BUYING AND SELLING A FRANCHISED BUSINESS:
GUIDING A FRANCHISEE THROUGH THE PROCESS

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BUYING AND SELLING A FRANCHISED BUSINESS: GUIDING A FRANCHISEE THROUGH THE PROCESS

I. INTRODUCTION

Transfers of franchised businesses involve three parties: the selling franchisee, the buying franchisee, and the franchisor. Typically, franchise agreements define the “transfer” of a franchised business by the franchisee in broad terms that may include the sale of the franchised business’ assets, the sale of the stock of the entity that owns the franchised business, a transfer that occurs as a result of the franchisee’s bankruptcy, or a transfer that occurs upon the death or disability of the franchisee. Franchisors intentionally keep this definition as broad as possible to protect the franchisor’s interests in having only qualified individuals operating the franchised business and using the franchisor’s trademarks.1 Regardless of the franchise system, multiple issues and concerns face each of the three parties in a sale of the franchised business and assignment of the franchise.

The presence of so many issues in the sale of an existing franchise emanate from the complicated contractual relationship between the franchisor and franchisee. Not only does the franchisor license the use of its trademarks and other intellectual property to the franchisee, it expects the franchisee to operate the business according to the franchisor’s standards and operating methods. The objective of the relationship is to create value for both the franchisee and the franchisor. The franchisee invests in purchasing a franchise to obtain the use of the franchisor’s intellectual property as well as the training, operating methods and support provided by the franchisor, and to receive an acceptable level of return on its investment. Before a franchise agreement is signed, both the franchisor and the franchisee spend considerable time investigating each other to ensure that both parties meet the expectations and qualifications of the other party. Quite often, however, the franchisee decides to sell the franchised business during the term of the franchise agreement, triggering certain obligations of the franchisee and certain rights of the franchisor contained in the transfer provisions of the franchise agreement.

This paper is intended as a practical guide for practitioners representing either the selling franchisee or the buying franchisee. To ensure awareness of all of the issues associated with the sale of a franchised business, this paper also addresses the franchisor’s rights under most franchise agreements when a transfer is contemplated by the selling franchisee. This paper addresses the sale of substantially all of a franchisee’s assets, including its rights to operate a single-unit franchise.2 For the purpose of this paper, the authors have assumed (a) the sale is of a single unit to a third party buyer; (b) the franchised unit is profitable; and (c) the transaction between the seller and buyer is at arm’s length.3

1 Andrea Terrell & Trish Treadwell, Transfer, Assignment, Death, or Incapacity of the Franchisee, in The Annotated Franchise Agreement, 177, 178-179 (Nina Greene, Dawn Newton & Kerry Olson, eds., 2018).

2 This paper does not address the practical or specific legal issues involved in (i) the sale of a large multi-unit franchised business; (ii) the sale of a regional developer; (iii) the sale of a distressed unit or asset that has limited or no profitability; (iv) a sale under Section 363 of the U.S. Bankruptcy Code; (v) a sale where the seller owns the underlying real estate and will become the buying franchisee’s landlord; and (vi) a stock sale.

II. SELLER’S PRE-MARKETING CONSIDERATIONS

A. Seller’s Reasons for Selling the Franchise

Before offering a business for sale, the seller of an existing, operating franchised business needs to determine if the business is ready to be sold. The first part of that inquiry starts with why the business is being sold. Assuming that the business is being sold because the owner has developed operations to the point where the business is mature and profitable, the motivation for the sale is to capitalize and liquidate the profit and good will of the business—i.e., “cash out.”

B. Is the Business Ready to Be Sold?

One of the first considerations for the seller should be whether the business is ready to be sold. Is the business in a position to maximize the sale price? The seller should ask the following questions:

1. Are the operations compliant with the franchisor’s standards?
2. Are all fees due to the franchisor paid in full and current to date?
3. For a location that has retail operations, are the premises in good condition?
4. Are accounts with suppliers and distributors paid current in accordance with any trade credit terms?
5. Are there key employees who will need to remain employed by the buyer to continue operations?
6. Are there any defaults in the lease by the seller or by the landlord?
7. Are there any issues related to operations, the relationship with employees, the relationship with the franchisor, or the relationship with the landlord that would negatively impact a prospective buyer’s interest in the business?
8. What is the amount of profitability and how is that trending (increasing, decreasing, flat)?

Ideally, the answer to questions 1-4 is “yes”; the answer to questions 5-7 is “no”; and the answer to question 8 is that profitability is high and has been increasing. If the answers are different, then additional analysis and action will be needed (e.g., bring operations into compliance, pay fees). Contrary answers tend to indicate that the sale price will not be maximized. This analysis of the operations prior to offering the business for sale is necessary (or at least a best practice) for understanding where negotiations will take place.

4 Other motivations, such as the business being distressed, a divorce that requires liquidation of assets, the owner-operator having a significant personal event that prevents participation in the business (e.g., injury in a car crash or debilitating medical condition) are not discussed in this paper. The analysis for these types of sales, although similar, often include other factors related to the desired result of the sale, which generally is to limit liability.
C. Seller’s Determination of the Target Sale Price

After analyzing the status of the business operations and determining that the business is ready to be sold, the next step for the seller is to determine the target sale price and the corresponding offer price. The initial offer price typically will be higher than the target sale price, which allows for negotiation.

1. Valuation Method

When determining the target sale price, business valuation should be part of the analysis. There are three different types of valuations: book value (assets less liabilities), which usually provides the lowest value; a multiple of the cashflow/EBITDA; and a discount of future earnings, which usually results in the highest valuation. The use of a multiple of cashflow is the most commonly used valuation method. It is based upon actual performance and tends to fairly represent the value of the business. It also is easy to understand.

2. Sources of Data for Valuation on a Multiple of Cashflow Basis

When determining the multiple of cashflow that the seller should use, there are a number of different sources that will provide useful information. The first, and likely the best source, is the franchisor. The franchisor will, as discussed below, be involved in the sale transaction, at the very least to approve the transfer. The franchisor typically will have sales data for each operating unit. The franchisor also often requires reporting from its franchisees on each operating unit’s profit and losses, including submission of financial statements and tax returns. Some franchisors will use this data to track the multiples of cashflow that are achieved upon the sale of an existing, operating unit. If the franchisor maintains this data and is willing to share it, then it should be used. The franchisor can disclose this information without having to identify the specific units that have been sold. Note, if you obtain this data, outlier sales—ones that are particularly high or are particularly low—should be excluded from use as being not representative.

Another source of information will be the other franchisees who have sold existing, operating units. The franchisor’s disclosure document (“FDD”) will contain the contact information for franchisees who have left the system in the last year and all current franchisees. Contacting each individual franchisee seller may be a cumbersome process, but these franchisees are an important source of information. Of course, not all will be able (or willing) to share the information as they may be precluded from disclosing such information due to confidentiality clauses in their asset purchase agreements.

Another source of information is BizBuySell.com. BizBuySell.com has listings of existing businesses that are for sale broken down into specific categories and subcategories. The listings do not identify the specific opportunity, but do typically list gross revenue, the asking price, and cashflow. From this data, the multiple of cashflow that similar businesses are seeking can be determined. BizBuySell.com also provides research data, including a Business Valuation Report.

D. Review of the Transfer Provisions in the Seller’s Franchise Agreement

Prior to offering the sale of the existing, operating unit, the seller should review its franchise agreement to determine what requirements are imposed by the franchisor for transfer. The provisions to review include:

1. How many years remain on the term of the franchise agreement?

2. Are renewal/successor terms available?

5 This sometimes is called the Seller’s Discretionary Earnings.
3. Does the franchise agreement require the buyer to enter into the “then-current form” of the franchise agreement? If so, the current form should be obtained from the franchisor to determine how the current form of agreement differs from the existing agreement.

4. Does the franchise agreement require upgrade/reimaging upon transfer? If so, an estimated cost will need to be determined. The franchisor will be involved in developing this cost because it will dictate the items that need to be upgraded and/or reimaged (e.g., new flooring, new signage, new menu boards, painting, repairs to existing equipment).

5. Is there a transfer fee? If so, how much is it and when is it due?

6. Are there required payments of other monies, such as outstanding royalties and advertising fund fees or the cost of legal expenses that the franchisor will incur as part of the transfer?

7. Does the franchisor require that the seller maintain any post-termination covenants contained elsewhere in the franchise agreement, such as confidentiality, indemnification, and non-competition covenants?

8. Does the franchisor require that the seller enter into a general release?

9. What are the experience and net worth requirements that the franchisor requires of the buyer?

10. Does the franchisor vet the qualifications of the prospective buyer? If so, how and when?

11. Does the franchisor have a right of first refusal to purchase the business? If so, what is the time period in which the franchisor must exercise the right of first refusal and what documentation must be provided to the franchisor to trigger the commencement of the period?

12. Does the franchisor require that the transfer and sale of the unit be completed in a specific amount of time? If so, how long is that period of time and when does it commence? Also, if the sale is not completed within the amount of time, what are the consequences?

E. **Evaluation of Tax Consequences**

The seller of the existing unit also should evaluate the tax consequences of the sale before offering the unit for sale. Doing so will help the seller identify the net amount that will be realized from the sale. Therefore, the seller’s tax advisor (CPA, tax attorney) should be involved in the process early on. The sale of the business may expose the seller to capital gains taxes that will need to be funded and paid. If so, those funds should be set aside immediately following the closing of the sale so that they are available to pay the Internal Revenue Service upon the filing of the tax return (final or otherwise) for the business. Additionally, franchised businesses (excluding sports franchises) are considered intangible assets under Section 197 of the Internal Revenue Code. Upon the sale, there could be a recapture of depreciation, resulting in the decrease of the net amount realized from the sale.
F. Identification of Liens and Debts

The seller of the existing, operating unit also should determine the amount of any outstanding liens and debts on the franchised business. The debts that may exist include:

1. debts to the franchisor (royalties, advertising fund fees);
2. debts to trade creditors such as suppliers and equipment lessors;
3. debts to taxing authorities (income, sales and use, personal property, employment);
4. debts to commercial lenders (SBA Guaranteed or not);
5. debts to the landlord; and
6. debts to utilities.

Some debts, such as commercial financing, will be secured. All these debts will need to be paid in full either before the closing or directly from the closing proceeds.

G. Review of Corporate Governing Documents

The seller of the existing unit also should review the seller’s corporate governing documents. Those documents may contain provisions that:

1. restrict transfer of assets;
2. require consent of other members or shareholders; or
3. require the contribution of money to effectuate the sale (e.g., a capital account make up provision in an operating agreement for an LLC that requires members to make capital contributions to bring a deficit capital account to $0.00).

Reviewing corporate governing documents is important because obstacles impacting the sale of the business may be identified at the early stages of the sale. For example, the governing documents likely require member consent to the transaction. Figuring out whether such obstacles exist is paramount to making sure that the potential sale is achievable. Any identified obstacles should be addressed before the business is marketed for sale.

H. Review of Market Conditions for the Business

Typically, the owner of the existing business will know the local and national market conditions that affect the business. Nonetheless, these conditions should be reviewed and should be taken into account prior to offering the business for sale. Certain market conditions may have an impact on the ability to sell the business. For example, is the business facing obsolescence? An example of this type of business is traditional four-color print shops. There used to be thousands of them. With the rise of affordable desktop color printing, however, these businesses now must find a niche in order to remain relevant and profitable. Similarly, businesses that have a fad-like concept may be difficult to sell. One example of this is the self-serve frozen yogurt restaurant. Fad concepts have a “boom and bust” cycle. The seller needs to determine whether it is in such a cycle. Finally, the concept itself may be tired. Without ongoing updates to the system and improvements to operations and customer experience (e.g., the restaurant’s menu and décor from 1984 still remain), the business will be difficult to sell unless it is exceptionally profitable.
III. MARKETING OF THE FRANCHISE BY SELLER

A. Who is the Target Buyer?

After the seller of the existing business has completed the pre-sale review and analysis, the next step is to market the business for sale. Who is going to buy the business? The seller should consider the level of sophistication that is needed to run the business, as well as the level of involvement of the owner in the day to day operations required by the franchisor. Does the franchisor allow the franchise owner to be merely an investor; or, does it require full-time best efforts by the franchise owner? Will any person who meets the “mirror test” do? The franchisor’s requirements for qualification of the new owner (which only the franchisor will know), should be obtained so that prospects that do not have sufficient qualifications may be rejected promptly.

B. First Target Group: Existing Franchisees

The first target buyer group that should be considered are the other franchisees in the system. The benefits of selling to an existing franchisee include:

1. the buyer already has been approved (at least once) as an operator of the business;
2. the buyer already has been trained to operate the business by the franchisor, so no additional training should be required; and
3. the franchisor knows and has a relationship with the buyer.

