find out if the dispute settled and, if so, what were the terms. An agreement requiring the parties to stand mute when such questions are asked either looks silly or creates an inference no one may want. A better solution is for the agreement to create an agreed response:

The terms of this Settlement Agreement, and any settlement offers, counter-offers, modifications and proposed modifications thereto, will be treated as confidential by both [franchisor] and [franchisee] and will not be disclosed by them to any person. If asked about the disposition of this lawsuit, [franchisor] or [franchisee] may say that “the case has been satisfactorily resolved” without violating this paragraph of this Settlement Agreement. [Franchisor] and [franchisee] agree that the only
other permissible communication to any third party about this lawsuit and the settlement of this lawsuit is set forth in the statement attached hereto as Exhibit ______.

A major issue when negotiating a confidentiality clause is “carve-outs”. Carve-outs are exceptions from the broad prohibition of the confidentiality clause. The most common carve-out pertains to taxes. Both the franchisor and the franchisee will likely need to communicate the terms of their settlement to not only taxing authorities, but to their accountants in order to satisfy reporting requirements:

[Franchisee] and its counsel agree that they shall keep strictly confidential and shall not reveal, publish, communicate or otherwise disseminate to any other person or entity, the terms and conditions of this Settlement Agreement including, without limitation, the amount of payment to be made to franchisee and franchisee’s counsel, provided that franchisee shall not be precluded from communicating the terms and conditions of this Settlement Agreement and the amount of the payment to any federal, state or local taxing authorities or to any tax accountant or tax preparer for [franchisee] and provided that such accountant or preparer for [franchisee] agrees to keep such information confidential, except with respect to such taxing authorities.

The mere insertion of this clause will not bind the franchisee’s tax accountant or tax preparer. However, it will imply a duty on the part of the franchisee to instruct the accountant or tax preparer as to the fact of confidentiality. Obtaining a separate consent from the accountant or tax preparer is the ultimate safeguard. Experience has taught, however, that this is very difficult to police.

The next carve-out is usually for post-settlement legal obligations. Usually, they arise when either the franchisor or the franchisee is the recipient of a subpoena or an application for a court or administrative order compelling disclosure of the settlement. No settlement agreement can insulate the franchisor or the franchisee from the duty to comply with a valid order or properly upheld subpoena. But, the settlement agreement can create a notice obligation by the party receiving the subpoena or application for order to the other party to the settlement. The settlement agreement can also impose a duty of cooperation. The language might look like this:

[Franchisee] may disclose the contents of this Settlement Agreement under a valid subpoena or valid order of any court or administrative agency of competent jurisdiction; provided, however, that:

(a) [franchisee] shall not seek such subpoena or order and shall not encourage or aid any other person or entity in seeking such subpoena or order, except to preserve [franchisee’s] rights under this Settlement Agreement;

(b) if [franchisee] receives a request, inquiry, subpoena or application for order seeking or requiring disclosure of the contents of this Settlement Agreement, within three business days of such receipt (or within such shorter time period as necessary to
allow adequate time to protect the confidentiality agreed to in this Settlement Agreement), [franchisee] shall notify [franchisor] by written notice of such receipt; and

(c) [franchisee] shall cooperate in opposing any effort to require disclosure of the content of this Settlement Agreement, where requested by [franchisor].

The assumption in the above paragraph is that it is the franchisor that will wish to preserve confidentiality, but the language can easily be reversed or made neutral if the circumstances warrant.

And finally, it is useful to provide expressly for what the law would imply anyhow, the ability of either party to the settlement agreement to disclose its contents with the consent of the other party. Including such a provision obviates the argument that the consent operates as general waiver of the confidentiality clause:

[Franchisee] may disclose the contents of this Settlement Agreement with the prior written consent of the general counsel of [franchisor]; provided, however, that such written consent shall not act as a general waiver of the terms of this confidentiality provision nor constitute consent to subsequent disclosures.

Franchisors, of course, may have other disclosure obligations. Whether a settlement must be included in a Franchise Disclosure Document is a topic that will be discussed later in this paper. Where disclosure is mandated, a franchisor can insist upon a carve-out for that which may be required in the Disclosure Document:

…neither [franchisor] nor [franchisee], nor their agents or attorneys shall disclose to third parties the terms of this Agreement or the settlement herein, except that they may disclose the terms of this Agreement to the full extent required by law in [franchisor's] Franchise Disclosure Document, and to accountants, auditors or others performing financial audits or government investigations in connection with or arising out of [franchisor's] Franchise Disclosure Document, but only to the extent necessary for the above business purposes.

Can a confidentiality clause provide its own remedy? It can. Breach of a confidentiality clause is a good example for the use of settlement liquidated damages (which is discussed in more detail later in this paper). Any formula can be used, but the best success may lie in a provision for a refund of a portion of the settlement payment:

[Franchisee] recognizes that this confidentiality provision was a significant inducement to [franchisor] to enter into this Settlement Agreement, and that a significant portion of the Settlement Payment as described above was in consideration of this confidentiality provision. If [franchisee] violates this paragraph, [franchisee] understands that [franchisor] may require [franchisee] to reimburse [portion] of the compensation provided to [franchisee] pursuant to this Settlement Agreement and that [franchisor] may
take any legal action necessary to protect [franchisor’s] rights under this paragraph.

Finally, where the settlement is of a pending court case, to avoid any future uncertainty the franchisor or the franchisee may demand that the settlement agreement be made a part of the court docket. If the settlement agreement is filed, confidentiality can only be preserved if there is a sealing order. Such an order is more likely to be granted where the application is joint:

It is the intent of [franchisor] and [franchisee] that this Settlement Agreement be filed on the court docket. The parties acknowledge, however, that this Settlement Agreement contains proprietary, confidential and privileged information, disclosure or dissemination of which would cause irreparable injury to themselves. They therefore agree that, as a condition to the filing of this Settlement Agreement with the court, they will make joint application for an order placing this Settlement Agreement under seal.

A provision such as this begs the question of what happens if the court does not grant the application for a sealing order. One possibility is to simply not file the settlement agreement. But, if a record in court is important, the provision can provide for something less than the full agreement:

In the event that an order sealing the Settlement Agreement is not granted, [franchisor] and [franchisee] agree to file a Memorandum, which will be sufficient for minimum jurisdictional purposes, but which will not contain any proprietary, confidential or privileged information.

B. Non-Disparagement Clauses

Both franchisors and franchisees know that a contested dispute is often acrimonious. Accusations can run high and, in the heat of the dispute, harsh words may be exchanged. It is a fact of human nature that, although a case may be settled, bad feelings linger. One side may look for an opportunity to injure the other through derogatory statements to third parties.

The fact of settlement usually does not shield either side from tort liability on account of conduct after the settlement is consummated. If a franchisor or a franchisee subsequently makes statements which constitute libel or slander under a given state’s laws, the victim of these statements can bring an action. The problem, typically, is in proving all of the elements of libel or slander, which usually includes proof of “malice” or at least negligence. The discouragement to harmful post-settlement statements is a non-disparagement clause. A non-disparagement clause transports disparaging statements from a tort to a contract claim. The party claiming injury need only prove that the statements were disparaging and that it was injured by the statements. In its most basic form, a non-disparagement clause contains a time period for the clause to be effective and the obligation not to make the statements. Often, however, there is some recitation of topics covered by the clause and that it covers not only the applicable party, but its representatives:

For a period of one year from the date of this Settlement Agreement, [franchisee] agrees not to make any statements,
whether written or oral, or engage in any activity which is detrimental to the name and/or reputation of [franchisor], nor make any disparaging comments concerning [franchisor], including, without limitation, [franchisor’s] products, plans, operations or its officers, directors, employees or stockholders.

Of course, the clause can be modified to be reciprocal:

Usually it is the franchisor who must be alert to situations where it may be bound by the statements of its agents. Sales representatives in the field have been known to make all manner of derogatory remarks, never dreaming that what they thought was offhand conversation would turn into a disparagement claim. Particularly where a franchisor is a large enterprise and tight controls upon its employees are difficult, it is a good idea to limit the liability of the franchisor to actions by the “company”:

[Franchisor] shall not disparage [franchisee], its services or its officers, agents or employees in any way either orally or in writing. [Franchisor] agrees that it will take the necessary steps to advise its Board of Directors (collectively), members of its Board of Directors (individually) and its agents and employees that a confidential agreement of settlement has been entered into and that, as part of the agreement of settlement, each side is obligated to refrain from any disparagement and that no person shall in any way disparage [franchisee], either orally or in writing. [Franchisor] shall only be liable for a breach of this non-disparagement obligation which occurs as a result of its own action and [franchisor] shall have no obligation as to actions taken individually by a member of its Board of Directors or an agent or employee and [franchisee’s] sole remedy in such event is a legal action against such individual.

As with confidentiality clauses, carve-outs should be considered. Most courts imply an exception from a disparagement claim when responding to legal process. It is better, however, to make that caveat express:

[Franchisee] agrees not to disparage [franchisor], its officers, directors, employees, shareholders and agents, in any manner likely to be harmful to its or their business, business reputation or personal reputation; provided that [franchisee] may respond accurately and wholly to any question, inquiry or request for information when required by legal process.

A corollary to responding to legal process is disclosing to a party’s financial and legal representatives when those representatives are, in turn, under their own duty of inquiry:

[Franchisor] and [franchisee] mutually agree not to publish, communicate or disseminate any negative information regarding the other to the public, the media, suppliers, vendors and other industry participants, except that they may communicate as reasonably required to their respective financial advisors,
accountants and attorneys when those representatives have a legal duty of inquiry or as otherwise required by law.

Often more contentious will be a carve-out to a non-disparagement clause for the right to respond to business inquiries about the other party’s performance under the settlement agreement. The negotiations can result in the same kind of scripted communications that apply to confidentiality clauses. Where an outright exception is created, it may look like this:

Notwithstanding any other provision to this Settlement Agreement, [franchisor] reserves the right to communicate with any prospective franchisee regarding [franchisee’s] continuing performance under the sections of this Agreement relating to proprietary information and additional restrictions.

Finally, like confidentiality clauses, enforcement of non-disparagement clauses is aided where the contract makes express the right to equitable relief:

[Franchisor] and [franchisee] hereby covenant and agree that each shall not make, at any time or place, any disparaging remarks, either verbally or in writing, concerning any of the parties’ actions or perceived omissions or otherwise take any action which would disparage or cast doubt upon the business acumen or judgment of the other party.

[Franchisor] and [franchisee] understand and acknowledge that each other party’s business and reputation are a special, unique and extraordinary character, which gives them particular value, the loss of which cannot reasonably be compensated in damages in an action of law. Accordingly, [franchisor] and [franchisee] further agree that in addition to any other rights and remedies that any other party may possess at law, the aggrieved party shall be entitled to injunctive or other equitable relief in order to prevent a remedy or breach of this provision.

As discussed in more detail later in this paper, courts will insist that, independent of any contractual entitlement, equitable grounds for injunctive relief be demonstrated. The clause is, however, relevant to that consideration.

C. **Return of Franchise Materials and Transfer of Franchisee Communication Sites**

Besides the use of trademarks, a franchise relationship is about products and process. The franchisee in a successful system gets to sell products with uniform acceptability and gets to operate his business following a well conceived business model. How that business model operates, however, is usually highly proprietary to the franchisor. Like any other termination or expiration of a franchise, a settling franchisor wants what it considers its proprietary materials returned promptly. Promptly should mean just that, no later than execution of the settlement agreement. A franchisor that defers the return of franchisor materials to some date in the future is looking for trouble. A basic provision reads as follows:
Upon execution of this Settlement Agreement, [franchisee] shall immediately return to [franchisor] all business materials furnished to [franchisee], together with all other material containing trade secrets or business practices.