Within the existing franchise system, multi-unit operators should be contacted first. Those operators are more likely than single-unit operators to be interested in expanding operations. They also tend to be more sophisticated and better capitalized and tend to have employees who may be shifted to the newly purchased unit to ease transition. They also present an opportunity for the franchisor to foster franchisee growth while simultaneously reducing the number of franchisees with whom it contracts.6

Should none of the multi-unit owners in the system be interested, the seller should consider whether there are any local franchisees who may be interested in expanding their territories. Such franchisees may be able to assume the seller’s operations and leverage management more easily than a franchisee whose territory is not within the same geographic marketplace. Of course, if there are no such candidates, the seller should consider marketing to the remainder of the system.

C. Second Target Prospect: The Franchisor

When selling the existing business, the franchisor will need to be involved in the process. The best practice is to involve the franchisor during the early stages. This often happens when the seller identifies the requirement for upgrades/reimaging upon transfer. The franchisor must be contacted to obtain the information.

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6 One of the authors, Roland Baggott, observes that there has been a shift by established, well developed franchisors to focus on larger, multi-unit franchising. Doing so creates a distinct set of franchisees who are typically better capitalized and more sophisticated in their operations. It limits the actual number of franchisee contacts. It also tends to limit the conflicts between franchisees in a market area. Transfers of single-unit, owner-operated businesses to a new franchisee may be disfavored.
Most franchise agreements will grant the franchisor the right of first refusal on the sale. To alleviate the risk associated with the exercise of a right of first refusal, the franchisor should be asked if it is interested in acquiring the unit. If it is, the next question to ask is whether the franchisor is paying a fair market value. This is where some of the pre-sale evaluation will be beneficial because the seller will have an insight into whether the price that the franchisor is willing to pay is a fair market value.

If the franchisor is not interested in acquiring the seller’s unit, the best practice is to ask the franchisor to waive its right of first refusal up front. Some franchisors will do so. Often, however, the franchisor will reserve the right to exercise the right of first refusal until the details of the transaction are presented for evaluation. If the seller can obtain a waiver early, the risk posed by the franchisor’s exercise of the right of first refusal or waiver thereof in a timely manner is mitigated. Section XI C below discusses the franchisor’s right of first refusal in more detail.

Additionally, if the franchisor is not interested in acquiring the seller’s unit, the franchisor may also know of franchisees who are seeking to expand their ownership. Some franchisors are willing to share this information freely. Others will require that a “finder’s fee” or brokerage fee be paid from the closing of the sale (a flat fee or a percentage of the total consideration, and often presented as being the higher of the two). Others, even if they know of an existing franchisee who wishes to expand, will not share this information because the franchisor would lose the opportunity to sell a new franchise to that prospect. Conversely, some franchisors have established resale programs to assist franchisees in the sale of their businesses to pre-approved prospective franchisees.7

The franchisor should be asked if it will provide leads from its prospect pool for new franchise sales. Most will not because they do not have an incentive to do so. Turning over a lead on a new franchise sale removes that prospect from the franchisor’s pipeline. Further, if the deal does not go through, the prospect may be turned off to the concept altogether. This disincentive is difficult to overcome.

D. Third Prospect Pool: BizBuySell.com

If the seller is unable to generate prospective buyers from within the system, including the franchisor, then self-listing the opportunity on BizBuySell.com is an option. BizBuySell.com claims to be the “Internet’s largest business for sale marketplace,” that it has facilitated over 100,000 successful business sales, and that it has over 10.7 million monthly page views (which includes its partner networks).8 If the seller cannot generate interest through the existing system, then a listing on BizBuySell.com may be successful.

The seller, however, should understand that the ease with which a prospective purchaser can contact the seller may cause the seller to expend significant amounts of time vetting prospects. The seller can also expect to be contacted by business brokers seeking to represent the seller. While self-listing can be an effective approach to marketing a business, the seller should understand the pros and cons of doing so.

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7 See Sarah Walters & Noah Leszcz, Resale Programs for Franchise Systems: A Different Perspective on Franchisees Exiting the System, 37 Franchise L.J. 421 (Winter 2018); See also, Brian B. Schnell & Sarah J. Yatchak, Let’s Make a Deal: Developing a Successful Franchise Resale Program, 27 Franchise L.J. 215 (2008).

E. Fourth Prospect Pool: Business Brokers

The first thing that a seller should be advised is that business brokers work in what is mostly an unregulated industry. A limited number of states require that a business broker have a real estate license. However, even in those states, business brokers need not have any background or training in the buying and selling of businesses. Thus, the barrier to entry into the business of business brokerage is very low. Almost anyone can be a business broker.

Because the barrier to entry into the business brokerage is low, the seller of an existing, operating franchised business should conduct significant due diligence of the broker before hiring the broker. Investigation should be made into the broker’s education, length of time in the business, transactional history, successes and failures. References from the broker should be obtained and checked. The brokerage agreement should be reviewed in detail.

Additionally, because business brokers typically charge a fee that is contingent upon closing in the amount of 10-15% of the total value of the purchase price (not just the cash portion), the seller needs to find out exactly, with detail, the scope of services that will be provided to the seller. The questions that need to be asked include:

1. Do you assist with establishing the value of the business and the asking price? If so, what do you use to develop those numbers?

2. How do you market the business?

3. What materials do you develop for the marketing of the business?

4. What networks do you have access to that you will leverage?

5. Will you screen the prospective buyers? If so, how?

6. What will your role be during the due diligence phase of the sale?

7. Will you conduct negotiations of the sale?

8. Will you be involved with the transfer of real estate? If so, then will you negotiate the assignment of any lease?

9. For real property that is being transferred, is the value of the real property included in the total compensation for the brokerage fee? This question is relevant regardless of whether the business broker has a real estate license.

10. Will you manage the deal?

11. How will you guide me through the transaction?

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9 According to the International Business Broker’s Association, the following states require a real estate license to practice as a business broker: Alaska, Arizona, California, Colorado, Florida, Georgia, Idaho, Illinois (registration only, not an actual license), Minnesota, Nebraska, Nevada, Oregon (only if real estate transfer is part of the transaction), South Dakota, Utah, Washington, Wisconsin, and Wyoming. See https://businessbrokeragepress.com/industry-resources/state-licensing (last visited July 27, 2019).

10 Every business broker puts an ad on BizBuySell.com.
12. How will you maximize value for me?

13. How long does your right to compensation from an identified prospect survive after the brokerage agreement expires or is terminated?

14. Does the fee that you charge include the development of all the documents necessary to affect a closing? If not, who develops the documents and who pays for the development of the documents?  

Deciding whether to use a business broker is a decision that should not be made lightly. The broker’s fees come directly from the seller’s profit. So, the seller needs to be confident that the premium that will be paid for the business broker’s services is worth the cost.

IV. CONSIDERATIONS OF BUYER

When representing a client buying a franchise, whether an existing franchise or not, counsel will want to advise the client about franchising generally, and the role of the franchisor and franchisee in the operation of a franchise. Franchising is intended to be a long-term relationship in which the franchisee must be prepared to give up some independence in return for the right to operate a franchise under a model and a trademark controlled by others.

The nature of the acquisition is important. Is the client acquiring only the assets owned by the selling entity? This would typically include both the seller’s tangible property (e.g., the furniture, fixture, equipment) as well as its intangible property (e.g., the good will, customer lists, etc.). Or, is the buyer purchasing the stock or membership interests in the selling entity? If the latter, the client will also be assuming the seller’s liabilities (e.g., any tax liabilities, lawsuits, violations of government regulations, etc.). Buyers frequently prefer to simply buy the assets of the seller, and often sellers are agreeable to such a transaction. However, if, for example, a license required to operate the business cannot be transferred and the buyer is unable to obtain the necessary license, the buyer may have no choice but to purchase the seller’s company.

Either way, as the acquisition includes the purchase of rights to operate a franchise, the franchisor’s consent to the acquisition will be required. Once the client learns the differences between acquiring a franchise versus an independent business, as well as the differences related to acquiring an existing franchise rather than a new unit or territory, the client and counsel can focus on the terms of the particular acquisition.

V. LETTER OF INTENT

A letter of intent (“LOI”) is a document that outlines the general terms of an agreement between the buyer and seller. It may also be referred to as a purchase offer or term sheet. The main purpose of an LOI is to facilitate the acquisition process and to identify the parties’ key obligations and their contractual understandings. Frequently, it is not intended as a binding

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11 Most brokerage agreements will require the seller to be responsible for the actual closing documents. So, the seller has to pay a lawyer to do the legal work and still pays the brokerage fee.

contract that can be legally enforced; rather it outlines the major terms of the sale and sets the framework for the formal agreement which will be drafted at a later time. Sometimes clients will agree to the LOI without the assistance of counsel. They prefer to ensure that there is general agreement to the acquisition before incurring legal costs. This is often the case when a broker is involved in introducing the buyer and seller. The LOI is then used by counsel as a basis for drafting the purchase agreement.

The LOI will generally identify: the parties to the transaction; the assets or business to be acquired; the purchase price and terms of payment; whether or not the parties intend the LOI to be binding; the parties’ obligations to engage in “good faith” negotiations and to execute a formal agreement; and any contingencies to the transaction. Examples of such contingencies are the seller will provide the buyer with information necessary for the buyer to conduct its due diligence to its satisfaction with all issues resolved and, if applicable, that the closing is conditioned on the buyer obtaining financing.

Although not usually binding in its entirety, the LOI may contain certain binding covenants such as an agreement by the seller to deal exclusively with the buyer and not entertain other offers. Or an agreement by the buyer to maintain the confidentiality of the seller’s information and not use it in a competitive business. Sometimes, the buyer will make a minimal deposit when executing the LOI to demonstrate its serious interest in the purchase. If a deposit is made by the buyer at the time the LOI is executed, the LOI should indicate the deposit amount as well as the terms for any return of that amount in the event the deal does not close. Whether or not the LOI (or some of the terms) are intended to be binding, if there are significant issues that have not been addressed or terms that are patently unfair, counsel should consider seeking to further negotiate those terms.

VI. DUE DILIGENCE

A. Buyer’s Due Diligence

Prior to closing on the acquisition and regardless of whether the purchase is an asset acquisition, stock transaction or merger, the buyer should conduct certain due diligence to assess the value of the business and the risks associated with the purchase. Typically, the buyer will want to obtain and review the following:

1. Information about the selling entity that will confirm its organization and good standing. This may include the seller’s articles of incorporation, bylaws, minute books and resolutions, the company’s organizational charts, a list of shareholders and ownership interests of each shareholder, the company’s assumed names, a certificate of good standing in the states where the company is incorporated and any annual reports.

2. The seller’s financial information including financial statements and income tax returns for at least the last three fiscal years; copies of sales tax returns and any excise tax returns for the prior three years; the company’s credit report if available; a schedule of indebtedness and contingent liabilities; a schedule of accounts receivables and accounts payables; the company’s general ledger; a description of its internal control procedures; and supplier invoices including utility bills.

3. Copies of all material contracts including the franchise agreement; any real estate lease; any nondisclosure or non-competition agreements to which the seller is a party;
vendor agreements that may be assumed by the buyer; loan agreements; and guaranties to which
the seller is a party.

4. Employee information including a list of any key employees, employment
contracts, and employee benefit plans; employee stock option plans and option agreements;
health and disability plans; and formal company policies relating to employees.

5. Details of any lawsuits or proceedings in the prior five years as well as a
list and description of any threatened litigation or claims.

6. Information that will allow the buyer to determine the length of time of
operations after the purchase for the buyer to achieve a return of the invested capital. Essentially,
the buyer should analyze the business operations sufficiently to determine how long the invested
capital (the initial purchase price and any immediate capital improvement costs) will be at risk
before that capital is returned to the buyer though distributions or dividends. The calculation of
this time period should take into account that the business will be required to make capital
expenditures and invest in its operations after the purchase. It also should not assume that
profitability will increase after the purchase. For example, if the sale price is $250,000 and the
business generates $125,000 of profit per year that is distributed to ownership, the timeline for
return of capital would be two years. The buyer needs to be comfortable with having the invested
capital at risk for whatever period of time it takes to achieve the return of capital.

7. A list and copy of all licenses, permits and consents required to operate the
business. The buyer should ensure that such licenses are transferrable or that it will be able to
acquire the necessary licenses prior to closing on the acquisition.

8. The buyer should conduct a title and lien search against the seller as well
as its owners. The title search will ensure that the seller owns the assets it is seeking to sell. A
lien search generally includes three types of liens: (i) U.C.C. filings; (ii) tax liens; and (iii) judgment
liens. Counsel will want to ensure that any judgments are satisfied and that all liens are cleared
prior to closing on the acquisition.