The clause is specific as to time, but too vague as to what must be returned. Better would be this:

Upon execution of this Settlement Agreement, [franchisee] shall immediately return to [franchisor] all operating manuals, plans, specifications, and other materials containing information prepared by [franchisor] and relative to the franchise system.

In most systems, the key document is the operating manual. However, the foregoing provision can also be improved by crafting the return of franchise materials clause, with more specificity as follows:

Upon execution of this Settlement Agreement, [franchisee] shall immediately return to [franchisor], the operations manual, computer equipment, video equipment, video discs, videotapes, software, software manuals and documentation, and any other communications media and material provided for [franchisee’s] use in connection with the operation of the franchised business. Upon execution of this Settlement Agreement, [franchisee] shall also immediately return to [franchisor], at no expense to [franchisor] all training materials and training curricula provided for use in connection with the training of [franchisee’s] staff. Such items are and shall remain the property of [franchisor].

The old days of simply recovering the operations manual are gone. A modern franchise involves computer hardware and software and other communications media, typically provided by the franchisor. A return clause that specifies these items is more calculated to ensure their production. A return clause should also address the issue of copies. A paragraph such as the one above should add:

At no time may [franchisee] make, or cause to be made, any copies or reproduction of the above materials and shall not disclose the terms to any other person.

What if the franchisee claims that it has lost or destroyed all of its franchise materials? A return clause will not work. The franchisor should substitute a representation provision. The paragraph discussed above can be modified to provide:

[Franchisee] hereby represents and warrants to [franchisor] that it is no longer in possession of the operations manual, computer equipment, video equipment, video discs, videotapes, software, software manuals and documentation, or any other communications media material provided for [franchisee’s] use in connection with the operation of the franchise business. [Franchisee] understands that the foregoing representation and warranty is a material inducement to [franchisor] to enter into this
Settlement Agreement. In the event that [franchisee] shall subsequently discover that it is still in possession of any of the foregoing media and material, [franchisee] shall immediately, upon discovery, return the media or material to [franchisor], at no expense to [franchisor]. Such items are and shall remain the property of [franchisor].

The other valuable tangible is franchisee communication sites. Usually, this means the franchise business telephone number. Customers may have grown familiar with the number to represent the franchised business and the settling franchisor wants continuity:

Upon execution of this Settlement Agreement, [franchisee] shall take all actions requisite by the relevant telephone carrier to transfer, at [franchisee’s] expense, all right, title and interest to the telephone numbers previously used for the franchised business. Thereafter, [franchisor] shall have sole right, title and interest to the foregoing telephone numbers and shall bear all expenses incurred in the operation of the foregoing telephone numbers.

Websites are a different matter. It has no meaning to compel a franchisee to “transfer” the franchisee’s website for the franchised business. Websites can be created or discontinued almost at will. It is better that the agreement provide for the discontinuance of anything on the franchisee’s website that denotes it as a franchised business:

Upon execution of this Settlement Agreement, [franchisee] shall discontinue on [franchisee’s] website and email any identification, advertising or other communications which in any way identify or associate [franchisee] with [franchisor].

Once the website contains no association with the franchisor, the franchisor has no real interest in its identification, content or use.

D. De-identification and Prohibition of Use of Marks and Proprietary Information

Most franchise agreements contain a provision for de-identification, the requirement that a franchisee cease to do anything that might denote a continuing relationship with the franchisor upon termination or expiration of the franchise agreement. Courts routinely enforce these obligations, including cessation of use of the franchisor's trademarks, servicemarks and trade names, whether on signs, advertising, or in another medium, cessation of the use of the telephone number(s) used in the franchise and transfer of the number(s) to the franchisor, and cessation of use of the franchisor's proprietary and confidential information. The cases and articles dealing with enforcement of these rights are legion.²

The same considerations that called for such a provision in the franchise agreement militate in favor of its inclusion in a settlement agreement. The parties assume a complete divorce from the relationship. But, how quickly that occurs and what is meant by de-identification can too easily fall in the cracks. As with returning franchised materials, specifying when the de-identification must occur (again, no later than execution of the settlement agreement is recommended) and what is meant by de-identification removes the ambiguities, which makes for better protection and lessens the chances of post-settlement disputes.

There are three typical subjects of de-identification; signage, printed material, and advertising. Unless there is a good reason to exclude one or more of these categories, a settlement de-identification clause should name them. The language might look like this:

Upon execution of this Settlement Agreement, [franchisee] shall have completed each of the following:

[a] removed, at [franchisee’s] expense all signs erected or used by [franchisee] and bearing the service marks or any other word or mark indicating that [franchisee] is associated or affiliated with [franchisor];

[b] erased or obliterated from letterhead, stationery, printed matter or other forms used by [franchisee] the service marks and all other words indicating that [franchisee] is or was associated or affiliated with [franchisor]; and

[c] permanently discontinued all advertising of [franchisee] to the effect that [franchisee] is or was associated or affiliated with [franchisor].

A franchisee may erase its signs, its letterhead and its advertising, but still attempt to profit upon its former franchisor’s “trade dress”. Many franchises market using distinctive color or style. A former franchisee that infringes on this can be the subject to a Lanham Act claim. Again, however, the proof is easier when the obligation is also a matter of contract:

If [franchisee] engages in any business after the date of this Settlement Agreement, it shall use trade names, service marks or trademarks, (if any) which are significantly different from those under which [franchisee] did business while a [franchisee] of [franchisor], and shall use sign formats, letterheads, stationery and advertising that is significantly different in color or style, and shall take all necessary steps to ensure that its officers, agents and employees observe these obligations.

As stated above, de-identification should be a condition to execution of the settlement agreement. But, if there is a new violation after the agreement, “self help” can be a useful right:

If [franchisee] violates any of the above obligations, [franchisor] shall have the right, upon fifteen days written notice, to enter upon [franchisee’s] premises without being deemed guilty of a trespass or any other tort, and make or cause to be made such removal
and changes at the expense of [franchisee], which expense [franchisee] shall pay to [franchisor] promptly upon demand.

As a practical matter, a self help provision is usually only useful in dealing with signage. The franchisor is, of course, always free to eschew a self help remedy and ask for an injunction. Self help, however, can turn out to be quicker and cheaper, but the franchisor should be careful to stay strictly within the bounds of the terms of the consent.

The requirement that a former franchisee not use its franchisor’s trademarks is an obligation which will exist as a matter of law under the Lanham Act. But, as with de-identification, creating a contractual obligation does more than create an alternative cause of action; it simplifies the proofs. There are two broad prohibitions which might be sought: (i) restraining conduct that might create a false inference that the former franchisee was still affiliated with the franchisor, and (ii) restraining use of what the franchisor regards as its proprietary information. The former is a contractual codification of statutory and common law trademark rights. The latter is a reduction to contract of state law trade secrets protection. In each instance, however, by making the obligation also one of contract, the obligation is both more clearly defined and more easily proved.

Unlike de-identification clauses, a prohibition on future use of marks is best served by being as broad as possible. It is impossible to anticipate every nuance in which a former franchisee might perpetuate the impression of some continuing affiliation, over and above direct use of trademarks:

Upon execution of this Settlement Agreement, [franchisee] shall forthwith discontinue the use and/or display of the service marks in any manner whatsoever and all materials containing or bearing the same, including any duplicate copies thereof, and shall not thereafter operate or do business under its current name or any other name in any manner that might tend to give the public the impression that [franchisee] is in any way associated or affiliated with [franchisor] or any of the businesses conducted by [franchisor].

Earlier, this paper discussed clauses providing for the return of proprietary information by the franchisee to the franchisor. The matter should not, however, stop there. First, it is usually impossible to know with certainty that copies of materials have not been retained. Second, knowledge learned is never fully banished. As with use of mark prohibitions, due to the infinite variety in which the information might be used, restraints on the use of proprietary information are better expressed broadly:

Upon execution of this Settlement Agreement, [franchisee] shall not thereafter use, in any manner, or for any purpose, directly or indirectly, any of [franchisor’s] trade secrets, procedures, techniques, or materials acquired by [franchisee] by virtue of the former franchise relationship, including, without limitation, (i) all information contained in the operations manual, (ii) any training or other bulletins, instruction sheets or supplements thereto, and (iii) any equipment, videotapes, video discs, and forms for operation. [Franchisee] acknowledges that the foregoing materials are confidential trade secrets of [franchisor], that the use
or duplication of such trade secrets shall constitute an unfair method of competition and that [franchisor] shall suffer irreparable injury thereby.

Of course, as in any contract, specific areas of concern can be identified and included in the proprietary description.

E. Non-Solicitation and Non-Compete Clauses

Where a franchise settlement involves a divorce of the parties, the last thing a franchisor wants is its former franchisee setting up shop the next day as its competitor. Often, an essential *quid pro quo* is that the separation be complete; that is to say, that the “goodwill” remain with the franchisor.3

In many franchise circumstances (retail comes particularly to mind), non-solicitation provisions are not particularly effective. The “customers” are not identifiable, and therefore not specifically protectable. Likewise, protecting key employees has less meaning where the franchise product is the key component of the business.

Still, there are jurisdictions (*e.g.*, California) which will not enforce non-competition clauses except to protect trade secrets or in sales of businesses. In such a situation, where the franchise business is not retail, non-solicitation clauses may be the best alternative.

Non-solicitation clauses are just what they sound like, agreements not to solicit someone in a given area for a finite period of time. Commonly, non-solicitation clauses protect two categories of people; customers of a franchisor and employees of a franchisor.

A typical non-solicitation clause protecting customers might read as follows:

For a period of one year from the execution of this Settlement Agreement, without the prior written consent of [franchisor], [franchisee] will not solicit or attempt to solicit any customer of [franchisor] with whom [franchisee] worked, became acquainted, or learned about during the franchise relationship, and who was a customer of [franchisor] at the time of execution of this Settlement Agreement. This prohibition is limited to solicitation and attempted solicitation of customers of [franchisor] for the purpose of offering, selling, or providing the type of products or services offered, sold, or provided by [franchisor] at the time of execution of this Settlement Agreement. This prohibition is further limited to the solicitation and attempted solicitation of customers located within the [geographic area], but regardless of the source of the solicitation.

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The sticking point with a provision such as this is, who is a customer? The clause contains the framework to ascertain customer status but identification can be contested. Where the nature of the franchise business supports, the clause is stronger if, instead of the generic description of protected customers, there is an actual list.

Franchisor employees are more easily identifiable, and therefore more easily protected under a non-solicitation clause:

Within one year from the date of this Settlement Agreement, without the prior written consent of [franchisor], [franchisee] will not solicit, employ or otherwise engage as an employee, independent contractor or otherwise, any person who is or was a non-clerical employee of [franchisor] at any time during one year proceeding the execution of this Settlement Agreement, or in any manner induce or attempt to induce any non-clerical employee of [franchisor] to terminate his or her employment with [franchisor].

Again, an equitable relief provision may be helpful:

[Franchisee] acknowledges that the restrictions contained in this section are reasonable and necessary in order to protect legitimate interests of [franchisor] and, in the event of a violation of any of these restrictions, in addition to damages if any, [franchisor] will be entitled to an equitable accounting of all earnings, profits or other benefits arising from such violation, which rights and remedies shall be cumulative of any other rights or remedies to which [franchisor] may be entitled in law or in equity.

Where state law does not proscribe them, non-compete clauses are a surer way of protecting a business. In most jurisdictions, the predicate to an enforceable non-compete clause is a “protectable interest” on the part of the beneficiary. In franchise networks, it is the system goodwill which is that interest. The next hurdle is to craft a provision which is reasonable in its scope, temporally, geographically and as to the conduct proscribed.

Within the above equitable requirements, the language of any competition clauses is fairly formulaic. Here is an example:

[Franchisee] acknowledges that [franchisor] does business throughout the [business territory] and further acknowledges that [franchisor] has previously invested a substantial amount of time, money and effort in building its products, services and customer relationships in the [business territory]. [Franchisee] therefore agrees that, for a period of one year from the date of this Settlement Agreement, [franchisee] will not, alone or with others, directly or indirectly work on, plan, prepare for, organize or engage in [the franchised business] within the [business territory]. [Franchisee] agrees that the above restrictions are fair and reasonable and necessary for the protection of the legitimate business interests of [franchisor] and that such restrictions will be enforced to their fullest extent.
Particularly in jurisdictions that will not rewrite the time provision, geographic extent or conduct proscribed of a non-compete clause, care should be taken to select boundaries that pass the test of reasonableness, since the consequence of overreaching may be no covenant at all.

There are two types of jurisdictions which will revise overbroad covenants not to compete. One jurisdiction will only line out any offending words or phrases. If nothing intelligible remains, there is no restriction. This is called "blue-pencilling." The other will rewrite a provision to reduce it to whatever is enforceable. For example, if a jurisdiction only blue pencils, and the offending provision states a duration of "five" years, then crossing out the "five" leaves nothing to enforce. But if the jurisdiction will rewrite, the court could change the "five" to two. One clause in the settlement agreement should work for either. The key is to recite an intent to avail of the protection:

If any provision of this settlement agreement is determined to be unenforceable by a court of competent jurisdiction, that provision will be reformed and construed so as to be valid, operative and enforceable to the maximum extent permitted by law and equity, while preserving its original intent.

F. Binding Principals to the Settlement

The principals of a corporate or other limited liability franchisee are not the same as their company. Unless there is some independent undertaking, the obligation will merely be that of the business entity. In franchise settlements, this is usually not sufficient. When the principals undertake conduct that violates their settlement, they will almost never do it under the same corporate identity as was the franchisee. It is possible to bind non-signatories by establishing that they aided and abetted the covenant breach. But, this requires an additional level of proof that may not be so readily available.

Most franchisors understand this and, where a settlement agreement entails covenants which survive execution of the agreement, it is routine to ask for personal guarantees. Typical guaranty language is:

The undersigned hereby unconditionally and irrevocably guaranty the full performance of each and every of the terms, covenants, and conditions of this Settlement Agreement to be kept and performed by [franchisee], including, but not limited to, the payment of all sums due thereunder.

A guaranty is usually strictly construed against the party seeking to enforce it. Some jurisdictions have limited the effect of a guaranty to monetary surety. If this occurs, the franchisor will have an action in damages but will have difficulty compelling conduct. Since equitable relief may be the sine qua non of the action, it is better to expand the principals' obligation. The clause should make clear that principals are bound to comply with the covenants to the same extent as their franchisee.

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The undersigned, being all of the persons and legal entities having a direct or indirect beneficial interest in [franchisee], do hereby agree to comply with and be bound by all provisions of this Settlement Agreement including, but not limited to, the [confidentiality, non-disparagement, non-solicitation, non-compete clauses] to the same extent as if each of them were [franchisee].

A negative covenant seals the obligation:

The undersigned also agree not to engage in any activities not permitted to [franchisee] under this Settlement Agreement.

As with any guaranty, the document containing principals’ undertakings should contain anti-extension, anti-modification and anti-waiver language:

The undersigned further agree that this agreement on their part shall continue in favor of [franchisor] notwithstanding any extensions, modifications or alterations of this Settlement Agreement and that no extension, modification or alteration of this Settlement Agreement shall release or discharge the undersigned. The undersigned waive notice of any demand by [franchisor], as well as notice of non-payment, non-performance or default, excepting such notices as are specifically provided in this Settlement Agreement.

Finally, it is a good idea to provide that principal undertakings are independent of the obligations of the franchisee under the Settlement Agreement. This eliminates any ambiguity on whether an action can be brought against the principals when no suit is brought against the franchisee.

II. HOW CAN YOU SECURE YOUR SETTLEMENT?

A. Limited Releases and Covenants Not to Sue

1. Releases

While we are all familiar in general with releases, it is worthwhile to review the general principles so that, in drafting them, counsel neither adds nor omits a phrase of legal significance to his client, nor drafts a release that may run afoul of common law or statute. 5

a. Essential Principles

Rare is the settlement that does not involve a release, whether “general” or more limited. Some releases are mutual and others are given only by one party. Like other contractual

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5 Be careful to check if applicable state law has a statute which requires certain language in or disclosures in releases.
obligations, a release will not be invalidated because the releasor’s decision to give the release was a poor business decision, as long as the release was given voluntarily.6

As in all legal drafting, precise language is crucial, a fact overlooked sometimes with respect to releases, because they seem to be simply “boilerplate.” As the cases demonstrate, however, the devil indeed can be in the details.7

i. Definition

The Restatement (Second) of Contracts, § 284 (1981), is the best place to start:

§ 284. Release

(1) A release is a writing providing that a duty owed to the maker of the release is discharged immediately or on the occurrence of a condition.

(2) The release takes effect on delivery as stated in §§ 101-03 and, subject to the occurrence of any condition, discharges the duty.

Comment:

a. Nature of Release. Although no particular form is required for an agreement to discharge a duty, the term “release” has traditionally been reserved for a formal written statement by an obligee that the obligator’s duty is discharged. That usage is preserved in this Section. No special words are required and the writing may state, for example, that it releases the obligor, that it releases the obligor’s duties or that it releases the obligee’s rights. It must, however, take effect immediately or on the occurrence of a condition. A promise to discharge in the future an existing duty merely creates a new duty that can itself be discharged by the parties. Such a promise is not a release. The duty that is released need not be matured. A purported release of a duty that does not yet exist, however, is not a release but a promise to discharge a duty in the future. A purported release of a duty that is revived on the occurrence of a condition is not a release but a contract not to sue . . . .

b. Interpretation. The rules of interpretation that apply to contracts generally apply also to writings that purport to be releases.

7 See, e.g., BASCO, Inc. v. Buth-Na Bodhaige, 198 F.3d 1053, Bus. Franchise Guide (CCH) ¶ 11,756 (8th Cir. 1999) (ambiguity in the term “surviving obligations” required Eighth Circuit to remand for fact finding by District Court); TCBY Systems, Inc. v. EGB Associates, Inc., Bus. Franchise Guide (CCH) ¶ 10,259 (8th Cir. 1993) (one counsel’s confusion concerning what was agreed to be released cannot prevail over language of the release); Tubby’s #14 Ltd. v. Tubby’s Sub Shops, Inc., Bus. Franchise Guide (CCH) ¶ 13,460 (E.D. Mich. 2006) (plaintiffs released Tubby’s from “all claims . . . of every kind or nature whatsoever.” There is “no broader classification than the word ‘all,’” and “all claims” means “claims, known and unknown.”)
ii. Promise to Discharge on Existing Duty in the Future

It is important to reiterate that a mere promise to discharge an existing duty in the future is not a release of that duty, Restatement (Second), supra, § 284, Comment (a).

iii. Release of Future Duty

While future obligations under an existing contract can of course be released, Corbin, at 84-85, “[a]bsent unambiguous, specific language to the contrary, a present release that purports to discharge future rights and claims in transactions that are not yet in existence shall be inoperative to discharge any right under a contract made subsequent to the release.” Id. at 85. See, e.g., Sheck v. Burger King Corp., 756 F. Supp. 543, Bus. Franchise Guide (CCH) ¶ 9,760 (S.D. Fla. 1991). Sheck is a case long famous for its pronouncements concerning encroachment and good faith (and of questionable precedental value now). But its holding on the scope of a release is not arguable. The District Court held a fast food franchise’s encroachment action was not barred by general releases of claims that were executed prior to the “accrual” of the action; under Florida law, a general release will ordinarily embrace only claims that have matured at the time of its execution. When the later of two releases was signed in May, 1986, the encroachment action was not mature. The Court stated franchisee might have been “aware of the possible conversion” of a nearby restaurant in 1985, but an encroachment action could not arise until the franchisor actually permitted the conversion or at least signed an agreement for the allegedly encroaching franchise.

A relatively recent Ninth Circuit case addresses some of the key issues that can arise in a challenge to a release. Even that famously "liberal" Circuit sustained the release but it teaches drafters that what might be "procedural niceties" to some are legal requirements to others. Notable among them are ensuring that the releasing party, usually the franchisee, be accorded the opportunity (indeed, encouraged) to seek counsel, and to take time to evaluate the agreement, and that the released party, usually the franchisor, not use its leverage to impose terms which so overreach that a Court might view them as unconscionable. Thus, in Lee v. GNC Franchising, Inc., Bus. Franchise Guide (CCH) ¶ 12,717 (9th Cir. 2003), the Court held a release in a renewal agreement valid. There was no fraudulent inducement, and even if the release was a contract of adhesion, "the release-for-renewal" requirement was part of the original agreement; therefore it could not have been contrary to the franchisee’s reasonable expectations. Nor was it unconscionable. Notice and an opportunity to review the release were afforded the franchisee. And the release did not purport to absolve the franchisor of liability for future fraud or intentional misconduct, which would have been against public policy. Likewise, see Hardees Food Systems, Inc. v. Oreel, 32 F. Supp. 2d 342, Bus. Franchise Guide (CCH) ¶ 11,537 (E.D.N.C. 1998) (a general release under North Carolina law does not release claims which “accrue” after the signing; claims accrue when there has been a breach of duty giving rise to the right to institute and maintain an action); Loehr v. Hot’N Now, Inc., Bus. Franchise Guide

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8 No Need for Sealing -The common law requirement that a release be under seal to be valid has been abolished by state statutes; in most states there is no longer a distinction between sealed and other written documents. Others have either made sealed or other writings presumptive of consideration or they recognize the enforceability of writings without consideration or seal. Corbin, supra, at pp. 78-79 and nn. 9-13. These niceties should not be relevant in settlements of franchise disputes, where consideration is uniformly present.
The very narrow channel available to a party which claims it was released from future claims indicates that this may be an ephemeral right. For example, as *Corbin* teaches:

If A executes and delivers to B a document purporting to discharge, in general terms, all of A’s existing rights against B and all rights that A may have in the future against B, and thereafter A should sell goods to B on credit and receive B’s promise to pay a sum of money therefore, *this subsequent contract of sale on credit is quite inconsistent with the express words of release previously executed.* The contract of sale manifests an intention of the parties to create a debt. *This manifested intention is in conflict with the words of the release and will prevail over it because it is later in time, just as a later contract that is entirely inconsistent with a previous one will operate as a discharge of the former.* So, also, a contract that is entirely inconsistent with the terms of a previously executed release will prevail over the previous release. *The previous release is only effective for the contractual relationship giving rise to it.*

*Corbin*, at 84-85 (Emphasis added.)

iv. **Conditional Release**

Just as a promise may be conditioned on the occurrence of a fact or event and the duty of performance must await the happening of the specified event, *id*, at 84, one may manifest an intent to discharge a duty at a future date or upon the happening of some fact or event. Upon receipt of a release subject to such a condition precedent, the obligor’s duty of performance and the obligee’s right remain active. The obligor is not yet privileged to forgo the duty to pay the debt owed. The already-existing duty to pay may be discharged by the occurrence of a condition subsequent, *i.e.*, the same fact or event that must precede the effectiveness of the release. *Id.* at 93.