9. The buyer should obtain a copy of the FDD provided to the seller, if
possible, and the franchisor’s current FDD. If the buyer will not assume the seller’s franchise
agreement, it should obtain a copy of the form of franchise agreement and related documents
that it will be required to execute. Counsel will want to compare the seller’s franchise agreement
and the franchise agreement that the buyer will execute to determine whether any adjustments to
the purchase price should be sought. For example, if the seller was paying a royalty of 5% but
the buyer’s franchise agreement requires the payment of an 8% royalty, the purchase price may
have to be negotiated to account for the buyer’s increased expenses and therefore reduction in
value of the business.

10. As with any franchise acquisition, the buyer should be encouraged to
speak with current and former franchisees (contact information for these franchisees will be
included in Item 20 of the FDD). These franchisees are the best source of information about the
franchise and franchisor as well as the industry. Franchisees in the state where the franchise will
be operated may also be a good source of information about state and local laws, rules and
regulations, including licensing information, that may affect the business.
B. **Seller’s Duties During Buyer’s Due Diligence**

The letter of intent for the transaction may include specific duties of the seller in the binding provisions, such as an obligation to provide access to the seller’s financial and operational documentation. Absent there being binding obligations in the letter of intent, the seller has few formal legal duties.

Of course, the seller should cooperate with the prospective buyer during the due diligence phase. The scope of the due diligence—how much the buyer wants to review—will be driven by the buyer. The buyer may send a due diligence request list, identifying documents that the prospective buyer wishes to review, such as accounting, financial, employee, and legal information. The seller should, at the very least, provide access to the information requested by the prospective buyer. If the seller makes copies of documents and provides them to the prospective buyer, the responses to the requests should be complete. To the extent that documentation does not exist or is incomplete, that documentation should be so identified. A “best practice” when producing documents during the due diligence phase is to bates label the documents and then place them in a “data room,” which may be as simple as a Dropbox folder, if permitted under the franchisor’s data security policies. Responses to due diligence requests should be made promptly. Delay in responding may cause the prospective buyer to lose interest.

Costs associated with due diligence should be monitored. If the prospective buyer (or it’s attorney or accountants) makes due diligence requests that will take an inordinate amount of employee time and labor, or will cause the attorney for the seller to spend time and effort that is disproportionate to the deal value, then arrangements should be made with the prospective buyer to obtain access to the documents and information so that they may be reviewed and analyzed sufficiently. There is a balancing act that the seller must perform in order to ensure that the due diligence phase does not gobble up profits from the sale.

The seller also should keep in mind that the documentation and information provided to the buyer, as well as any statements and interpretations thereof, will be relied upon by the prospective buyer and form part of the inducement of the buyer into the transaction. The seller has a legal duty to not misrepresent the status of the business—either affirmatively (i.e., fraud) or by omitting material information (i.e., fraud by omission).

VII. **DEAL CONSIDERATIONS**

A. **Division of Work Between Lawyers; Cost Sharing**

The sale of a business, especially a franchised business, is a complex transaction that involves many legal and practical issues. It is therefore strongly encouraged that both the seller and the buyer engage legal counsel to assist them in the sale/purchase of the franchised business. If the seller and/or buyer are less sophisticated about business transactions in general, they may suggest that the same lawyer represent them both or that one lawyer represent one of the parties but provide assistance as needed to the other party. Both situations raise ethical issues and also violate the American Bar Association’s Model Rules of Professional Conduct.13

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13 See, e.g., Model Rules of Prof'l Conduct R. 1.7 (A lawyer has a concurrent conflict of interest if the representation of one client will be directly adverse to another client) and R. 4.3 (A lawyer shall not give legal advice to an unrepresented person if the lawyer knows the interests of such person are in conflict with the interests of the client) (1983).
However, if both parties retain their own counsel, the work needed to ultimately close on
the sale of the franchised business from the seller to the buyer can be divided between the two
lawyers so the costs associated with the transaction can be managed. Ideally, seller’s counsel
should prepare the LOI and the asset purchase agreement (“APA”). These documents will
contain the specific deal points of the sale which should initially be set by the seller. Obviously,
there may be negotiations on certain terms of the APA prior to the signing of the APA; however,
the seller should be the party that provides the initial draft to the buyer. An experienced
transactional lawyer should have a general form of APA from which to start as he/she drafts an
APA with the specific transaction deal points, including any atypical terms important to seller. Or,
as mentioned below, the franchisor may provide a form of APA it prefers its franchisees use in
the sale of the franchised business. Seller’s counsel should also provide the draft of the closing
statement, the assignments of the phone number to the business as well as other contracts used
in operations (not including the assignment of the franchise agreement or lease as discussed
below). Seller’s counsel will also be involved in reviewing any broker agreement if the seller
decides to use a broker to assist it in selling the business.

Buyer’s counsel will need to review and likely request changes to all the documents
provided by seller’s counsel. Buyer’s counsel will also review all loan documents for buyer’s
financing of the purchase price. Buyer’s counsel may be involved in the due diligence process,
including reviewing the contracts used in the business and the title and lien search.

Both counsel will review the transfer document provided by the franchisor. In most
franchised systems, the transfer agreement is not negotiable, but each counsel will need to review
this document to ensure it contains the terms contained in the seller’s existing franchise
agreement regarding transfer or any negotiated terms. Additionally, if the business is operated
on real property leased to the seller, both parties’ counsel will review the assignment of lease
provided by the landlord. Both counsel will also prepare any required corporate resolutions or
other documents approving the sale or purchase of the business. Finally, it is strongly advised
that both counsel work together to timely obtain new or transferred licenses or permits needed to
operate the business. As there are typically fees associated with any transfer of existing licenses
or permits or issuance of new licenses or permits, the parties should agree who will pay these
fees.

B. Negotiations

While the seller’s counsel will provide first drafts of the APA and associated documents,
the parties likely will then enter into negotiations about some of the terms of these documents.

1. Leverage Points

Both parties and their counsel should carefully consider their own leverage points in the
negotiations. These points stem from the reason the seller has decided to sell the business and
the reason the buyer wants to purchase the business. Buyer’s leverage points will be different if
the seller is selling a failing business or is on the downturn in the market versus the sale of a
successful ongoing business. If the seller is selling a successful business and has decided it is
ready to “cash out” and retire or move on, the seller will be less likely to negotiate certain key
terms believing it can hold out on those terms and either reach agreement with the buyer or find
another buyer who will agree to seller’s terms. However, if the sale is due to the business’s
financial difficulties or to generate cash to pay off some or all of seller’s debts, the buyer may have
a greater opportunity to reach a compromise with the seller on key terms. The seller’s leverage
will be different if the buyer is new to the franchised system and just purchasing this one unit to
gain entry into the system or if the buyer is an existing multi-unit franchisee in the system. The single unit buyer may agree to terms it otherwise would not agree to in order to gain entry into the franchised system; alternatively, it may not agree to those terms if it can easily purchase a unit from another franchisee. The multi-unit franchisee may be willing to agree to terms to grow the size of its business; alternatively, it may believe it has the upper hand being a successful multi-unit franchisee and may make its own demands for terms otherwise unacceptable to the seller. Both parties and their counsel should understand what their leverage points are and what the other party may consider their own leverage points before entering into negotiations.

2. **Potential Deal Breakers**

In addition to leverage points, each party should determine what terms they consider to be deal breakers. While its obvious that price would be a deal breaker, the price is typically agreed upon very early in the deal. However, the buyer may want to reduce the price after signing the LOI if it discovers issues with the business during the due diligence process, or if the seller wants the buyer to assume liabilities of the business that were not mentioned during the price negotiations. More likely, the buyer may demand a price reduction if the existing franchise agreement’s transfer provisions require the buyer to enter into the then-current form of franchise agreement and that agreement requires the buyer to pay a higher monthly royalty than the seller pays or additional fees that the seller has not had to pay. Additionally, the franchisor may require that the franchised business be remodeled to the then-current standard as a condition of its consent to the transfer. If the buyer must pay for this work, it will likely expect some purchase price reduction. As discussed further in Section XII B below, the buyer may also ask for a holdback be taken at closing to cover any of these or other liabilities it may incur. All these terms may cause the buyer to walk away from the deal if the buyer’s financial projections for the business post-closing are negatively impacted by these requirements.

The APA may contain contingencies that each party must meet before the closing of the sale and, if not met, the deal will not close. The buyer must meet the franchisor’s qualifications as a franchisee or the franchisor will not consent to the transfer. The landlord must agree to the transfer of the lease from the seller to the buyer. The buyer must obtain financing to fund the purchase. The contingencies to closing in the APA should contain all the pre-closing items of importance to both parties.

3. **Pre-Closing Interactions with the Franchisor and Landlord**

If the franchise agreement is silent about when the seller franchisee must inform the franchisor it intends to sell the business, the seller must determine the best time to do so. As discussed in Sections II and III above, the franchisor may be a good source of information regarding the sales price of other units as well as a source of potential buyers. It therefore may be prudent for the seller to contact its franchisor when it makes the decision to sell. If the relationship between the seller and the franchisor is strained for any reason, the seller may decide to wait to contact the franchisor until it has a signed APA and therefore needs to obtain the franchisor’s consent to the transfer. These communications should come from the seller. The buyer will begin its interaction with the franchisor when the franchisor requests information from the buyer necessary for the franchisor to determine whether the buyer meets the franchisor’s qualifications. The buyer may also enter into negotiations with the franchisor regarding terms of the franchise agreement, such as the length of the existing term or any required reinvestment or remodel of the franchised business.
As discussed in Section XI below, if the franchise agreement has specific requirements regarding the timing of the process for the franchisor to approve the buyer and give its consent to the transfer, the seller must follow that timing or risk that the franchisor will disapprove of the transfer solely on the basis that the seller did not comply with the terms of the franchise agreement.

The seller should also be the party to begin discussions with the landlord regarding the lease assignment. The buyer may then become involved with negotiations with the landlord if the existing term of the lease is shorter than the term of the franchise agreement or shorter than the time the buyer needs to receive an acceptable return on its investment in the franchised business. The landlord will also need financial information from the buyer to determine whether the buyer is an acceptable tenant. Finally, as discussed in Section X below, the landlord may require that the seller remain liable for all obligations under the lease through the lease expiration date and therefore request a guarantee from the seller or its principals of all of buyer’s obligations post-transfer.

VIII. ASSET PURCHASE AGREEMENT

The APA is the contract between the buyer and seller that contains the final terms pursuant to which the buyer agrees to purchase the seller’s assets. Counsel for both parties should ensure that the APA contains all of the provisions contained in the LOI. It is not uncommon for LOI terms to be left out or changed when the APA is drafted. Hopefully, this is only the result of inadvertent error rather than an attempt to change previously agreed to terms. Regardless of the cause, if the parties have already negotiated certain provisions, they should be included in the APA. A redacted sample APA is attached to this paper as Exhibit A.

At the outset, the APA will contain certain recitals or whereas clauses describing the parties and the nature of the transaction. It may identify the seller’s business and state that the seller is the owner of certain assets used in the operation of the business, which assets the buyer is seeking to purchase. While there are various provisions which are often included in an APA, as described below, additional provisions may be appropriate depending on the situation. Counsel should ensure that the APA is carefully tailored to the terms of the specific transaction. In some franchise systems, the franchisor will provide the parties with a form of APA, often included in the franchisor’s FDD, which can be used for the transaction. Notwithstanding, there may be modifications required to address the particulars of the sale.

A. Sale and Purchase of Assets

The APA should identify the assets that will be purchased by the buyer. These assets often consist of the seller’s hard assets as well as intangibles. Such assets may include the seller’s furniture, fixtures and equipment; certain of the seller’s business records and data including vendor and supplier lists; personnel records; identification of existing inventory and supplies; customer lists and accounts; third party contracts such as those with specific suppliers; rights under any real estate lease or equipment leases; rights under the franchise agreement; any “dba” (also known as a fictitious name, trade name or assumed name that a company uses to conduct business that is different from its legal name); the telephone number(s) and any electronic and internet names and sites used in the operation of the business; and the goodwill of the business (to the extent owned by the seller and not the franchisor). The assets will be more specifically identified in schedules to the APA (see Section VIII(N) below) and copies of the leases and third-party contracts should be attached to the APA as well. In addition to specific assets, the APA will typically have a catch-all phrase such as “all other assets required and necessary to operate the
business and utilize the assets.” The buyer will also want to make sure that the APA clearly indicates that assets are being acquired free and clear of all liens, claims, encumbrances, restrictions or liabilities.