Thus, in many settlement agreements the franchisee (usually) must accomplish certain duties before the release is effective. Perhaps the franchisee must pay monies, or return the franchisor’s Manual, or transfer the telephone number, or otherwise complete de-identification, or even send notice to customers of the end of the relationship and of their right to continued service by a successor franchisee or by the franchisor. Sometimes the language will require completion of the obligations to the "franchisor's reasonable satisfaction," but where the duties are not subject to discretion, that is not needed.

In any event, the language in the agreement might recite:

The release in Section ___ of this Agreement is conditioned upon franchisee's complete satisfaction of all obligations set forth in Section ___ hereof, and until that occurs, the release shall be of no force or effect.
v. Avoidance and Invalidation of Releases

Like any contract, a release may be avoided or set aside if its execution was induced by fraud, duress or mutual mistake, or the release was unconscionable, or on other equitable grounds present at the time of execution. Id. at 87. An aggrieved party's remedies in seeking to address legal flaws in a release are several. Avoidance by invalidating or rescission is one. Or, the party might affirm the settlement of which the release is a part and sue for damages for fraud, if the claim is within the scope of the release. Finally, the party may seek to have the release reformed to conform to the mutual understanding or intent of the parties.9

vi. Electronic Releases

Release agreements may be effective under the Uniform Electronic Transactions Act ("UETA") or similar statutes. Thus, Corbin states:

A record10 generated electronically manifesting an intention to discharge an existing claim or obligation is likewise effective as a comparable written release under the applicable statutory scheme if the jurisdiction

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9 Id. at 90. See also, W.E. Shipley, “Specific Performance of Compromise and Settlement”; 48 A.L.R. 2d 1211 (1956 & Supp. 2007); Freiplinger of Knoxville, Inc. v. Daimler-Chrysler Vans, LLC, 438 F. Supp. 2d 869, Bus. Franchise Guide (CCH) ¶ 13,405 (E.D. Tenn. 2006) (no rescission or other relief where adequate consideration, where franchisee expressly agreed not to challenge release on the basis of subsequently discovered facts, and where it knew of facts on which its fraudulent inducement argument was based three years before signing the release).

See Lee v. GNC, supra; Stone Motor Co. v. General Motors Corp., 293 F.3d 456, Bus. Franchise Guide (CCH) ¶ 12,354 (8th Cir. 2002) (because there can be no "duress" excusing performance unless a party is deprived of all reasonable alternatives but to comply, there was no "duress" where franchisee had a reasonable alternative, i.e., franchisee could have refused to sign release and to sell his franchise, instead retaining it and suing for damages. He also was represented by two lawyers in the negotiation, a substantial fact mitigating against a finding of duress); Gruver v. Midas Intl' Corp., 925 F.2d 200, Bus. Franchise Guide (CCH) ¶ 12,715 (9th Cir. 1991) (release was valid; economic duress required (1) wrongful acts or threats and (2) financial distress resulting and (3) absence of any reasonable alternative), Hyman v. Ford Motor Co., 142 F. Supp. 2d 735, Bus. Franchise Guide (CCH) ¶ 12,175 (D.S.C. 2001) (a dealer's general release of Ford in exchange for a repurchase of assets was valid; duress cannot exist under South Carolina law and under Restatement (Second) of Contracts, § 175 unless the other party's threat leaves the releasor with no reasonable alternative in the sense that the will of the releasee is substituted for the will of the releaser. Moreover, where the releasor has counsel in the negotiation, duress is almost impossible to establish); McDonald's Corp. v. Magruder, Bus. Franchise Guide (CCH) ¶ 10,774 (D. Ariz. 1995) (a release cannot be unconscionable unless there is no meaningful choice and the bargain is one no reasonable person would offer and no reasonable person would accept); Newman v. Snap-On Tools Corp., Bus. Franchise Guide (CCH) ¶ 9,126 (E.D. Va. 1988) (absent "clear and convincing evidence" that franchisor subverted the franchisee's free will, there could be no voiding of the release by "duress" even where the other choices for the franchisee were not attractive); Dunes Hospitality LLC v. Country Kitchen Int'l., 623 N.W.2d 484, Bus. Franchise Guide (CCH) ¶ 12,055 (S.D. 2001); Shergill v. TWR Express, Inc., Bus. Franchise Guide (CCH) ¶ 11,449 (N.Y. Sup. Ct. 1998) (franchisees’ lack of knowledge of potential claims they might have had against franchisor did not invalidate a release). As discussed in Section V of this paper, some state franchise statutes bar a franchisee from waiving its rights under those statutes by means of a release. Nevertheless, often these statutes do not invalidate settlements of disputes involving the statute, especially if the dispute arose during the relationship.

10 The Uniform Electronic Transactions Act defines a record as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;” an electronic record means “a record created, generated, sent, communicated, received, or stored by electronic means. U.E.T.A. § 2(13) & (7).
has codified the Uniform Electronic Transactions Act or similar statute. For those transactions affecting interstate or foreign commerce the Electronic Signatures in Global and National Commerce Act makes a record as effective as a writing. The substantive requirements imposed upon a written release remain unaltered by statutory enactments facilitating electronic transacting. See, 15 U.S.C. § 7001(a) & (b).

_id. at 80.

b. **Release Language**

A General Release foregoes any claim whatsoever, known or unknown, that a party has against another party. It is especially important that a franchisee understand (and here is a crucial job for counsel) the counter-intuitive principle that even claims for losses that the franchisee does not know about are nonetheless "gone." And a party must also realize that unless it reserves certain rights, as in the Limited Release which follows after this General Release, it will lose even the right to indemnification. Thus, after a General Release, if a person sues the franchisor on account of injury from a fall at the former franchisee's location, which occurred prior to the release, the franchisor will be unable to obtain contractual indemnification for fees, costs and damages from the former franchisee. Below are forms of Releases.

i. **General Release**

In consideration of the termination of the Franchise Agreement and Franchisor's agreements set forth in this Settlement Agreement, the Franchisee and its subsidiaries and affiliates and its and their heirs, successors and assigns and their officers, directors, employees, representatives and agents ("Franchisee Release Persons") hereby now and forever release the Franchisor, and its subsidiaries, affiliates and parents and their officers, directors, employees and agents ("Franchisor Release Persons") from any and all liabilities, obligations, actions at law or equity, penalties, claims, demands or suits of any kind whatsoever that the Franchisee Release Persons and their respective successors, heirs and assigns would otherwise have against Franchisor as of the date of this Settlement Agreement, including but not limited to those arising out of, relating to or in any way connected with the Franchise Agreement and its termination, the parties' negotiation of and entry into the Franchise Agreement, Franchisor's actions and requirements related to the Store, and the Franchisee's operation of the Store. This release extends to all claims, whether arising from contract, tort or statute, law or equity, known or unknown, it being the express intention of the parties hereto that upon execution of this Settlement Agreement, the Franchisee Release Persons and their respective successors, heirs and assigns, shall have no further claim against or with respect to the Franchisor Release Persons, except claims based upon performance of, or failure to perform, this Settlement Agreement.

ii. **Limited Release**

Franchisor, for itself and its subsidiaries and affiliates, and its and their officers, directors, employees, agents and representatives, and their heirs, successors and assigns (the "Releasing Parties") hereby release Franchisee and its subsidiaries, affiliates and its officers, directors, employees and agents (the "Released Parties") from (a) all claims, counterclaims, and causes of action asserted in the case of Franchisor v. Franchisee, No. 07-666 (OBL) in the United States District Court for the District of Kabul, and (b) all claims and causes of action, whether arising from contract, tort, statute, law or equity, known or unknown, which relate to the
Released Parties’ failure to pay royalties, advertising fees or other monies due or alleged to be due to Franchisor from September 10, 2001 to date, pursuant to the Franchise Agreement between Franchisor and Franchisee dated December 7, 1941 ("the Franchise Agreement"), and all amendments and modifications thereto; provided that this is a limited release and all other claims and courses of action which the Franchisor has or may have against the Released Parties including for indemnification under Section XV of the Franchise Agreement are neither released nor affected by this limited release or by the settlement agreement between the parties, of which this release is a part.

2. **Covenants Not to Sue**

Covenants (contracts) not to sue do not “release” obligations, but may have the same effect:

§ 285. Contract Not to Sue

(1) A contract not to sue is a contract under which the obligee of a duty promises never to sue the obligor or a third person to enforce the duty or not to do so for a limited time.

(2) Except as stated in Subsection (3), a contract never to sue discharges the duty and a contract not to sue for a limited time bars an action to enforce the duty during that time.

(3) A contract not to sue one co-obligor bars levy of execution on the property of the promisee during the agreed time but does not bar an action or the recovery of judgment against any co-obligor.11

If a literal interpretation of a writing that purports to be a release would frustrate that purpose, the writing may be interpreted as a contract not to sue. This is particularly likely in the case of a purported release of one joint obligor that states that all rights against another joint obligor are reserved. If the effect of a literal interpretation of the writing as a release would be to release the other joint obligor and frustrate the obligee’s purpose, as indicated by her attempted reservation of rights, the writing will be interpreted as a contract not to sue.12

To the extent the parties agree that various obligations (and perhaps various disputes) will not be settled, a covenant not to sue may be useful. A limited release, addressing only what has been settled and expressly stating that nothing else has been resolved and all other obligations continue, may have a similar effect.

A sample covenant not to sue follows:

Franchisor covenants and agrees that she will not institute, maintain, or prosecute any claim against Franchisee which constitutes or is a necessary part of the claims asserted or identified in Franchisor v.

11 *Restatement (Second) of Contracts, supra, § 285.*
Franchisee, No. 07-666 (OBL) in the United States District Court for the District of Kabul. This covenant not to sue is not a release and will not inure to the benefit of any third party, nor will it prevent Franchisor A from instituting, maintaining or prosecuting any claims against any third party, whether or not such third party is claimed to be a joint tortfeasor with Franchisee, nor will it prevent Franchisor from instituting, maintaining or prosecuting any claim against Franchisee not expressly identified in this covenant not to sue.

B. Indemnities

Franchise agreements routinely contain indemnity clauses. Often they are substantially weighted in favor of indemnifications given by the franchisee to the franchisor, with respect to the franchisee’s operation of the franchise.

Typically, the indemnification clause in a franchise agreement or settlement is not an effort by a party at exculpation; rather, it is an effort by one party to be protected financially where it is threatened with or incurs liability, but where the other party to the contract is the legally responsible party. Indemnification is important where vicarious liability might be visited upon the franchisor but when, in reality, the franchisee alone is responsible, or where a court might impose liability on a franchisor because the court may not adequately understand the nature of the franchise relationship. Of course, sometimes the franchisee requires indemnification when liability is sought to be imposed on it but the franchisor may in reality be wholly responsible. An example of this risk, virtually always indemnified by franchisors, is where the franchisor licenses the franchisee to use its trademark(s), trade secrets, or copyrighted materials, and indemnifies the franchisee for damages, fees and expenses if a third party claims its rights have been infringed.

An indemnification in a settlement agreement will be useful particularly where for example, the franchisee has obligations to take acts pursuant to the settlement as a result of which a third party may be injured, and where the franchisor might be sued jointly with or in place of franchisee.

Often the parties also continue in effect in a settlement agreement the indemnification provisions of the Franchise Agreement. In that event, the Indemnification can be simple:

The Indemnification obligation of Section XV of the Franchise Agreement shall continue in effect, notwithstanding the release or any other provision in this Settlement Agreement.

On the other hand, if there are duties to be carried out as part of the settlement agreement which may in any way raise the possibility of a third party claim, the settlement agreement should be broader. A sample of such an indemnification provision in a settlement agreement follows:

The Indemnification obligation of Section XV of the Franchise Agreement shall continue in effect, notwithstanding the release or any other provision in this Settlement Agreement.

Franchisee agrees to indemnify and hold harmless Franchisor and each of its past, present and future owners, members, managers, officers, directors,
employees and agents, as well as its parent companies, subsidiaries and affiliates, and each of their past, present and future owners, members, managers, officers, directors, employees and agents (each, a "Franchisor Indemnified Party" and collectively, "the Franchisor Indemnified Parties") for, from and against any and all claims, causes of action, demands, suits, costs, damages, and fees ("Losses and Expenses") incurred by any of the Franchisor Indemnified Parties as a result of any Claim by any third party asserted against Franchisee and/or any of the Franchisor Indemnified Parties arising from any act or omission by Franchisee or any of Franchisee's employees, officers, directors, or agents or any of Franchisee's subsidiaries, or affiliates, which act or omission relates to this Settlement Agreement [or Consent Judgment, if there is one]; provided, however, that the indemnification contained in this Section shall not apply to any Claim by any third party for damages proximately caused by Franchisor's failure to comply with the terms and conditions of this Agreement.

Important to an indemnification, of which an insurance contract is a species, is the principle of notice, so the party standing behind the indemnity has the right to evaluate the potential claim or loss, and to take action to minimize it, settle it or defend against it. Otherwise, the indemnifying party may later face a huge financial liability where, had it been advised from the start of the risk, it may have avoided that. The language below is an example of a notice and opportunity to defend clause:

The Franchisor Indemnified Party shall notify Franchisee in writing of any Claim to which the indemnification obligation applies as soon as practicable after such Franchisor Indemnified Party obtains actual knowledge of the assertion of the Claim. The Franchisor Indemnified Parties shall have the exclusive right, in their sole discretion, (i) to retain their own counsel of their own choosing to represent them with respect to any Claim, and (ii) to control the response thereto and the defense thereof, including the right to enter into an agreement to settle such Claim. Franchisee may participate at its own expense in such defense. Franchisee agrees to give Franchisee's full cooperation to the Franchisor Indemnified Parties in assisting them with the defense of any such Claim, and to reimburse them for all their costs and expenses in defending any such Claim, including court costs and reasonable attorneys' fees, within thirty (30) days of the date of each invoice delivered by such Franchisor Indemnified Party to Franchisee enumerating such costs, expenses and attorneys' fees.

C. Escrows

Franchise lawyers are well-acquainted with escrows -- at a minimum, as a result of the requirements of many state franchise registration laws and business opportunity laws. Escrows are adaptable to a wide variety of legal arrangements. They can be useful in settlements, whenever money or other consideration, such as a release, is to be held by a person (usually a neutral third party) pending completion of certain duties in the settlement agreement. At that point, funds or the other consideration are transferred by the "escrow agent" to whomever is the rightful recipient. Escrows ensure in advance that money owed will be available and there will be no need to sue for it. They may delay distribution, however, and there is usually a cost in retaining an escrow agent, whether a bank or a lawyer or other person. With respect to a release held in escrow:
Where a release is the consideration, such a delivery in escrow is operative as a release subject to a condition precedent. After such delivery, the party executing the release has no power of revocation unless expressly reserved. As with any other conditional delivery, on the happening of the condition, the release becomes fully operative as such without the making of any second delivery by the holder to the obligor. The parol evidence rule does not prevent parol proof of the conditional delivery, even though such proof makes the document operate just as if the condition had been incorporated in the writing.\textsuperscript{13}

Escrows are rarely needed in franchise settlement agreements, but if there is doubt as to a party’s ability or a party’s intent to live up to a future financial obligation, where performance by the other party of a duty is a condition subsequent to payment of that financial obligation, an escrow can be valuable.

A simple escrow agreement often provides that the attorney for the party owing the money or other consideration (or sometimes the attorney for the party owed the money or other consideration), will hold the funds in an interest-bearing account (interest to be paid as directed) and will deliver them when notified by an agreed-upon procedure that the obligations of the other party necessary to obtain the money or other consideration have been accomplished. A longer form of escrow agreement – more complex than usually needed but providing many useful provisions--is contained in Appendix “A” hereto.

\section*{D. Settlement Liquidated Damages}

Liquidated damages provisions can be useful in remedying violations of certain obligations in settlement agreements where it is nearly impossible to calculate actual damages. Examples of such violations are breach of the obligation to maintain the terms of the settlement in confidence (to the extent permitted by disclosure law), or to avoid disparagement of the other party. As discussed below, by their nature they limit recovery, so they will not be valuable where the potential recovery is much larger than the liquidated amount, and is reasonably ascertainable. They can save fees and time, however, because they obviate the need to litigate the damages issue.

The classic definition of liquidated damages is in the \textit{Restatement (Second) of Contracts}:

\textbf{§ 356. Liquidated Damages and Penalties}

\begin{enumerate}
\item Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.
\end{enumerate}

“The central objective behind the system of contract is compensatory, not punitive.” There is “no justification on either economic or other grounds for a term providing . . . a penalty

\textsuperscript{13} Corbin, supra, p. 81.
[and such] a penalty is unenforceable on grounds of public policy. The rest of the agreement remains enforceable, however . . . ."  

The test of a penalty is this:

[T]wo factors combine in determining whether an amount of money fixed as damages is so unreasonably large as to be a penalty. The first factor is the anticipated or actual loss caused by the breach. The amount fixed is reasonable to the extent that it approximates the actual loss that has resulted from the particular breach, even though it may not approximate the loss that might have been anticipated under other possible breaches. . . . Further, the amount fixed is reasonable to the extent that it approximates the loss anticipated at the time of the making of the contract, even thought it may not approximate the actual loss . . . . The greater the difficulty either of proving that loss has occurred or of establishing its amount with the requisite certainty . . . the easier it is to show that the amount fixed is reasonable. To the extent that there is uncertainty as to the harm, the estimate of the court or jury may not accord with the principle of compensation any more than does the advance estimate of the parties. A determination whether the amount fixed is a penalty turns on a combination of these two factors. If the difficulty of proof of loss is great, considerable latitude is allowed in the approximation of anticipated or actual harm. If, on the other hand, the difficulty of proof of loss is slight, less latitude is allowed in that approximation. If, to take an extreme case, it is clear that no loss at all has occurred, a provision fixing a substantial sum as damages is unenforceable . . . .

Neither the parties’ actual intentions nor their characterization of the provision as “liquidated damages” is significant in determining whether the provision is valid. See Tempco Electric Heater Corp. v. Temp. Eng. Co., Bus. Franchise Guide (CCH) ¶ 12,845 (N.D. Ill. 2004). There, a liquidated damages provision in a software licensing agreement between a manufacturer of electric heaters and a distributor was not an unenforceable penalty under Illinois law. The provision required the distributor to pay the manufacturer $15,000 plus interest for every hardware access key to the manufacturer’s computer pricing program for the heaters that the distributor failed to return at the end of their relationship. The keys allowed a user to access and operate the manufacturer’s proprietary pricing program. Although the hardware access keys had no intrinsic value, the court held the provision served the legitimate purpose of compensating the manufacturer for the possible misuse of its intellectual property in the form of the pricing program, and that the provision’s charge of $15,000 per key served the legitimate purpose of reducing the number of keys that were not returned. Evidence demonstrated that, as the more keys were unreturned, the greater was the potential for misuse of the program, including simultaneous misuse by different parties in different locations.
Finally, a liquidated damages provision does not preclude the granting of specific performance. As the Restatement (Second) states:

§ 361. Effect of Provision for Liquidated Damages

Specific performance or an injunction may be granted to enforce a duty even though there is a provision for liquidated damages for breach of that duty.

A sample liquidated damages provision in a settlement agreement follows:

If Franchisor violates its obligation set forth in this paragraph, Franchisor shall pay Franchisee, as liquidated damages and not as a penalty, the sum of _____ ($______) for each such violation. The parties agree that ascertainment of the amount of damage actually caused by Franchisor's violation would be very difficult to determine and that the liquidated damages chosen are a reasonable estimate of the anticipated loss to Franchisee resulting from each violation by Franchisor.

As noted above, an alternative format is to have a formula to calculate liquidated damages, as used in hotel franchise agreements, see n.5, above. It could be a certain number of months of royalties, for example. But the formula must still pass muster under the basic liquidated damages test.

Another sample liquidated damages provision, relating to disparagement, is:

The parties agree that a violation by Franchisee of the obligation not to disparage the Franchisor would cause the Franchisor harm which cannot be fully compensated for in damages, and is therefore irreparable. They agree that a portion of the harm, i.e., that suffered before institution of equitable relief, is remediable in damages, but that the calculation of such damage would be very difficult. The parties therefore agree that, with respect to each of its violations of this non-disparagement provision occurring prior to entry of equitable relief, Franchisee shall pay Franchisor, as liquidated damages and not as a penalty, the sum of $10,000.

franchisor's potential loss), reversed and remanded, 241 F.3d 23, Bus. Franchise Guide (CCH) ¶ 12,030 (1st Cir. 2001) (District Court ignored Massachusetts law and majority rule that party which alleges liquidated damage clause is a penalty has burden to establish that defense).

Liquidated damages clauses for default/termination or failure by a franchisee to fulfill obligations to commence business are found in many hotel franchise agreements. They generally follow the same formula, consisting of a pre-determined amount of money per room multiplied by the number of rooms in the hotel, multiplied by the number of months remaining in the agreement’s term. Usually they are enforced, see Ramada Worldwide, Inc. v. Homewood Hotels, Inc., Bus. Franchise Guide (CCH) ¶ 13,545 (E.D. Ill. 2007); Best Western Intl v. Oasis Inv. LP, 398 F.Supp. 2d 1075, Bus. Franchise Guide (CCH) ¶ 13,205 (D. Ariz 2005); but see Shree Ganesh, Inc. v. Days Inns Worldwide, Inc., 192 F.Supp. 2d 774, Bus. Franchise Guide (CCH) ¶ 12,341 (W.D. Ohio 2002).
III. HOW CAN YOU ENFORCE YOUR SETTLEMENT?

A. Forum Selection Clauses

Forum selection clauses are routine by now in franchise agreements, and often are included in settlement agreements. On the other hand, at least sixteen states, including California, Connecticut, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, New Jersey, North Carolina, North Dakota, Rhode Island, South Carolina and Wisconsin, protect franchisees in part from the full force of forum selection clauses that limit litigation to the state chosen in a franchise agreement. These states allow the franchisee to sue in its home state. Moreover, New Jersey requires the franchisor to sue a franchisee only in New Jersey for violations of the New Jersey Franchise Practices Act, see Kubis, n.6 below, and Idaho’s statute, n.2 below, is to the same effect with regard to its statute. Nevertheless, even those jurisdictions permit choice of forum clauses with respect to common law and non-franchise statutory claims, and forum selection clauses are generally enforced.