The seller may want to exclude certain assets from the sale, such as the seller’s cash, bank accounts, prepaid expenses, financial records, etc. These excluded assets can be identified on a schedule to the APA. If the buyer is assuming any of the seller’s liabilities, that obligation would also be set forth, and the buyer should ensure that the APA clearly states that the buyer is not assuming any other liabilities of the seller.

B. Consideration

1. Purchase Price

The APA will identify the purchase price to be paid; any deposit made by the buyer; and the balance to be paid at closing.\(^\text{14}\) It will also indicate the method of payment required, such as wire transfer or certified check; and any financing arrangements with the seller. (See Section IX below). When determining the purchase price, the parties should consider and address who will incur the third-party costs associated with the sale, such as any transfer fees imposed by the franchisor, landlord, and other vendors. Often, clients do not account for these costs at the LOI stage. Counsel will want to discuss these costs with the clients and account for them when negotiating and drafting the APA.

2. Adjustments to be Made at Closing and Post-Closing

The APA will identify any adjustments to the purchase price that will made at closing. These may include an adjustment for the seller’s prepaid expenses such as rent and utilities to the extent that payments made by the seller include a period of time after the closing date. The parties will also want to adjust for any gift card liabilities and customer deposits made prior to the closing date if the buyer is going to honor those gift cards and deposits. Some adjustments may be required after closing and the APA will specify that as well. (See Section XII B below). Frequently, there will be a catch-all provision requiring the parties to notify each other within a certain amount of time, such as 30 days post-closing, if there was an incorrect calculation of any expenses or if an item should have been included in the adjustments but was omitted. The APA should also identify any holdbacks that will occur at closing and the conditions required for the release of the held back funds.

3. Price Allocation and Taxes

The APA will identify how the purchase price will be allocated for tax purposes. Generally, pursuant to Section 1060 of the Internal Revenue Code, the parties to an asset acquisition must file Form 8594 indicating the amount of consideration received for the assets transferred.\(^\text{15}\) This information will be used to determine both the transferee’s basis in such assets and the gain or loss of the transferor with respect to such acquisition. The APA should include a provision

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\(^\text{14}\) A typical deposit is 5-10% of the purchase price, depending on the amount of the purchase price and the type of business. This deposit will act as security for the seller who is often agreeing to stop soliciting buyers between the contract and closing dates. If the buyer defaults under the terms of the APA, the seller may be able to keep the deposit as a remedy for the default.

\(^\text{15}\) Internal Revenue Code §1060, 26 U.S. Code § 1060 (1986).
whereby the parties will agree to each file Form 8594 and to use the price allocation agreed to in the APA.

The APA should identify which party (often the buyer) will assume the obligation to pay any taxes applicable to the transfer of the assets. In addition, depending on the jurisdiction, the parties may have to file notice of the transaction to the local tax authorities. For example, if the seller operates the business in New York and is required to collect sales tax in the ordinary course of business, the buyer must notify the New York State Tax Department of the transaction prior to closing. This will permit the state tax authorities to advise the parties whether any sales taxes are past due. If so, the state authorities will identify the amount of taxes owed and the corresponding portion of the purchase price that should be held in escrow and ultimately paid to the tax department rather than the seller. If the buyer fails to comply with this obligation, New York will impose liability on the buyer for any sales taxes owed by the seller.  

4. Seller’s Non-competition

If the seller (and/or its owners) will agree to not engage in a competitive business post-closing, that agreement should be included in the APA. When the purchase involves the acquisition of an existing franchise, the buyer’s concerns may be alleviated by the seller’s obligations under its franchise agreement in this regard. However, it is helpful to include the non-compete in the APA. If the seller breaches its obligations, the buyer will then have a claim against the seller rather than simply relying on the franchisor to enforce the post-termination provisions of the seller’s franchise agreement. If a non-compete will be included, the drafters can simply take the applicable language from the seller’s franchise agreement and incorporate it into the APA.

C. Representations and Warranties of Seller and Buyer as of Date of Contract and Closing

The APA will identify any representations or warranties made by the parties and should clearly state that these representations and warranties shall be true as of the date of the APA as well as the date of closing. This section typically imposes a greater burden on the seller as the buyer will want to make sure it is acquiring the assets free and clear of any liens and that the financial and other information provided to the buyer is true and accurate. Counsel for the buyer may want to seriously consider the risks to the client if the seller’s representations are false. If the risk is substantial, consideration should be given to requiring the owners of the selling entity to make the representations and warranties in their individual capacities as well as on behalf of their company. This is important because once the transaction closes, the seller entity may be liquidated and dissolved. If the buyer subsequently determines that the seller’s representations were false, it may not have a remedy against the defunct seller. However, if the owners of the seller have also made the representations in their individual capacity, the buyer can seek redress against them. Not surprisingly, many sellers and their owners will not agree to this request and ultimately, as with any negotiation, obtaining these representations and warranties from the owners will depend on the leverage of the parties.

16 N.Y. Tax Law § 1141 (McKinney 2015), See also TEX. TAX CODE § 111.020 (buyer of business liable for seller’s unpaid state taxes or fees unless buyer receives a Certificate of No Tax Due from state comptroller or buyer withholds an amount of purchase price necessary to pay off unpaid taxes); ILL. ADMIN. CODE tit. 86, § 130.1701 (2007) (buyer must notify Dept. of Revenue of the impending sale; the Dept. will tell buyer how much of the purchase price to withhold to use to pay seller’s taxes in the event seller does not pay them post-sale).
1. **The Seller’s Representations and Warranties**

The seller’s representations and warranties typically include: (a) that it is duly organized and in good standing; (b) that the seller has the full power and authority to enter into the APA; (c) that the seller has good, valid, marketable title to the assets, free and clear of all liens (except as otherwise set forth in the APA); (d) that all financial information provided to the buyer is true and accurate; (e) that the seller has complied with all laws and regulations in connection with the operation of the business; (f) that all permits (such as health permits, sidewalk café permits, etc.) are in full force and effect and that there are no proceedings to revoke them; (g) that there are no outstanding contracts or equipment leases except as set forth in the applicable schedule to the APA; (h) that all assets required to operate the business are set forth in the applicable schedule to the APA; (i) that there are no outstanding or threatened violations or litigation; (j) that all tax returns have or will be timely filed and all taxes have been paid; (k) that between the date of the APA and the closing of the transaction, the seller shall not have experienced any damage, destruction or loss, individually or in the aggregate that materially or adversely affects the assets to be transferred; (l) that the seller is not insolvent and will not be rendered insolvent by reason of the transfer of the assets; and (m) that the seller maintains no employee benefit plans, or if seller does maintain any employee benefit plans, that such plans are in good standing, in compliance with all laws and that the seller is not aware of any claim that would lead to litigation against any plan. The seller will want to ensure that the APA contains a provision indicating that, except for the specific express representations and warranties contained in the APA, there are no representations or warranties, express or implied applicable to the transaction.

2. **The Buyer’s Representations and Warranties**

The buyer typically has many fewer obligations in this section of the APA. The buyer often represents: (a) that it has the authority to enter into the agreement; (b) that the performance of its obligations under the agreement will not violate its organizational documents or any laws; and (c) that it acknowledges that, other than as set forth in the APA, no representations or warranties were made by or on behalf of the seller and that it is not relying on any representations or warranties not contained in the APA. The buyer also may be required to represent and warrant that it has performed all due diligence that it deems necessary, that the seller has fully responded to all due diligence requests, that the buyer has inspected the assets being purchased, and that the assets being purchased are in good working condition.

D. **Seller’s Covenants**

The APA will identify the seller’s obligations prior to closing. These obligations should be tailored to the specific transaction but generally will include the following:

1. An obligation to provide the buyer and its attorneys, accountants and other advisors with access to the seller’s properties, books, records, agreements and other documents that the buyer may reasonably request. Sometimes, the seller will also agree to permit the buyer to contact the seller’s suppliers, vendors, landlords and employees. However, there are occasions where the seller will want to limit such communications and, again, this will be determined by the particulars of the situation.

2. An obligation to conduct operations in the ordinary course of business.
3. An obligation to maintain the assets in their present condition, normal wear and tear excepted.

4. An obligation to perform on all contracts required for the operation of the business and comply with all applicable laws.

5. An obligation to refrain from creating any new liens on the assets.

6. The seller should also agree to: (i) not sell or dispose of any of the assets except in the ordinary course of business; (ii) not make any capital improvements or expenditures without the consent of the buyer; and (iii) promptly advise the buyer of any change of condition to the assets or adverse change in the financial condition of business.

E. Employees of the Business

The APA should indicate what will happen with the seller’s employees. Frequently, the seller is obligated to ensure that all employees shall cease to be employees of seller as of the date of closing and to pay all costs associated with such termination including but not limited to severance pay, vacation, and any contributions to benefit plans prior to date of closing. The buyer will then have the right to hire the employees at or any time after closing in its sole discretion. If there are employees that are necessary for the operation of the business or that the buyer requires to continue operations, the buyer may seek to make the closing subject to its retention of those employees. Alternatively, the parties can agree to an adjustment to the purchase price if an employee refuses to continue employment with the buyer.

F. Conditions Precedent to Closing by Buyer

The APA will set forth the conditions that must occur before the buyer has to proceed with the acquisition. These often include the requirements that the seller’s representations and warranties be true as of the closing date and that the seller shall have complied with all its covenants contained in the APA. In addition, at the time of closing, there should be no litigation against the seller that would adversely affect the assets to be sold or the seller’s business. There should be no material adverse changes to the assets or the condition of the seller’s business between the date of the APA and the closing. The parties shall have obtained, by closing, all required consents and approvals by third parties including the franchisor, lessor, and any other suppliers or vendors and/or proof of termination of all contracts between the seller and the third parties. The buyer shall have obtained, by closing, any necessary licenses or permits required to operate the business. Finally, the buyer will want to make sure that there are no liens against the assets and that the seller provides evidence satisfactory to buyer of such removal.

As set forth above, the buyer will likely want to make the closing contingent on it obtaining any necessary licenses or permits to operate the business. The closing should also be contingent on the parties receiving the consent of third parties such as the franchisor, landlord or other third-party vendors where the buyer is going to assume the seller’s contracts. While there is often no dispute between the seller and buyer that such consent is required and that the transaction will be conditioned on obtaining that consent, the parties may differ on what is actually required. For example, the seller may take the position that, provided the landlord or franchisor consents to an assignment, the buyer has to proceed. The buyer, however, may want to reserve the option to cancel the deal if the consent is conditioned on terms unacceptable to the buyer. For example, as discussed in Section XI below, the franchisor often requires the buyer to sign the “then-current form of franchise agreement.” That agreement may have very different terms than the seller’s form of franchise agreement. It may contain a reduced territory, an increase in fees, or new fees.
Any one of these issues may affect the value of the business to the buyer. If the APA requires only the franchisor’s consent, the buyer may have to proceed with the acquisition notwithstanding the impact of the franchise agreement’s terms on the value of the business. Similarly, the landlord may require the buyer to sign a new lease with an increased rent or security deposit. Or, the landlord may require the buyer to assume the seller’s existing lease, which may only have a short term remaining and no right to renew. These are issues that should be carefully considered, negotiated, and accounted for in the APA.

G. **Conditions Precedent to Seller’s Obligations**

The APA will also identify the conditions that must occur before the seller has to proceed with the acquisition. These will include that the buyer’s representations and warranties will be true as of the closing date and that the buyer will have complied with all of its obligations under the APA, including but not limited to tendering payment. The seller may also want to make its obligation to close contingent on obtaining a release from the landlord, franchisor, and any third parties in connection with any other contracts that will be assumed by the buyer. But see Section XI below for a discussion about the franchisor’s required release from the seller.

H. **Closing and Deliverables**

The APA will set forth an anticipated closing date and location and identify the documents and other instruments which will be exchanged at the closing.

I. **Indemnification**

Another provision that may be the subject of negotiation is the parties’ indemnification obligations. Not surprisingly, the buyer will want the strongest indemnification language possible, whereas the seller will likely seek to limit its obligations post-closing. At a minimum, the buyer should attempt to have the seller indemnify the buyer, its officers, agents, and affiliates from all losses arising from any breach of any seller representation; any seller failure to perform any obligation required pursuant to the APA; any seller liabilities of any kind, other than any liabilities specifically assumed by the buyer; and any claims arising in connection with the business or purchased assets prior to the closing date.

The buyer should also carefully consider whether it is sufficiently protected by an indemnification from the seller entity or whether to seek an indemnification obligation from the seller’s owners. Of course, the seller is unlikely to want to agree to individual owner liability, and this provision will likely be the subject of negotiation.

The seller should obtain an indemnification obligation from the buyer for all claims arising from any breach of any representation or warranty of the buyer; any failure to comply with any of its obligations pursuant to the APA; and any claim arising from the buyer’s ownership and operation of the business and purchased assets after the closing date. The parties should also determine the time period within which they are required to provide the other side with notice of a claim and state that the obligation to indemnify shall survive the closing.

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J. **Survival period**

The APA should clearly identify the survival period pursuant to which all representations and obligations, including the parties’ indemnification obligations, will remain in effect. This is important because, unless expressly stated otherwise, once the closing has occurred, the representations, warranties and obligations will expire. This provision may be subject to negotiation. The buyer will, of course, want the survival period to extend as long as possible, e.g., for the period of any applicable statute of limitations. The seller, however, will want a shorter period, such as one year from the closing, so as to end the risks associated with the transaction as soon as possible.

K. **Further Assurances**

The buyer should ensure that the APA contains a provision stating that after the closing, the parties will, without further consideration, execute and deliver any other instruments and take any such action as may be reasonably requested to complete the transaction provided for in the APA.

L. **Confidentiality**

The parties may want to include a provision pursuant to which they agree to keep confidential any information provided to them or obtained by them in connection with the APA. This provision will likely exclude disclosure to the parties’ attorneys, accountants and advisers as well as the franchisor, landlord, and other third parties as may be required to effectuate the APA's terms. It should also exclude any disclosure as may be required by law.

M. **Miscellaneous**

The APA will often contain a section devoted to miscellaneous and boilerplate provisions. These may include the following:

1. **Risk of Loss**

   The APA should address which party, typically the seller, will bear the risk of loss, damage or condemnation prior to the closing.

2. **Broker Fees**

   If there is a broker involved in the transaction, the parties should identify that broker in the APA and address which party will pay the broker’s fees. Typically, broker fees are paid by the seller. The parties will also want representations from each other stating that they have not dealt with any other brokers who may claim a fee in connection with the transaction.

3. **Boiler Plate Provisions**

   The APA will often include certain “boiler plate” provisions. These may include that each party will bear its own expenses incurred in connection with the transaction and that each party will use its best efforts to satisfy the conditions to closing and otherwise to consummate the transactions contemplated by the APA. The APA should also include a notice provision; identify the applicable governing law and venue; and include a provision permitting the parties to sign separate copies of the APA (a “counterparts” provision).
N. **Schedules**

In addition to identifying the assets to be purchased or excluded and any liabilities to be assumed by the buyer, the APA will identify the documents to be delivered by each party at closing. These documents are often referenced through the APA and attached as Schedules. These will include copies of all third-party contracts that will be assigned to the buyer and applicable assignment documents; a bill of sale; and if any portion of the purchase price will be financed by the seller, any note and security agreement.

IX. **FINANCING THE DEAL**

There are four primary sources for financing the deal: commercial financing, Small Business Administration (“SBA”) financing, seller financing, and Rollovers as Business Startups (“ROBS”).

A. **Commercial Financing**

Commercial financing is traditional loan financing from a banking institution where the lender provides the loan for the capital to complete the deal. This type of financing often is the most expensive type of financing. The loan documents typically carry interest at the prime rate plus additional percentage points above prime. Thus, the interest expense is not fixed and will not be fixed and will vary from month to month depending on the current prime rate. The repayment will require repayment of principal and interest. Invariably, the loan will have a “balloon” at the end of the term where all remaining outstanding principal and interest are due and payable.

Before making the loan, the commercial lender will evaluate the sale terms and will determine how much of the sale price it will lend. Similar to traditional real estate financing, the lender will require that a portion of the sale price be paid by the buyer. Commercial lenders may have a portion of their practice that is dedicated to franchise financing. These lenders typically will have already evaluated certain brands and their success. If the lender is not comfortable with the profitability of the deal, then the financing will not be available.

The commercial lender will typically expect to take a security interest in the assets of the franchised business, including the franchise agreement, as collateral for the loan. However, most franchise agreements restrict the right of the franchisee to grant a security interest in the assets and prohibit the right to use the franchise agreement as collateral.\(^\text{18}\) This impasse can be solved with the use of a tri-party agreement between the franchisor, lender and franchisee. This agreement will provide for both the franchisor’s and the lender’s rights and remedies in the event the franchisee defaults under either the franchise agreement or the loan.\(^\text{19}\) The franchisor may likely have to agree to subordinate its royalties to the loan payments but, in exchange for that, the franchisor will gain the right to determine what happens to the franchised business in the event the franchisee defaults under either the loan or the franchise agreement.

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\(^{19}\) Id. See, also, Nancy G. Gourley & David W. Koch, *The Other Contracts in the Franchise Relationship*, ABA 29th Forum on Franchising W-24, p.5-6 (2006).
B. **SBA Financing**

SBA financing is a subset of commercial financing. The SBA does not provide funds to the borrower. Instead, the SBA guarantees a portion of the lender’s loan, which is conditional based on the lender following certain requirements established by the SBA. If the borrower defaults, the SBA pays off the guaranteed portion of the remaining loan balance. This conditional guaranty covers a portion of the risk of borrower repayment default.

The SBA has created the SBA Franchise Directory (the "Directory") of all franchise and other brands reviewed by the SBA that are eligible for SBA financial assistance. In order for a franchisee to be eligible for a SBA guaranty, the franchisor must be listed on the Directory. That process requires the franchisor to submit the franchise agreement, its FDD and all other documents the franchisor requires the franchisee to sign to franchise@sba.gov for an affiliation and eligibility determination. The eligibility standards are set forth in the SBA’s Standard Operating Procedure, currently SBA SOP 50 10 5 (J). If the franchisor is not listed on the Directory, the loan will not be eligible for the SBA guaranty.

For each loan that the SBA guarantees, it performs a legal review. This process can take many months to complete and depends on the SBA receiving all of the documentation that it requests; which requests may come piecemeal. After the SBA completes its legal review, it will provide an authorization letter. The authorization letter sets forth conditions that must be met before the loan may close. Negotiation of the SBA authorization letter is not possible. So, all hoops must be jumped through, all "i’s" dotted and "t’s" crossed.

The benefit of SBA financing is that commercial lenders are often willing to take greater risk with the loan than with non-SBA-guaranteed loans. The interest rate often is lower as well.

C. **Seller Financing**

Seller financing occurs when the seller agrees to accept payment of a portion of the sale proceeds over time, backed by a promissory note and security agreement. The seller therefore is taking on the risk of non-payment. Seller financing also has complications related to the collateral that is subject to the security agreement. The franchisor will have to approve the extent of the collateral, which may be limited only to operational assets that are not proprietary and may not include the franchise agreement. Thus, the liquidation value of the collateral is the extent to which the transaction is secured. Further complicating the issue is whether the franchisor would be willing to grant the seller the franchise rights if the buyer defaults. Finally, another practical complication is whether the seller really wants to get back into the business that it previously sold. Simply put, seller financing should be used only when necessary and then should be limited.

D. **ROBS Rollover**

The ROBS Rollover is a relatively new development as a form of financing. Essentially, the buyer takes money from an existing retirement plan (e.g., 401k plan) to finance the deal. The process requires that the buyer form a C-corporation. Then, the buyer creates a self-directed 401k plan. Funds from the existing 401k plan are then transferred to the newly created self-directed 401k plan. The buyer, as trustee of the self-directed 401k plan, then directs the plan to purchase the stock of the new C-Corporation. The C-Corporation then uses the funds to complete the purchase.
The ROBS Rollover is fraught with risk. The first risk is related to compliance with the 401k administration rules. Among other things, those rules require that participation in the 401k plan be offered to employees. Failure to comply with the 401k administration could result in putting the entire investment at risk during an IRS audit. If the IRS determines that the plan has not complied, then the initial investment—the rollover—will likely be considered an early distribution from the retirement plan and subject to the 10% early withdrawal penalty. Many single-unit franchisees will not have sufficient capital to pay the 10% early withdrawal penalty.

An additional risk, even if the plan is administered compliantly, is that the business will fail. If the business fails, then the previous retirement savings are wiped out. In general, the ROBS Rollover should be used with extreme caution and only if there are no other sources of financing. The old franchise lawyer saying, “I’ve never met someone who lost their life savings by not buying a franchise” applies.

X. CLOSING DOCUMENTS

In addition to the APA, there are other documents that will be required to complete the sale. Those documents include:

A. Bill of Sale and General Assignment

The Bill of Sale and General Assignment typically is a short document that confirms the sale price and states that seller sells, conveys, assigns, transfers and delivers to the buyer all of the seller’s right, title and interest in the assets being conveyed through the APA. Essentially, it is a receipt that transfers title in the personal property.

B. Transfer Agreement, Termination Agreement and Consent of Franchisor

The Transfer Agreement, Termination Agreement and Consent of Franchisor is as important as the APA to completing the transaction. This agreement is a tri-party agreement between the seller, buyer and franchisor. It identifies the terms and conditions required by the franchisor in connection with the transfer of the franchise rights. It typically will contain the franchisor’s consent to the transfer, a waiver of the franchisor’s right of first refusal, the amount of the transfer fee being paid, a release of the franchisor by both the seller and buyer, amendments to the franchise agreement being executed by the buyer (such as to the term), and potentially a termination of the seller’s franchise agreement, depending on how the franchisor structures its transfer requirements in the franchise agreement.20

C. Assignment of Lease and Landlord Approval

For franchised locations that lease their locations, the sale of the franchise will also require the lease to be assigned to the buyer. The lease will contain the terms and conditions upon which the landlord will permit lease assignment. Those provisions typically include that the assignee have a similar net worth and operating experience as the seller. Most landlords also charge an assignment fee. The landlord will need proof that the buyer will be able to meet the assignment criteria. The seller should ask the landlord what information must be submitted. The seller also should ask how long the process will take. Some landlords are merely the property operator and

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20 If the franchisor requires the buyer sign the then-current form of franchise agreement, the transfer agreement will not address amendments to the existing franchise agreement. The transfer agreement and terms are discussed in detail in Section XI.
manager and are required to obtain the consent of the building owners or lenders on the property or both. This process can be lengthy. So, start early.

The lease assignment agreement should address the seller’s security deposit and whether it will be returned to the seller and replaced by the buyer or credited to the buyer. Often, the landlord will require the deposit to be assigned to the buyer. If the landlord requires an assignment of the security deposit, the purchase price should be adjusted, and the closing statement will identify the security deposit amount as an adjustment in favor of the seller.

For a seller that is a business entity, most leases contain a personal guaranty from the business owners—the individuals. The seller should specifically negotiate with the landlord for a release of the personal guarantees. Typically, the lease assignment provisions will not require the landlord to release any liability of the primary tenant (seller franchisee) or the guarantors. Rather, the landlord may retain each of them as obligors on the lease. The seller should do everything possible to obtain the release from the landlord.

If the landlord will not grant the release, then the seller and the guarantors have a contingent liability that depends on the performance of a third party, the buyer, over which they have no control. This contingent liability could cause the deal to fall apart. To provide the seller and guarantors with security that they will not have liability on the lease, the seller can demand that the buyer provide a bond in the amount of the contingent liability or an irrevocable letter of credit (which usually has annual reductions based upon the decreasing liability on the lease) or at a minimum obtain a guaranty from both the buyer and its owners. Further, if the lease has renewal provisions, the seller should negotiate to have any liability for renewal terms removed. If the landlord refuses, the seller, prior to closing, should notify the landlord that it will not be exercising any of the renewal terms and that the lease will expire at the end of the original term. If that type of notice is given, the buyer should be provided a copy of that notice too.

D. Corporate Resolutions and Meeting Minutes

For the seller that is a business entity, the members or shareholders need to approve the sale. The same is true for the buyer. This approval is either accomplished by a Unanimous Written Consent or through a meeting of the members or shareholders. Either form used should state that the company proposes to sell substantially all of its assets to the buyer and the amount of the sale and that the members approve of the sale on the terms and conditions of the APA. If a formal meeting is necessary, the meeting should be properly noticed, a quorum should be met, the proposed transaction should be discussed, and a vote held and recorded. If not all of the members or shareholders vote in favor of the sale, then before the sale is concluded, the Operating Agreement or Bylaws should be reviewed to confirm that a sufficient number of votes in favor of the deal were cast so that the deal can be completed.

E. Form 8594

The APA should contain a provision that allocates the purchase price for the assets being sold, or minimally requires the parties to agree on this allocation at closing. The allocation of the purchase price must then be reported to the Internal Revenue Service on Form 8594. This form should be prepared in conjunction with the sale and acknowledged (by initials at the very least) by both the buyer and the seller. This form is filed with both the seller’s and the buyer’s income tax returns for the year in which the sale occurs. It establishes the purchaser’s tax basis in the assets being purchased divided into separate classes of assets, each of which will have specific depreciation rates. It also will determine whether or not the sale of any of the assets that have previously been depreciated are subject to a recapture under Section 197 of the Internal Revenue Code. As discussed further in Section XII C below, because of the differing rates of depreciation
as well as the possibility of a Section 197 recapture, the seller’s interests are unlikely to align with the buyer’s interests. Accounting and tax input should be received by both the buyer and the seller.