As a practical matter, if the dispute already is in litigation, the settlement agreement should provide not just that the parties "consent" to jurisdiction, since that is not exclusive; it should provide that the agreement "must" or "shall" be enforced "exclusively" by the court of the jurisdiction in which the suit is pending, and the settlement agreement should provide further that the "court retains jurisdiction to enforce this agreement." The sample Consent Judgment (Appendix "B" hereto) contains such a clause. (Consent Judgments are discussed below.)

B. Consents to Judgments

A Consent Judgment is an equitable order, designed to memorialize and enforce an agreement by the parties which resolves a dispute. The parties sign it and the Court orders it. It usually resolves an entire case, although it can resolve a single dispute in a case. An example of the latter is where, in a case seeking to enforce a non-compete but also seeking damages, the parties might resolve the non-compete issue with a Consent Judgment but then litigate the damages issues. Normally, however, it ends the case.

The advantage of the Consent Judgment is that it places immediately under the Court's aegis the terms it embodies; enforcement is much easier and the threat of contempt for violation is present, which would not be the situation with respect to an agreement not made part of a Court Order. Khan Inc. v. Wortham, 983 S.W. 2d 539, Bus. Franchise Guide (CCH) ¶ 11,524


(Mo. App. 1998) (civil contempt sanctions against franchisee which violated Court order enforcing post-termination obligations). On the other hand, the formality and heavy-handedness of the Consent Judgment, and submission to the jurisdiction of Court of matters the parties might wish to resolve less formally may mitigate against this device.

Consent Judgments add teeth to the settlement and furnish a clear and expeditious procedure to enforce it. Consent Judgments may include any number of alternative provisions (whether legal or equitable), including for example enforcement of non-competes and trade secret rights, modification of contract terms, payment of monies (which can include establishing a separate Promissory Note, or Confess Judgment), and remedies for breach of the Consent Judgment, which occasionally includes a right to cure a violation of the Consent Judgment.

Analogously, many franchise agreements include “consent to injunction” provisions, notably in the non-compete or trade secret sections. Few courts would grant an injunction based solely upon such a provision, because the movant must still establish the normal requisites for such relief, i.e., likelihood of success, irreparable harm, balance of hardships, and public interest. Occasionally, however, a court will cite such a provision as support for entry of an injunction which recites that the franchisor will “suffer irreparable harm” if the franchisee violates a post-term covenant, or recites that the franchise “agrees to imposition of an injunction” against her for such a violation.21

An example of a Consent Judgment containing many of the provisions above is in Appendix “B” hereto.

IV. WHEN DO YOU HAVE TO DISCLOSE YOUR SETTLEMENT?

By now, the franchising world knows that the new franchise rule of the Federal Trade Commission (the “Commission”) was effective on a voluntary basis starting July 1, 2007. Beginning on July 1, 2008, franchisors must use the new rule, which is codified as 17 C.F.R. § 436. While the new franchise rule closely tracks the UFOC guidelines, in important places the rule goes beyond the requirements in the guidelines. The new rule has sometimes been referred to as “UFOC Plus”.

In the normal course, it will be the new franchise rule which determines whether, notwithstanding the wishes of the franchisor, the franchisee or even a confidentiality clause, the terms of a settlement must be disclosed generally. The new franchise rule’s “Litigation” section is the applicable portion. Much has been written about the enhanced scope of this section. On closer examination, however, even under the new rule there are many circumstances where the terms of a settlement need not be included in the Franchise Disclosure Document.

The litigation disclosure requirements in the new franchise rule are contained in 16 C.F.R. § 436.5(c). The first thing to note about this section is that each operative paragraph is conditioned upon there being an "action". 16 C.F.R. § 436.5(c)(1),(2). The new franchise rule defines “action” as “complaints, cross-claims, counterclaims, and third-party complaints in a judicial action or proceeding, and their equivalents in an administrative action or arbitration.” 16 C.F.R. § 436.1(a). If there is a franchise dispute which never reaches a judicial, administrative

or arbitration proceeding, the settlement of that dispute is not covered, and therefore not subject to a disclosure obligation in the Franchise Disclosure Document.

Even if the settlement arises out of an “action”, the new franchise rule carries forward the requirement of materiality. In its adoption notice of March 30, 2007, the Commission explained that it believed that a definition of “material” was unnecessary. Rather, under long-established Commission jurisprudence, materiality in franchise matters meant, “a reasonable prospective franchisee” standard. If the matter would be deemed important to a reasonable prospective franchisee, it should be regarded as material. 72 F.R. 15444, 15455 (2007). But, the rule itself gives more guidance. Pending civil actions other than ordinary routine litigation incidental to the business are material, “in the context of the number of franchisees and the size, nature, or financial condition of the franchise system and its business operations”. 16 C.F.R. 436.5(c)(1)(i)(B). Thus, the touchstone to measuring materiality should be an action that, for whatever reason, generates information that is useful to a prospective franchisee in assessing the overall quality of the franchise relationship. 72 F.R. 15444, 15482 (2007).

Assuming the settlement arises out of an “action” which is “material”, there is a third bar before the new franchise rule imposes a duty of disclosure for a settlement agreement. The settlement must be unfavorable to the franchisor.

In its adoption notice, the Commission agreed with the implication of the UFOC guidelines, which deemed favorable or neutral settlements to a franchisor not material, and therefore did not call for their disclosure. 72 F.R. 15444, 15479 (2007). Item 3 of the new franchise rule likewise permits franchisors to omit settled litigation where a settlement is favorable to the franchisor or at least otherwise neutral. 16 C.F.R. § 436.5(c)(1)(iii)(B) of the new franchise rule creates the requisite that the franchisor be “held liable” and explains that:

“Held liable” means that, as a result of claims or counterclaims, the person must pay money or other consideration, must reduce indebtedness by the amount of an award, cannot enforce its rights, or must take action adverse to its interests.

Relying upon this provision, the Commission stated:

In other words, a franchisor need not disclose a settlement if the franchisor neither pays any material consideration, nor is bound by obligations that are materially adverse to its interests.


Thus, to create a duty of disclosure under the new franchise rule, a settlement agreement must be resolving an “action”, which is “material” and be meaningfully adverse to the interests of the franchisor.

If all of these conditions are satisfied, under the new franchise rule whether it was the franchisor or the franchisee who initiated suit is much less important. 16 C.F.R. § 436.5(c)(1)(ii). Except for a franchisor-initiated suit in which no franchisee counterclaim has been filed, the franchisor has full disclosure obligations. 72 F.R. 15444, 15483 (2007). This means that the disclosure must include: the title of the case, the case number, the initial filing date, the names of the parties, the forum, and the relationship of the opposing party to the franchisor. The disclosure must also summarize the legal and factual nature of the claims, the relief sought or
obtained, if a judgment was entered the date of entry, any conclusions of law and fact, any damages, or settlement terms. 16 C.F.R. 436.5(c)(3). Footnote 2 to the provision adds:

If a settlement agreement must be disclosed in this Item, all material settlement terms must be disclosed, whether or not the agreement is confidential.

The footnote creates an exception for settlements entered into before commencing franchise sales. And, a franchisor who historically used only the franchise rule format or is new to franchising need not disclose confidential settlements entered into prior to the effective date of the new franchise rule. In the main, however, if the settlement agreement is covered by the new franchise rule, a confidentiality clause will not save its terms from inclusion in the Franchise Disclosure Document.

In the rare material litigation that is franchisor-initiated and without any counterclaim, the new franchise rule has a more limited disclosure obligation. Suits may be listed under a common heading that can serve as the case summary. 16 C.F.R. 436.5(c)(4). It is not clear whether the override of confidentiality agreements which governs generally also applies here. However, it is difficult to postulate a settlement agreement on terms that are adverse to a franchisor’s interests where the only claim is the franchisor’s, so the issue may be academic.

The new franchise rule contains a confidentiality clause disclosure separate from the litigation section. 16 C.F.R. § 436.5(t)(7) requires a franchisor to generally disclose whether franchisees signed confidentiality clauses during the last three fiscal years. “Confidentiality clause” is specifically defined.

[A]ny contract, order or settlement provision that directly or indirectly restricts a current or former franchisee from discussing his or her personal experience as a franchisee in the franchisor’s system with any prospective franchisee....

16 C.F.R. § 436.1(c).

The definition is limited to communications between a current or former franchisee, on the one hand, and a prospective franchisee, on the other hand. As the Commission recognizes, the definition does not cover other recipients, for example the media. 72 F.R. 15444, 15455-56 (2007). For its part, the subject matter is confined to a franchisee’s “personal experience as a franchisee in the franchisor’s system”. The disclosure obligation is not triggered by an agreement barring disclosure of specific settlement terms, so long as the franchisee can disclose that it had a litigated action with the franchisor. 72 F.R. 15444, 15455 (2007). Finally, the definition exempts “clauses that protect a franchisor’s trademarks or other proprietary information.” 16 C.F.R. § 436.1(c).

While this separate disclosure obligation would seem to pick up many confidentiality clauses in settlement agreements, the disclosure burden is nominal. The Franchise Disclosure Document must include the following language:

“In some instances, current and former franchisees sign provisions restricting their ability to speak openly about their experience with [name of franchise system]. You may wish to
speak with current and former franchisees, but be aware that not all such franchisees will be able to communicate with you."

16 C.F.R. § 436.5(t)(7). This provision goes on to afford franchisors the option to disclose the number and percentage of current and former franchisees who, during the last three fiscal years, signed agreements that included confidentiality clauses and the option to disclose the circumstances under which the clauses were signed. But, a franchisor availing itself of this option should be careful. Selective disclosure can itself be deceptive and the alternative of omnibus explanations may raise questions that were better avoided.

V. WHEN DOES A FRANCHISE STATUTE LIMIT YOUR SETTLEMENT?

Some state franchise statutes, either registration laws or relationship laws, contain a provision that bars waivers or releases of the franchisee’s rights under the relevant statute. Typically they bar "any condition, stipulation or provision purporting to waive compliance" with the statute.22

The important point here is that these provisions almost invariably apply only to a franchisee’s retention of rights under the specific particular franchise statute at issue, although Illinois bars waivers of rights under any Illinois statute. And, some of these anti-waiver provisions exempt settlements of disputes, e.g. Connecticut, Idaho, Illinois, Iowa, Michigan, Washington and Wisconsin.

Finally, some of the anti-waiver provisions bar waivers (and releases) of rights under the franchise statute only with respect to prospective franchisees, i.e., only at the inception of the relationship. These include Arkansas, Connecticut, Michigan and Washington. (Washington does not permit waiver unless the franchisee had independent counsel). And, some statutes that do not expressly limit the anti-waiver language to agreements at the inception of the relationship have been interpreted to be so limited, see, e.g., Giampapa v. Carvel Corp., Bus. Franchise Guide (CCH) ¶ 11,442 (D. N.J. 1998) (New Jersey Franchise Practices Act); Williams v. Stone, 923 F.Supp. 689, Bus. Franchise Guide (CCH) ¶ 10,924 (E.D. Pa. 1996), aff'd on other grounds, 109 F.3d 890, Bus. Franchise Guide (CCH) ¶ 11,132 (3d Cir. 1997) (Maryland Franchise Registration and Disclosure Law); Schmitt-Norton Food, Inc. v. Ford Motor Co., 524 F.Supp. 1099, Bus. Franchise Guide (CCH) ¶ 7795 (D. Minn. 1981) (Minn. Franchise Act).