F. Closing Statement

The parties to the transaction should prepare a formal closing statement that shows the purchase price and any adjustments (i.e., pro-ration, lease deposit) to the purchase price based upon the terms of the APA and other documents related to the transaction. It should list the amount of money that the buyer must pay at closing and the amount provided by each source of funding (e.g., one line for funds from commercial financing, another line for cash brought by the buyer). It also should list disbursements, such as payment of the seller’s debts to lenders, payment of outstanding royalty and advertising funds fees to the franchisor, and payment of the transfer fees to the landlord and franchisor. It also should have an acknowledgement that states something similar to:

   The undersigned acknowledge receipt of a copy of this Closing Statement, agree to the correctness hereof, and ratify and approve the disbursements reflected hereon. Buyer and Seller acknowledge that all conditions precedent to the parties’ obligations under the Asset Purchase Agreement between Buyer and Seller have been fully satisfied and such Asset Purchase Agreement has been fully performed by the parties thereto.

This type of acknowledgement is important in case there is a dispute over the transaction and disbursements made at or subsequent to the closing.

G. Other Assignments and Transfers

There may be other assets that require separate assignment documents, such as:

1. Telephone numbers;
2. Domain names/URLs;
3. Advertising contracts;
4. Postage meter contracts;
5. Pest control contracts;
6. Garbage/waste removal contracts;
7. HVAC service contracts;
8. Point of Sale software contracts, as well as support contracts;
9. Vendor contracts; and
10. Administrative rights to social media pages.
Each of these assignments should be completed at the closing of the transaction. Often, the vendors will have their own documents that will be used.

H. Utilities

The utilities for the seller’s business will need to be terminated and re-established by the buyer. Those utilities include electricity, water, telephone service, internet service, and television/cable service. Typically, these services cannot be transferred. The seller should have all deposits returned to the seller and the buyer will need to place new deposits when establishing service in the buyer’s name.

I. Seller’s Termination of Employees/Rehire by Buyer

Concurrent with the closing, the seller should terminate all of the employees of the franchised business and the buyer should re-hire all of the employees that it wishes to retain. If the seller must comply with any WARN Act\textsuperscript{21} that requires advance notice be given to the employees, it must do so. The seller also must provide the termination notice and the final paycheck in accordance with the law of the state in which the business is located. The buyer, upon re-hire, will need to provide the state in which the business is located the proper reporting for the hiring of the employees. The buyer also may wish to establish a payroll service (such as Paychex or ADP) immediately thereafter.

J. Insurance, Licenses, Taxes and Permits

The seller should take steps necessary to cancel existing insurance policies and obtain refunds for any unearned premiums. This should be done in conjunction with an evaluation of any potential unasserted claims to determine the timing of the termination of insurance. The buyer should establish, prior to the closing, all necessary insurance as well as any additional insurance required by the franchisor. The buyer should review the franchise agreement that it is signing to make sure the buyer complies with the insurance requirements dictated by the franchisor and should name the franchisor as an additional insured if required.

The seller should timely file any final tax returns, including payroll, sales and use, and income tax returns. The buyer will need to establish accounts with the taxing authorities.

The buyer, prior to the closing, should obtain all licenses and permits to begin operating the business. These may include business licenses and licenses for specific industries (e.g., pest control).

XI. FRANCHISOR’S CONSENT TO TRANSFER, RIGHT OF FIRST REFUSAL, AND OTHER RIGHTS CONTAINED IN THE FRANCHISE AGREEMENT

Virtually every franchise agreement contains language requiring the franchisee to obtain the franchisor’s consent prior to any transfer of the franchise agreement and/or the franchised business. The franchise agreement typically also provides for the process by which the franchisee

\textsuperscript{21}29 U.S.C. §§ 2101-2109 (1988). Note that many states also have their own Warn Act laws. Counsel for seller should also check the law of the state in which the franchised business is located.
must notify the franchisor of its intent to sell. Additionally, many franchise agreements include the franchisor’s right of first refusal to purchase the business on the terms of the deal presented to the franchisor for consent. There is relevant case law on all of these issues, as well as many excellent papers written discussing how these rights impact the franchisor, the selling franchisee, and the buying franchisee. As this paper is intended to be a practical guide and not a legal analysis of issues arising in a transfer, the authors raise the following issues for the readers’ awareness and guidance and provide references to the papers written addressing the legal analyses of the issues arising in a transfer.

A. Consent to Transfer

The language in a franchise agreement requiring the franchisor’s consent to any proposed transfer of the franchisee’s business or the franchise agreement varies from system to system. It is important for the seller and its counsel to know what its franchise agreement requires and what standard is applied to the franchisor’s decision to consent or deny consent to the transfer. Generally speaking, franchise agreements address the franchisor’s consent standard in one of the following ways: (1) the franchisor must act reasonably or not act unreasonably; (2) the franchisor cannot act arbitrarily; (3) the franchisor has unlimited or sole discretion; or (4) the agreement is silent regarding the franchisor’s consent standard. If the franchise agreement contains a reasonableness standard, the franchisor must be prepared to show a reasonable and good faith business justification for its denial of consent. If the seller or buyer object and bring litigation against the franchisor, courts have generally held in the franchisor’s favor in these instances.

If the franchisor has sole discretion to consent or withhold consent, sellers and buyers have attempted to use the implied covenant of good faith and fair dealing against the franchisor. These attempts have typically failed as courts have held that the implied covenant of good faith and fair dealing cannot override the agreed upon terms of the franchise agreement. If the franchise agreement gives the franchisor the unfettered right to withhold consent in its sole discretion, this is viewed as a negotiated term that will not be undone by the application of the implied covenant. However, the parties must be mindful of state franchise relationship laws, as discussed below, that may impose requirements on the franchisor regardless of the language of the franchise agreement.

In addition to language describing the franchisor’s consent standard, the franchise agreement likely includes a description or a list of the franchisor’s conditions to transfer. Many agreements provide a general condition that the proposed buyer meet all the franchisor’s then-current qualifications for a new franchisee entering the franchise system. Most larger franchisors have a clearly defined written set of criteria they use to qualify a new franchisee which can also be easily applied to the buying franchisee. However, not all franchise systems have written qualifications, making it harder for the franchisor to prove that it applied its then-current qualifications.

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25 While this paper focuses on the sale of a business-format franchised business, counsel for sellers and buyers should also be aware that industry specific laws, such as the Petroleum Marketing Practices Act and dealership laws, have specific provisions addressing the ability of a seller to transfer its business and govern the “franchisor’s” ability to deny or grant consent to such a transfer.
qualifications but found the proposed buyer to be lacking in one or more criteria and therefore denied consent to the transfer.

In many franchise agreements, the franchisor also conditions its consent on several other requirements, such as:

a. the buyer entering into franchisor’s then-current franchise agreement;

b. the buyer providing franchisor with guarantees from all individuals or entities as requested by franchisor;

c. the buyer successfully completing the franchisor’s training;

d. the seller paying franchisor for all unpaid royalties, fees or other monies owed to franchisor as of the closing date;

e. the seller paying the franchisor the transfer fee26;

f. the seller and/or the buyer agreeing to perform all maintenance or upgrades required by the franchisor to bring the franchised unit into compliance with franchisor’s then-current standards;

g. the seller delivering a release to the franchisor, releasing the franchisor and its affiliates, officers, and directors from all obligations under the franchise agreement;

h. the franchisor determining that the purchase price to be paid by buyer is reasonable; and

i. the seller is not in default under any term of the franchise agreement on the date consent is requested and as of the closing date.27

In addition to claims of breach of the implied covenant of good faith and fair dealing, sellers and/or buyers have alleged tortious interference or bad faith when the franchisor denies consent to the proposed transfer.28 Both of these claims have not typically been successful for the seller or buyer.29

While some of these conditions to consent should be clear from the terms of the franchise agreement and not create issues between the buyer and seller, several of these conditions are worth further discussion to ensure counsel for the seller and buyer are aware of their implications.

26 The parties, in particular the seller, need to account for this cost when determining the purchase price as this will reduce the seller’s profit from the sale.


29 See Truby & Beyer, supra note 3 at 20-25 (a claim of tortious interference cannot succeed if the defendant is a necessary party to the transaction since a party to a contract cannot be liable for interference).
1. **Requirement that Buyer Enter into Then-Current Form of Franchise Agreement**

Franchisors often condition their consent to a transfer on the buyer franchisee entering into the franchisor's then-current form of franchise agreement. The franchisor may have significantly changed the terms of the franchise agreement over time and will strive to move all franchisees to the new form as the opportunity arises. However, the new terms may be considerably different than the terms in the existing franchise agreement entered into by the seller, including the amount of the royalty fee or advertising fee, or changes to the dispute resolution mechanisms. Additionally, in lieu of the full initial term set forth in the then-current franchise agreement, franchisors often change the initial term to mirror the remaining term of the seller's franchise agreement. Buyers and their counsel need to pay special attention to these changes, in particular any change to royalties or other required payments as this may change the buyer's projections of the business as well as the value of the existing business to the buyer. If the buyer is an existing franchisee of the franchisor, it may also take exception to this requirement as its other franchised units may still be governed by the terms of the older agreement. This issue should be considered by the seller early in the sale process, and the buyer should understand the financial implications of this requirement prior to making an offer for the business. The parties should also understand if a state franchise relationship addresses this issue as discussed in Section XI D below.

As discussed in Sections XI B below, the requirement that the buyer enter into a new franchise agreement triggers the franchisor's obligation to disclose the buyer through a timely delivery of franchisor's FDD.

2. **Requirement that Buyer or Seller Perform Maintenance or Required Reinvestment**

Most franchise agreements require the franchisee to maintain the franchised unit in good condition. The agreement likely also includes a requirement that the franchisee remodel the unit at certain times during the term or as requested by the franchisor. This standard language is important to the franchisor and to the system so that all franchised units meet the franchisor's (and the brand's customers') standards for the appearance of the unit, even as those standards may be changed by the franchisor over the term of a franchise agreement. As this is an important element of the franchisor's brand protection, many franchise agreements use a transfer as an additional point in time to require maintenance or required reinvestment.

However, this requirement imposes additional costs to the buyer or impacts the seller's funds if seller must complete the work prior to closing or give buyer a credit for the work. It is once again important for both the seller and the buyer to understand the requirements for maintenance and reinvestment in the franchise agreement, as well as the franchisor's point of view about the then-current condition of the franchised unit and its expectations of the work needed to bring the unit into compliance with franchisor's then-current standard. Note also that seller's failure to properly maintain the franchised unit or perform required remodeling to bring it to the franchisor's then-current standards may also breach the franchise agreement, which must be cured before the franchisor consents to the transfer if the franchise agreement conditions transfer on the absence of defaults. All parties may need to work cooperatively to determine the

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30 See Truby & Beyer, supra note 3 at 36-37; Terrell & Treadwell, supra note 1 at 197.
needed work, the cost of that work, and the timing for completion that makes the transfer economically feasible for the buyer.

3. **Requirement that Seller Release Franchisor**

Franchisors typically require that the selling franchisee sign a unilateral release of franchisor, its affiliates, officers, and directors as a condition to the consent. A franchisor does not want to consent to a transfer only to find itself involved in litigation with the former franchisee. Requiring the release as a condition to the consent to transfer provides an opportunity for the selling franchisee to raise any open issues it has with the franchisor which both parties can then work to resolve prior to the transfer. Courts typically uphold the franchisor's right to require a release from the seller when the business is transferred, reasoning that it is commercially reasonable for a franchisor to expect to resolve any claims against it when the business relationship is ending.\(^31\)

Note, however, that certain state franchise relationship laws prohibit or limit a unilateral release as discussed below.

One additional point regarding releases in a transfer. Selling franchisees should be aware that they may retain liability for ongoing compliance with the franchise agreement by the buyer as the franchisor does not typically provide a release of the seller. It is not uncommon for the franchisor to include specific language in the Assignment and Consent Agreement that reiterates the seller's ongoing liabilities under the franchise agreement.

4. **Requirement that Purchase Price be Reasonable**

Some franchise agreements give the franchisor the right to determine the reasonableness of the agreed upon purchase price as a condition to consenting to the transfer. Naturally, franchisees dislike the idea of even providing the purchase price to the franchisor, let alone giving the franchisor the right to comment about the price or withhold its consent to the transfer due to the price. The franchisor, however, does not want the buyer franchisee to overpay for the franchised business, which could result in financial struggles, or even a financial default, during the balance of the franchise term. This also helps the franchisor control the market price for its franchised businesses. This is another important provision in the franchise agreement that the seller and its counsel must be aware of prior to commencing the sales process.

**B. Franchisor Disclosure Obligations**

Pursuant to the Federal Trade Commission Franchise Rule ("FTC Rule"), franchisors must provide any prospective franchisee with an FDD as part of an offer or sale of a franchise.\(^32\) However, the FTC Rule excludes the transfer of a franchise by an existing franchisee if the franchisor does not have significant involvement in the transaction.\(^33\) The Rule expressly states that providing consent to the transfer does not create a significant involvement in the transaction.\(^34\)

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\(^{32}\) 16 C.F.R. §436.2(a) (2007).

\(^{33}\) Id. § 436.1 (t).

\(^{34}\) Id.
There are certain circumstances, however, in which the franchisor does become significantly involved and therefore is required to disclose the buyer with the franchisor’s current FDD. If the franchise agreement requires that the buyer enter into the then-current form of franchise agreement, the franchisor must first provide the buyer with an FDD. The same is true if the franchisor facilitates the sale between the seller and buyer, or if the franchisor holds discussions with the buyer regarding the financial condition of the franchised business.

C. Franchisor’s Right of First Refusal

Many franchise agreements grant the franchisor a right of first refusal (“ROFR”) to purchase a franchised business on the same terms as those agreed upon between the seller and the buyer. This right gives the franchisor more control over the ownership of its franchised businesses by preventing an undesirable buyer from entering the system despite meeting all of the transfer conditions. It can also allow the franchisor to purchase the franchised business and then resell it to a different franchisee or keep it as a company-owned unit as part of an overall change in strategy. Note that the franchisor’s waiver of its ROFR does not mean that the franchisor has given consent to the transfer to the buyer. The transfer provisions of the agreement still govern that process.

The terms of the ROFR in the franchise agreement generally provide the process by which the seller must notify the franchisor of the sale. Seller and its counsel should be well-informed of the required process prior to negotiating offers to purchase the franchised business. Typically, the ROFR requires the seller give notice to the franchisor of every offer to purchase the seller’s business, including all the material terms and conditions. Many franchise agreements give the franchisor the right to request additional information prior to making its decision whether to exercise its ROFR. The agreement likely will contain the timing by which the franchisor must make this decision. The franchise agreement may provide that the franchisor can substitute cash if the buyer is paying a portion of the purchase price in cash with the balance paid by another form of consideration. The agreement may also allow the franchisor to assign its ROFR to a third party.

Issues can arise between the franchisor and the seller that may not be specifically addressed by the terms of the franchise agreement. What constitutes a “bona fide” offer? This raises the question about if and when the seller must provide notice to the franchisor, as well as impacting the franchisor's prescribed time in which to exercise the ROFR. There are numerous cases in which the seller franchisee alleged the franchisor waived its ROFR by not exercising it timely. The outcome of these cases is fact specific. Clear language in the franchise agreement and good communication between the franchisor and seller can help avoid these issues.

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D. State Franchise Relationship Issues Impacting the Sale of a Franchised Business

Some of the states that have franchise relationship laws include provisions in such laws that govern the transfer of an existing franchise. These laws supersede the terms of the franchise agreement pertaining to its transfer, so counsel for the seller should be mindful if such a state franchise relationship law is applicable to its client’s sale. These state laws generally provide one or more of the following: (i) a specific timeframe by which the franchisee must notify the franchisor of its intent to sell the franchised business; (ii) a specific timeframe by which the franchisor must provide its consent or denial of the transfer, after which time the franchisor is deemed to have consented; (iii) the requirement that the buyer franchisee agrees in writing to comply with all requirements of the franchise; or (iv) the franchisor can only deny its consent to the transfer for good cause, which encompasses the buyer meeting the franchisor’s then-current qualifications for new franchisees. The Iowa law also prohibits the franchisor from requiring that the buyer enter into the then-current form of franchise agreement.

E. Other Franchisor Considerations

Two additional points are worth mentioning from the franchisor’s point of view in the transfer of a franchise. First, most franchise agreements contain a post-term covenant not to compete. This non-compete typically is written to apply not only to the expiration or termination of the franchise agreement, but also upon the transfer of the franchise agreement to a third party. While the buyer may ask for a non-compete from the seller or, alternatively, fail to ask for this on the assumption that the franchisor will enforce its non-compete, it is prudent for the buyer to include a non-compete in its APA with the seller and for the franchisor to reiterate the terms of its non-compete in the Assignment and Consent to Transfer Agreement. This protects both the buyer and the franchisor.

Second, if the franchisee borrowed funds that are guaranteed by the SBA to fund its purchase of the franchise, some or all of the franchisor’s standard restrictions or conditions on the transfer of the franchise will be limited. Under the SBA’s Standard Operating Procedures (“SOP”), the SBA will not authorize a loan guarantee for a franchise purchase if the franchise agreement provides that the franchisor can withhold its consent to the transfer at its sole discretion. The SBA’s SOP requires that the franchisor’s consent “not be unreasonably withheld or delayed” and will require the franchisor and franchisee enter into an amendment to the franchise agreement that has the exact language acceptable to the SBA. Counsel for all parties to the transfer must be aware of this restriction if either the seller or the buyer are borrowing funds that are guaranteed by the SBA.


37 For a more in-depth discussion of the state franchise relationship law applicable to a transfer, See Truby & Beyer, supra note 3 at 6-12; Cohen & Micklich, supra note 23 at 1-5; and Elizabeth M. Weldon & Nicole Liguori Micklich, Strange Weather: California’s Amended Franchise Relations Act, AB 525, 35 Franchise L.J. 577 (Spring 2016).

38 Terrell & Treadwell, supra note 1 at 188.

39 Small Business Administration SOP 50 10 5 (l), Jan. 1, 2017; and SBA Form 2462 (02-2017).
XII. POST-CLOSING ISSUES

A. Consulting Agreement between Seller and Buyer

Occasionally, the buyer will request that the seller provide post-closing consulting services to the buyer for the operation of the business. This raises several issues that must be addressed in the consulting agreement. First, the seller’s franchise agreement or the franchisor in its consent documents, will likely include a post-term covenant not to compete which also applies to the seller’s sale of the business. The franchisor, therefore, should agree that the seller may continue to assist the buyer in the operation of the business for a specified length of time.

The consulting agreement should also address the following terms:

1. The specific services the seller will provide to the buyer. Does the buyer expect the seller to be at the business every day working? Or shadowing the buyer to train the buyer in the operation of the business? The franchisor will likely require the buyer to pass the franchisor’s training program prior to closing unless the buyer is an existing franchisee. In many consulting agreements, the seller agrees to be available whenever the buyer needs the seller’s assistance. This provides greater flexibility for the seller and does not commit seller to any full-time work but does require the seller to make himself available whenever the buyer requests assistance.

2. The term of the consulting agreement. Does the buyer need assistance for 3 months or 12 months? The time commitment for seller should be clearly stated in the consulting agreement.

3. The compensation due the seller for its services under the consulting agreement. Will this compensation be over and above the purchase price or will the parties agree that a portion of the purchase price will be paid to seller as compensation for these services? This income is treated as regular income to seller for income tax purposes and deductible as a business expense for the buyer but the seller may prefer to receive the entire purchase price at closing and then receive compensation for its services under the consulting agreement as additional payments for the services provided.

4. The seller is an independent contractor and not an employee of the buyer.

5. In addition to any non-compete contained in the franchise agreement or the APA, the buyer may want to include a specific non-compete in the consulting agreement prohibiting the seller from competing with the buyer during the term of the consulting agreement and for a reasonable period of time after the term.

6. The buyer may also want to include a non-solicitation agreement to prevent the seller from soliciting any of the buyer’s employees or customers during the term of the consulting agreement and for a reasonable period of time after the term. This type of provision may also be in the APA; however, it is good practice to also include it in the consulting agreement as the seller may have closer contacts with the buyer’s employees and customers as a result of providing consulting services.

7. A confidentiality provision requiring the seller to keep all information it learns about the buyer’s business confidential.
8. The reasons that either the seller or the buyer can terminate the consulting agreement prior to its expiration. The parties may also include provisions about dispute resolution in the event either party breaches the terms of the consulting agreement.

A consulting agreement for post-closing services should be signed at closing.

B. Post-Closing Adjustments and Holdbacks

It is common for the APA to include a section that provides for a post-closing adjustment of the purchase price. Regardless of the method by which the seller determines its asking price (as discussed in Section II C above) and the ultimate negotiated purchase price, that price is determined well before the actual closing date. If transfers of licenses or permits are required, or the franchisor requires the buyer to attend the franchisor’s full training program before it will approve the buyer, it may be many months before the closing date. Even without these types of events, the due diligence and loan funding may take several months to complete. During that period, assets and liabilities of the seller may fluctuate due to ongoing operations. One specific example of this is the liability the seller may have from the sale of gift cards which may increase or decrease from the date the APA is signed until the closing date.

The agreed-upon purchase price should ensure that the buyer receives a certain level of post-closing operating capital so it can continue the operation of the business as it was run prior to the closing. If it does not receive an acceptable level of post-closing working capital, the buyer will have to increase its investment to fund its post-closing working capital requirements. As there likely will be fluctuations in the seller’s assets and liabilities between the date the APA is signed and the closing date, the APA should provide for a post-closing adjustment. This section of the APA requires careful consideration by counsel for both parties, as well as their accountants and financial advisors.

The terms of the post-closing adjustment must be clear. First, what accounting standard will be used to determine any difference in the seller’s working capital between the date of the APA and the date of closing? Most franchise agreements require the franchisee to produce financial statements in accordance with generally accepted accounting principles (“GAAP”). Buyer’s accountants, however, should review the seller’s financial statements provided during due diligence to determine how the seller has interpreted GAAP in its statements. The post-closing adjustments need to be calculated using the same accounting treatment as seller used prior to closing so the buyer is comparing “apples to apples”. Then counsel for the buyer can properly draft the language in the APA pertaining to the post-closing adjustments.

Typically, this adjustment will occur at some point 60 to 90 days after the closing. The seller needs enough time to prepare its final balance sheet and financial statements. After providing the final financial statements to the buyer, the buyer and its accountant can determine if the difference in seller’s working capital is more or less than the threshold set out in the APA. Often, the parties will also agree to a minimum or floor, i.e., there will be no adjustment unless the amount is higher or lower than $X. While some transactions only provide for a post-closing adjustment to the buyer if seller’s working capital is less than it was at the time of the APA, other agreements may provide for adjustments for both the seller and the buyer so the seller is not discouraged from operating the business to its fullest extent for the period between the signing of the APA and the closing date.
The APA may also provide that a specified amount of the purchase price will be held back from payment to the seller. This holdback amount may be specified to cover the costs of any indemnity the seller may owe to the buyer, or it may be intended to cover the post-closing adjustments, or it could be a combination of these two concepts. Typically, the holdback funds will be held in an escrow account by a bank pursuant to the terms of an escrow agreement between the bank, the buyer, and seller. The length of the escrow term will depend on the reason the funds are being held in escrow. If this holdback is intended to cover indemnity claims, the parties will likely agree to hold the funds in escrow until a known claim is resolved or the statute of limitations has run on other potential claims. If the holdback is for the post-closing adjustment, it will be held for the period set out in the APA in which this adjustment is to be decided between the parties.

One additional drafting note – the APA should contain dispute resolution language specific to the calculation of the post-closing adjustment. If the parties do not agree on the amount of this adjustment, the APA should address how this dispute will be resolved. It is common that the parties agree to use an independent accountant or financial advisor to act as the arbitrator of this dispute.

C. **Tax Liability**

As mentioned above in Section VIII B (3), the APA should also contain a provision requiring the seller and the buyer to agree on how the purchase price will be allocated among all of the assets sold, including any goodwill. As also discussed in Section X E above, both the buyer and the seller must complete IRS Form 8594, allocating the purchase price to the assets sold, and file this form with the IRS. This allocation determines the gain recognized by the seller, creates the “stepped-up” basis of the assets purchased by the buyer to their then-current fair market value, and is used to determine the sales, use and other transfer tax liability arising from the sale of the franchised business.

The buyer will want to allocate a higher value to the assets that depreciate quickly, i.e., equipment, and a lower value to assets that depreciate slower, i.e., goodwill. This can help the buyer financially, particularly in the first few years the buyer owns the business. On the other hand, the seller will want intangible assets, like goodwill, to have a greater value as that will be taxed at the capital gains rate while hard assets will be taxed as ordinary income. Since the buyer and seller must both file Form 8594 with the same allocation of the purchase price, the APA must address how any disagreements about the allocation will be resolved.