VI. CONCLUSION

Most lawyers view the settlement process as 95% negotiation and 5% "papering it over." To paraphrase Yogi, however, "settlements are 67% negotiation, 33% drafting, and 25% plain-old-fashioned good lawyering."

APPENDIX A

ESCROW AGREEMENT [CASH]

This ESCROW AGREEMENT (this “Agreement”) is dated as of the ____ day of ____________, 20___, by and among Franchisee, Franchisor and The Bank of Kabul, as escrow agent (the "Escrow Agent").

REcITALS

WHEREAS, Franchisor and Franchisee have settled a lawsuit titled Franchisor v. Franchisee, No. 07-666 (OBL) in the United States District Court for District of Kabul ("the suit"); and

WHEREAS, the Franchisor has agreed to pay the Franchisee the sum of $250,000 (the "Funds") upon the Franchisee's completion of obligations set forth in paragraphs 2, 3 and 5 of the Settlement Agreement between the Franchisor and Franchisee, which Settlement Agreement is attached hereto as Exhibit A and is made a part thereof; and

WHEREAS, the Franchisee desires to obtain security for the payment of the Funds pending completion of the Franchisee's obligations under Paragraphs 2, 3 and 5 of the Settlement Agreement;

NOW, THEREFORE, the parties agree:

Section 1. Deposit of Funds; Investment.

(a) Franchisor and Franchisor hereby appoint the Escrow Agent as the escrow agent under this Agreement, and the Escrow Agent accepts such appointment according to the terms and conditions set forth herein. On the date hereof, the Franchisor has deposited with the Escrow Agent, and the Escrow Agent hereby acknowledges receipt of, an aggregate of $250,000 in cash (the “Escrow Deposit”; the Escrow Deposit together with any interest or income accrued thereon, hereinafter referred to as the “Escrow Property”). The Escrow Agent shall hold, invest, reinvest, manage, administer, distribute and dispose of the Escrow Property in accordance with the terms and conditions of this Agreement.

(b) Until the termination of this Agreement, the Escrow Property, including any interest and other income from time to time earned thereon, shall be invested unless otherwise directed in written instructions to the Escrow Agent by the parties in interest bearing time deposits with maturity dates of 30 days or less of any bank located within the United States of America having capital and surplus in excess of $_______________, including one or more accounts maintained by the Escrow Agent.
The parties acknowledge that the Escrow Agent shall not be responsible for any diminution in the Escrow Property due to losses resulting from investments made pursuant to this Agreement.

The Escrow Agent may break or cancel any investment to the extent necessary or appropriate to make any payment required hereby, and shall not be responsible for any costs or penalties associated therewith.

(c) The parties hereto agree that, for tax reporting purposes, all interest or other income earned from the investment of the Escrow Property shall (i) to the extent such interest or other income is distributed by the Escrow Agent to any person or entity pursuant to the terms of this Agreement during a tax year, be reported as allocated to such person or entity for such tax year, and (ii) otherwise shall be reported as allocated to ___________________________.

Section 2. Payment from Escrow.

The Escrow Property shall be held and disbursed by the Escrow Agent as follows:

(a) The Franchisee may submit to the Escrow Agent and the Franchisor a certificate certifying (i) that the Franchisee is entitled to a withdrawal of the Escrow Property pursuant to the Settlement Agreement. If, within ten (10) days after the Escrow Agent receives such certificate, the Escrow Agent does not receive a written notice disputing the Franchisee's right to such withdrawal, then Escrow Agent shall pay to the Franchisee out of the Escrow Property an amount equal to the amount indicated in the certificate.

(b) If, during the ten (10) day period above, Escrow Agent receives a statement by the Franchisor disputing Franchisee's right to receive a payment from the Escrow Property, the Escrow Agent shall (i) promptly forward a copy of that statement to the Franchisee, (ii) if applicable, pay to Franchisee any undisputed amount out of the Escrow Property, and (iii) continue to hold in escrow the amount in dispute until receipt of (x) a statement signed by the Franchisor directing the disposition of such disputed amount, or (y) a certified copy of a final, non-appealable decision of a court of competent jurisdiction directing the Escrow Agent to disburse the amount subject to the dispute (a “Final Determination”). The Escrow Agent shall be entitled to receive from the claiming party an opinion of counsel that the Final Determination is non-appealable.

(c) Notwithstanding anything to the contrary in this Agreement, the Escrow Agent shall disburse from the Escrow Property such amounts, to the order of such person or persons, in such manner and at such time as it shall be instructed in writing jointly by the parties.

Section 3. Concerning the Escrow Agent.

(a) The parties hereto acknowledge and agree that the Escrow Agent (i) shall not be charged with knowledge of any agreement or instrument referred to or described herein (including without limitation the Settlement Agreement), or responsible for determining compliance therewith, and shall not otherwise be bound thereby, (ii) shall be obligated to
perform only those duties as are expressly set forth in this Agreement on its part to be performed, and no implied duties or obligations of any kind shall be read into this Agreement against the Escrow Agent, (iii) shall not be obligated to take any legal or other action hereunder which in its judgment might cause it to incur any expense or liability unless it shall have been furnished with indemnification acceptable to the Escrow Agent, or which, in its judgment, might subject it to any liabilities or obligations in its individual capacity, (iv) may rely on and shall be protected in acting or refraining from acting upon any written notice, direction or other document furnished to it hereunder and believed by it in good faith to be genuine and to have been signed or presented by the proper person, and shall have no duty to confirm the genuineness or validity of any such notice, direction or document or any signature thereon, or of the signing authority of such person, and (v) may consult counsel satisfactory to it, and the opinion or advice of such counsel in any instance shall be full and complete authorization and protection with respect to any action taken or omitted by it hereunder in good faith and in accordance with such opinion or advice.

(b) All of the duties of the Escrow Agent shall be ministerial in nature and in no event shall the Escrow Agent be deemed to owe any fiduciary duty to any party hereto.

(c) The Escrow Agent shall not be liable for any action taken or omitted to be taken by it hereunder except in the case of the Escrow Agent’s gross negligence or willful misconduct. In no event shall the Escrow Agent be liable for indirect, punitive, special or consequential damages (including but not limited to lost profits).

(d) The Escrow Agent is hereby authorized, in making or disposing of any investment permitted by this Agreement, to deal with itself (in its individual capacity) or with any one or more of its affiliates.

(e) In the event that the Escrow Agent is faced with inconsistent claims or demands of the parties, the Escrow Agent may refuse to take further action until directed to do so by joint instruction of the parties or until the Escrow Agent has received a Final Determination. The Escrow Agent shall have the right to interplead the parties in any court of competent jurisdiction and request such court determine the respective rights of such parties.

(f) In order to comply with any obligations of financial institutions under federal and state law to obtain, verify and record information that identifies each person who opens an account, including particularly laws designed to fight the funding of terrorism and money laundering activities, the Escrow Agent shall be entitled to require documentation from any party hereto to verify its formation, existence and identify, including, but not limited to, licenses, passports, financial statements, and other identification and authorization documents.

(g) The Escrow Agent may execute any of its powers or responsibilities hereunder either directly or by or through its agents or attorneys.

(h) Nothing in this Agreement shall impose upon the Escrow Agent any duty to qualify to do business in any jurisdiction other than the Commonwealth of Kabul.
Section 4. Compensation, Reimbursement and Indemnification.

(a) The Escrow Agent shall be entitled to be paid a fee for its services pursuant to the attached Fee Schedule and to be reimbursed for its reasonable costs and expenses incurred in the negotiation of this Agreement and the performance of its duties hereunder (including reasonable counsel fees). Each of the parties agrees, jointly and severally to pay or reimburse the Escrow Agent for such fees, costs and expenses. The fees set forth on the attached Fee Schedule may be subject to change hereafter by the Escrow Agent on an annual basis.

(b) Each of the parties hereby agrees, jointly and severally, to indemnify the Escrow Agent and its directors, officers, employees, affiliates and agents (collectively the Indemnified Parties) and hold the Indemnified Parties harmless from and against any loss, liability, damage, claim, cost and expense of any nature incurred by the Indemnified Parties arising out of or in connection with this Agreement or with the administration of the Escrow Agent’s duties hereunder, including but not limited to reasonable counsel fees and other costs and expenses of litigation, except to the extent such loss, liability, damage, claim, cost or expense shall be caused by the Escrow Agent’s gross negligence or willful misconduct.

(c) Notwithstanding anything herein to the contrary, the Escrow Agent shall have and is hereby granted a first lien on, security interest in, and right of set-off against the Escrow Property to secure its rights to compensation, reimbursement of expenses and indemnification hereunder, and any other amounts owing to it from time to time hereunder. The Escrow Agent shall have the right to deduct any such amounts from the Escrow Property without prior notice to any party.

(d) The terms of this Section 6 shall survive the termination of this Agreement and the distribution of all of the Escrow Property.

Section 5. Resignation.

(a) The Escrow Agent may resign as escrow agent at any time and be discharged of its duties hereunder after thirty (30) days’ notice to the other parties hereto, but only if a successor escrow agent has been appointed by the parties prior to the effective date of the Escrow Agent’s resignation. Upon receipt of notice of resignation, the parties promptly shall use their best efforts to designate a successor escrow agent to serve in accordance with the terms of this Agreement. If they cannot agree on a successor escrow agent during such thirty (30) day period, the Escrow Agent shall be deemed to be solely a custodian of the Escrow Property without further duties and Escrow Agent may petition a court of competent jurisdiction to have a successor appointed. Any successor Escrow Agent shall execute and deliver to predecessor Escrow Agent, the Purchaser, the Sellers and the Sellers’ Representative an instrument accepting such appointment and the transfer of the Escrow Property, and agreeing to the terms of this Agreement, and thereupon such successor Escrow Agent shall, without further act, become vested with all the estates, properties, rights, powers and duties of predecessor Escrow Agent as if originally named herein.
(b) Any banking institution or trust company with which Escrow Agent may merge or consolidate, or to which Escrow Agent transfers all or substantially all of its corporate trust business, shall be the successor Escrow Agent without further act.

Section 6. Dispute Resolution.

In the event of any dispute with respect to the disposition of the Escrow Property, the Escrow Agent is authorized and shall be entitled to retain in its possession without liability to anyone, all or any of said Escrow Property until such dispute shall have been settled either by the mutual written agreement of the parties involved or by a Final Determination. The Escrow Agent may, but shall be under no duty whatsoever to, institute or defend any legal proceedings which relate to the Escrow Property.

Section 7. Notices; Wiring Instructions.

(a) All communications under this Agreement shall be in writing and shall be delivered by email, facsimile, with delivery to immediately follow by hand, or by recognized overnight courier or by registered mail or certified mail, postage prepaid to the parties at the following addresses:

(b) Any notice so addressed shall be deemed to be given: if delivered by hand, on the date of such delivery; if sent by overnight courier, on the next business day; and if mailed by registered or certified mail, on the third business day after the date of such mailing.

Any funds to be paid to or by the Escrow Agent hereunder shall be sent by wire transfer pursuant to the following instructions:

Bank: _____________________________
ABA # _____________________________
Acct. # _____________________________
Attn: _____________________________
Ref: _____________________________

Section 8. Termination.

Upon distribution by the Escrow Agent of the entire amount of the Escrow Property, this Agreement shall terminate, except for any provisions that expressly survive termination.

Section 9. Miscellaneous.

(a) Nothing in this Agreement, expressed or implied, is intended to confer any rights, remedies, obligations or liabilities under or by reason of this Agreement on any other person or entity other than the parties hereto, and their respective successors and assigns.
(b) No provision of this Agreement shall be deemed amended or modified unless such an amendment or modification is in writing, dated, and executed by all of the parties hereto.

(c) This Agreement shall inure to the benefit of the parties hereto, and shall be binding upon the parties hereto and their respective successors and assigns.

(d) This Agreement shall be governed by, and construed according to, the laws of the Commonwealth of Kabul, without regard to its principles relating to conflicts of law. THE PARTIES CONSENT TO THE EXCLUSIVE JURISDICTION OF THE COURTS OF THE Commonwealth of Kabul FOR THE PURPOSES OF ALL LEGAL PROCEEDINGS ARISING OUT OF OR RELATING TO THIS AGREEMENT AND THE TRANSACTIONS CONTEMPLATED HEREBY. THE PARTIES HEREBY IRREVOCABLY WAIVE, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, (a) ANY OBJECTION TO THE LAYING OF VENUE OF ANY SUCH PROCEEDING BROUGHT IN SUCH A COURT; AND (b) ANY CLAIM THAT ANY SUCH PROCEEDING BROUGHT IN SUCH COURT HAS BEEN BROUGHT IN AN INCONVENIENT FORUM.

(e) If any court should find any particular provision of this Agreement void, illegal or unenforceable, then that provision shall be regarded as severable and stricken from this Agreement, and the remainder of this Agreement shall remain in full force and effect.

(f) This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same instrument. Facsimile signatures shall be deemed to be original signatures.

(g) THE PARTIES HERETO HEREBY WAIVE A TRIAL BY JURY IN ANY SUIT, ACTION OR PROCEEDING BETWEEN THEM OR THEIR SUCCESSORS OR ASSIGNS, ARISING UNDER OR IN CONNECTION WITH OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY.

(h) The Escrow Agent shall not be responsible for delays or failures in performance resulting from acts beyond its control. Such acts shall include but not be limited to strikes, lockouts, riots, acts of war, epidemics, governmental regulations hereafter imposed, casualties, communication line failures, computer viruses or power failures.

(i) As between the Escrow Agent, on the one hand, and the other parties hereto, on the other hand, this Agreement constitutes the entire agreement with respect to the subject matter herein. As between the other parties hereto, this Agreement shall govern to the extent of any conflict between it and the Purchase Agreement or any other agreement or writing.
IN WITNESS WHEREOF, each of the parties has caused this Agreement to be duly executed and delivered in its name and on its behalf as of the ____ day of __________, 200_.

[FRANCHISOR]

[FRANCHISEE]

BANK OF KABUL, as Escrow Agent

By _________________________________

Name: _______________________________

Title: _______________________________
CONSENT JUDGMENT

WHEREAS, Franchisor sued Franchisee for alleged violations of obligations owed to Franchisor resulting from the termination of the Franchisee's franchise, and

WHEREAS, the parties have agreed to resolve the claims by means of this Consent Judgment;

NOW THEREFORE, it is hereby stipulated by the parties and it is ORDERED by the Court as follows:

1. Enforcement of Post-Termination Non-Competition Covenant

From the date hereof until December 31, 2007, Franchisee shall not, directly or indirectly, without Franchisor's prior written consent, establish, assist, consult with, participate in or be employed by any enterprise that is or plans to be engaged in any of Franchisee's prior territory for Franchisor, i.e., zip code sectional areas 1111, 1112, 1113, 1116, and 1118 in the
Commonwealth of Kabul, in selling widgets from the Khyber Pass or any product competitive with such widgets.

2. Protection of Franchisor's Proprietary Assets

   (a) Franchisor's "Proprietary Assets" consist of its trademarks, trade name, copyrighted materials, trade secrets and confidential information, as defined in ¶ 2 of the Franchise Agreement dated December 7, 1941, incorporated herein (the "Franchise Agreement.")

   (b) Within five (5) days after the date of entry of this Consent Judgment, Franchisee shall fulfill all obligations under ¶ 17 of the Franchise Agreement, including, without limitation, (i) cessation of all use of Franchisor's trademarks, and trade names, (ii) cessation of use of the telephone number(s) which Franchisee has used in connection with the Franchise and assignment of those number(s) to Franchisor; (iii) cessation of use of the Franchisor's copyrighted materials, including but not limited to the Franchise "Operations Manual"; and (iv) cessation of use of the Franchisor's trade secrets and confidential information, whether in the Operations Manual or in any other format.

   (c) Within five (5) days from the date of entry of this Consent Judgment, Franchisee shall return to Franchisor all materials the Franchisor provided to Franchisee during the franchise, including without limitation the Operating Manual, and turn over to Franchisor the Franchisee's customer list.

3. Monetary Payments

   Within ten (10) days after entry of this Consent Judgment, Franchisee shall pay to Franchisor the sum of $15,000 by bank check or certified funds. Within sixty (60) days after entry of this Consent Judgment, Franchisee shall pay to Franchisor the sum of $25,000 by bank check or certified funds.
4. **Non-Disparagement and Liquidated Damages**

For a period of one year from the date of this Consent Judgment, Franchisee agrees not to make any statements, whether written or oral, or engage in any activity which is detrimental to the name and/or reputation of Franchisor, nor make any disparaging comments concerning Franchisor, including, without limitation, Franchisor's products, plans, operations or its officers, directors, employees or stockholders. The parties agree that a violation by Franchisee of the obligation not to disparage the Franchisor would cause the Franchisor harm which cannot be fully compensated for in damages, and is therefore irreparable. They agree that a portion of the harm, *i.e.*, that suffered before institution of equitable relief, is remediable in damages, but that the calculation of such damage would be very difficult. The parties therefore agree that, with respect to each of its violations of this non-disparagement provision occurring prior to entry of equitable relief, Franchisee shall pay Franchisor, as liquidated damages and not as a penalty, the sum of $10,000.

5. **Consent to Equitable Relief**

Franchisee recognizes that violation of paragraphs 1, 2 or 4 hereof cannot be remedied fully in damages but will cause irreparable harm to Franchisor. If franchisee violates any of these paragraphs, franchisee consents to entry of a temporary restraining order and preliminary injunction against it enforcing such obligation(s), without the necessity of bond. It also agrees to ultimate entry of a permanent injunction enforcing these obligations.

6. **Limited Right to Cure Violation of Non-Competition Provision**

To the extent that it comes to the attention of Franchisor that Franchisee is alleged to have violated the non-competition provision of Paragraph 1 hereof, Franchisor, prior to instituting suit to enforce that provision, shall write to Franchisee, advise of the allegations, and
provide such Franchisee five (5) days to respond in writing. Such response shall include providing copies of any written or tangible items reasonably requested by Franchisor. If, after receiving the response, (a) Franchisor concludes such Franchisee is not violating this provision, it shall inform Franchisee in writing, or (b) Franchisor concludes such Franchisee is violating the provision, it shall advise Franchisee in writing that Franchisee must cease such violation(s) within five (5) days, certify in writing to Franchisor that such Franchisee has done so, and the parties shall seek to agree upon a proper monetary remedy also, as appropriate. If this procedure is unsuccessful in resolving the matter, Franchisor has the right to take all actions it deems appropriate to enforce the obligations and to remedy the violation(s). This right to cure is a one-time right and need not be provided to Franchisee with respect to any subsequent violation of Paragraph 1 or otherwise.

7. Choice of Law and Forum

This Consent Judgment shall be construed and enforced under this law of the Commonwealth of Kabul, regardless of choice of law considerations. All disputes relating to this Consent Judgment or to the relationship of the parties must be resolved exclusively in this District. The Court retains jurisdiction to enforce it and determine all such questions.

8. Attorneys' Fees

In any proceeding under Section 7 hereof, the prevailing party shall be paid its reasonable attorneys fees by the non-prevailing party.

9. Civil Contempt

Any violation of this Consent Judgment shall constitute civil contempt.
10. **Voluntary Agreement and Counsel**

The parties have entered into this Consent Judgment voluntarily after consulting with counsel of their choice.

11. **Dismissal**

This case is dismissed with prejudice, subject to the obligations of this Consent Judgment.

**AGREED TO THIS ___ DAY OF _____, 2007:**

Counsel for Franchisor                     Counsel for Franchisee

**IT IS SO ORDERED THIS ___ DAY OF _____, 2007**

_______________________________________
United States District Judge
MARTIN G. GILBERT is chairman of the franchise group at Stryker, Tams & Dill LLP in Newark, New Jersey. In his franchise and distribution system practice, Mr. Gilbert handles commercial litigation and business transactions with emphasis on both national franchisors and local licensees. His work covers franchise and distribution agreements, trademark litigation, injunctive relief, franchise system standards and covenants not to compete. Mr. Gilbert has extensive trial, appellate and alternative dispute resolution experience.

Mr. Gilbert is a member of the American Bar Association’s Forum on Franchising, the International Franchise Association and the New Jersey State Bar Association’s Committee on Franchising. He is a graduate of Rutgers University (A.B. 1971), Georgetown University Law Center (J.D. 1974) and admitted to practice in New Jersey and New York.
ALLAN HILLMAN counsels businesses and litigates in the areas of antitrust, franchise, and intellectual property, and his practice encompasses the entire distribution and supply chain, with particular emphasis on litigation, arbitration, UFOC filings, and business counseling. His intellectual property experience includes trademark, copyright, trade secret and non-compete issues.

Allan is an Associate Editor of the American Bar Association Franchise Law Journal and has been the Chair and officer in Connecticut and Maryland State bar association business, franchise and antitrust sections. He has authored and lectured on the subjects of Antitrust, Franchise and Distribution Law, Litigation and Arbitration, and Enforcement of Franchise Agreements and Transfers of Franchises to the 1998, 1999, 2002, 2005 and 2007 American Bar Association Forum on Franchising, on franchisor and franchisee relations and Trademarks and Trade Secrets to the International Franchise Association (2005-06); on Trade Secrets, Covenants Not to Compete and Business Torts at the Maryland Judicial Conference; on Franchise Law, Antitrust Law, and Intellectual Property Law at the Maryland Judicial Conference; on Franchise Law, Antitrust Law and Intellectual Property Law at the Maryland Institute for the Continuing Professional Education of Lawyers (MICPEL); on International Antitrust, Trade Secrets, Anti-Boycott Laws and Import-Export Regulations to the World Trade Center Institute; and taught Antitrust Law and Non-Competition Covenants to the Judges of the Maryland Business and Technology Court (2003-04). He is the author of the Maryland chapter of The Franchise Deskbook (2001) and Franchise Deskbook 2d (forthcoming, 2007), and regional editor of Covenants Not to Compete in Franchising (2d, 2002). He has been Legal Affairs Correspondent for Franchise Times, and the U.S. Distribution Journal. He has litigated successfully cases on vertical and horizontal restraints, price-fixing, monopoly, franchise and distribution agreements, terminations and non-competes, and trademark, copyright and trade secret cases.