As most franchise agreements specify that the franchisor owns the goodwill associated with all franchised businesses, one might question how there can be any of the purchase price allocated to goodwill. If there is any of the purchase price remaining unallocated after the purchase price has been allocated to all of the hard assets, that amount constitutes goodwill for purposes of Form 8594.

D. **Wind Down of Seller**

After the closing, the seller should consider winding down its business entity. Unless the seller is operating in his/her individual capacity, which should be a rare occasion, or the seller entity owns and operates other businesses and intends to continue to operate those businesses post-closing, the seller entity should be wound down pursuant to the applicable state law governing the type of business entity, i.e., C corporation, limited liability company, or partnership.
XIII. OTHER STATE SPECIFIC LAWS ISSUES

There are unique state laws applicable to the sale of businesses that counsel for the parties should be aware of and ensure their clients comply with as part of the sale of the franchised business. This paper will address two of the more common issues.

A. Bulk Sales Laws

Bulk sales laws are state or local laws that require that the buyer give notice to the seller’s creditors that the buyer is acquiring all or a significant portion of the seller’s business or assets. Under the terms of the APA, the buyer of the business assets will typically not be liable for any of seller’s liabilities existing as of the closing date unless the buyer specifically assumes certain liabilities identified in the APA. The bulk sales laws were passed to protect the creditors of the seller and ensure those creditors either are paid in full prior to the closing date or from the proceeds of the sale. Under the bulk sales laws, the obligation is on the buyer to notify all of the seller’s creditors of the pending sale. If the buyer does not comply with this requirement (and other terms of the bulk sales laws), the buyer may then be liable to the seller’s creditors for any unpaid liabilities despite the language in the APA. Failure to follow the bulk sales processes creates transferee liability on the buyer to seller’s creditors who can bring a claim directly against the buyer for any unpaid liabilities of the seller.

Most states have repealed their bulk sales laws as described above and replaced it with their own Uniform Commercial Code provisions or eliminated the concept entirely except for tax payments. As discussed in Section VIII B (3) above, states still consider a “bulk sales” impact on taxes and fees owed the state by the seller and the buyer may be held liable if either the seller or buyer do not give the state the proper notice of the sale and receive a tax clearance form from the state.

B. Required Licenses and Permits

The operation of any brick and mortar franchised business requires the owner/operator to maintain certain licenses and permits to operate the business. Many on-line or virtual only businesses may also require certain licenses. Counsel for both the buyer and the seller must be aware of every license and permit required for the operation of the franchised business being sold/purchased. Some of these licenses and/or permits are granted by the state in which the business operates, while others are granted – and required – by the county or municipality in which the business operates. Therefore, a careful due diligence process is necessary to ensure counsel, in particular counsel for the buyer, knows every license and/or permit the buyer will need to have in place at the time of closing. Some of these license and/or permits can be transferred from the seller to buyer after providing the state/county/municipality with their required documentation and information. Others cannot be transferred and therefore the buyer needs to apply for such licenses and/or permits well before the closing date, so it has sufficient time to receive these by the closing date.

As an example, suppose the franchised business to be sold is a restaurant that has a full bar and sells all types of alcohol. The restaurant therefore requires a liquor license to sell alcohol. While most liquor licenses are granted by the state, there are certain states in which the local county or municipality issues the liquor license or issues a license in addition to the state license. Some liquor licenses can be transferred from the seller to the buyer; however, many cannot. The application process for a new license can be lengthy and requires the submission of massive
amounts of information about the applicant’s entity and the individuals who own the entity, including the requirement to provide fingerprints for all officers of the entity and all majority owners of an entity. There are a few states that recognize that the lengthy process to obtain a new liquor license may impact the potential closing date for the sale of the restaurant and therefore allow the buyer to operate the restaurant using the seller’s liquor license under a management agreement. The management agreement must be approved by the state. Counsel for seller will want to carefully negotiate this agreement as the seller will remain liable for all liquor-related liabilities that occur while the restaurant is being operated by the buyer and its employees. Having a valid liquor license in place at the closing date should be a condition precedent to closing for both parties. It is a best practice for the buyer’s counsel to retain counsel that specializes in liquor licenses and has the contacts at the appropriate governmental agency so that counsel can more effectively push through the request to transfer the license or the approval of the new liquor license.

The restaurant may also need one or more of the following to operate: (i) a health permit; (ii) a use and occupancy permit; (iii) a boiler certificate; (iv) a fire alarm permit; (v) a burglar alarm permit; (vi) a café permit; (vii) a grease discharge permit; (viii) a business license; and (ix) proof of business tax receipt. All of these are typically issued by the county or municipality in which the restaurant is located; therefore, a search of state requirements may miss many of the required permits.

These are just some of the various permits required to operate a restaurant and would need to be transferred or new permits issued by the closing date. Each type of business will be subject to its own set of operating licenses and permits and counsel for both parties must be aware of all necessary licenses and permits and ensure they are transferred or obtained properly on or before the closing date.

XIV. CONCLUSION

Representing clients buying and selling existing franchises involves myriad legal issues and business considerations. In addition to the customary corporate, conveyancing, financing, real estate and other issues associated with the transfer of a business, the sale of a franchise raises certain unusual issues. Regardless of the franchise system, counsel will want to account for these unique aspects of the transaction when advising clients buying or selling an existing franchised business.
Exhibit A

Sample Redacted Asset Purchase Agreement
CLOSING STATEMENT

Date: June 13, 2016
Seller
Buyer
Total Sales Price $68,960.00
Assets Sold: [Redacted]

SALES PRICE:
Fixed Assets $63,960.00
Inventory $5,000.00
TOTAL SALES PRICE $68,960.00

Price Adjustments in Favor of Seller
Prepaid Rent June 14, 2016 to June 30, 2016 $6,533.34
PDQ Service Fees June 14, 2016 to June 30, 2016 $2,302.50
TOTAL AMOUNT DUE SELLER $72,981.25

Price Adjustments in Favor of Buyer
Deposit/Earnest Money $5,000.00
TOTAL AMOUNT TO BRING $75,000.00

The undersigned acknowledge receipt of a copy of this Closing Statement, agree to the correctness hereof, and ratifies and approves the disbursements reflected hereon. By its execution hereof, Buyer and Seller acknowledge that all conditions precedent to the parties' obligations under the Asset Purchase Agreement between Buyer and Seller have been fully satisfied and such Asset Purchase Agreement has been fully performed by the parties thereto.

SELLER:

[Redacted]

Authorized Member

BUYER:

[Redacted]

Authorized Member
ASSET PURCHASE AGREEMENT

BETWEEN

[Redacted]
A TENNESSEE LIMITED LIABILITY COMPANY

AND

[Redacted]
A TENNESSEE LIMITED LIABILITY COMPANY

DATED AS OF

JUNE 13, 2016
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ASSET PURCHASE AGREEMENT

THIS ASSET PURCHASE AGREEMENT (together with all Schedules and Exhibits hereeto, this "Agreement"), dated as of the 13th day of June, 2016 (the "Effective Date"), is entered into by and between ___________________________ a Tennessee Limited Liability Company, with its registered office located at ___________________________, appearing herein through its duly authorized Member, ___________________________ ("Seller"), and ___________________________ a Tennessee limited liability company, with its registered office and principal place of Business located at ___________________________, appearing herein through its duly authorized Member, ___________________________ ("Buyer").

RECITALS:

Seller is the owner of those certain assets used in the operations of a ______ franchised restaurant (the "Business"). Seller desires to sell, and Buyer desires to buy certain of the assets of Seller used in or relating to the operation of the Business, on the terms and conditions set forth in this Agreement.

THEREFORE, Seller and Buyer agree as follows:

ARTICLE I

SALE AND PURCHASE OF ASSETS

1.1 Transfer of Assets. Seller agrees to sell, assign, transfer and deliver to Buyer, and Buyer agrees to purchase and accept from Seller, at the Closing (as defined in Section 8.1 below) certain properties and assets of Seller, as specifically described below, used by Seller in connection with the operations of the Business, but excluding certain assets described in Section 1.3. The assets being sold hereunder are collectively referred to as the "Purchased Assets," and the assets described in Section 1.3 are collectively referred to as the "Excluded Assets."

1.2 Purchased Assets. The Purchased Assets specifically include the following:

(a) **Lease.** Leasehold estate pursuant to that certain Lease Agreement, dated July 10, 2006, with a Commencement Date, as extended on December 15, 2011, by and between ___________________________ as Lessee, and ___________________________ (the successor in interest to ___________________________ or its assigns, as Lessor).

(b) **FF&E.** All furniture, furnishings, fixtures, equipment, fittings, machinery apparatus, signage, appliances, draperies, carpeting and other similar articles of tangible personal property used in connection with the Business as of the Effective Date, listed in Schedule 1.2(b).

(c) **Inventories and Supplies.** All inventories owned by Seller for use in the Business.
(d) **Vendor and Supply Contracts.** All of Seller's interest in the vendor and supply contracts and other agreements described on Schedule 1.2(d) (the "Vendor and Supply Contracts") to the extent that such can be assigned.

(e) **Business Records.** Copies of all technical data, inventory records and lists, budgets, Vendor and supplier records and lists, payroll and personnel records for existing employees, computer programs and data created or maintained in connection with the Business, during the period beginning June 1, 2013 through the Closing Date.

(f) **Intangibles.** All general intangibles not otherwise listed in this Section 1.2 that are owned by Seller and used in connection with the Business, including the telephone and facsimile numbers set forth on Schedule 1.2(f).

1.3 **Excluded Assets.** All other assets of Seller of every kind and description used in connection with the Business that are not set forth in Section 1.2 shall be retained by Seller. Specific assets to be excluded include, but are not limited to, Seller’s corporate books and records, and cash on hand, as more fully set forth in Schedule 1.3.

1.4 **Liabilities.** The Purchased Assets shall be sold and conveyed to Buyer free and clear of all liabilities, obligations, liens, security interests and encumbrances whatsoever (collectively, "Liens", or, individually, a "Lien"); provided, however, that Buyer will assume at Closing (i) the Seller’s obligations under the Lease arising after the Closing Date; (ii) the Vendor and Supply Contracts set forth on Schedule 1.2(d) that are unperformed as of the Closing Date, and (iii) purchase orders for materials and supplies necessary to the operation of the Business, which purchase orders have been entered into in the ordinary course of the Business but have not been satisfied as of the Closing Date; (iv) any unperformed obligations on the Franchise, LLC Statement of Compliance (together, the "Assumed Liabilities"). Except as specifically set forth above, Seller shall retain responsibility for all liabilities accrued as of the Closing Date and for all liabilities arising from Seller’s operations prior to the Closing Date (including, without limitation, all salaries, severance, employee benefits and all other obligations with respect to Seller’s employees), whether or not accrued and whether or not disclosed.

1.5 **The Lease.** In connection with the conveyance of the leasehold estates pursuant to Section 1.2(a), Buyer shall be solely responsible for any and all assignment fees arising from or associated with the assignment of the Lease by Seller to Buyer or otherwise triggered by the consummation of the transaction contemplated by this Agreement, if any. The covenants of this Section 1.5 shall survive Closing.

**ARTICLE II**

**CONSIDERATION**

2.1 **Purchase Price.** The total purchase price (the "Purchase Price") for the Purchased Assets shall be Sixty Eight Thousand Nine Hundred Sixty and No/100 Dollars ($68,960). Buyer shall pay the full Purchase Price on the Closing Date. Additionally, Buyer shall pay to ________ Franchise, Inc. $2,500 (half of the required transfer fee).
2.2 **Purchase Price Adjustments.** (a) The Purchase Price shall be increased by:

(i) personal property taxes, gross receipts taxes or other similar taxes, if any, relating to the Purchased Assets paid prior to Closing on account of any period from and after 12:01 a.m. of the Closing Date;

(ii) amounts paid prior to the Closing Date under the Lease or under the Vendor and Supply Contracts on account of any period from and after 12:01 a.m. of the Closing Date;

(iii) any deposits with landlords, utilities or other creditors that are transferred to Buyer as of the Closing Date; and

(iv) any other charges or fees customarily prorated by a credit to the seller in Tennessee, on customary terms.

(b) The Purchase Price shall be decreased by:

(i) unpaid personal property taxes, sales taxes, gross receipts taxes, taxes on rent, or other similar taxes, if any, relating to the Purchased Assets payable on account of any period prior to 12:01 a.m. of the Closing Date;

(ii) unpaid amounts payable under the Lease or under the Vendor and Supply Contracts for any period prior to 12:01 a.m. of the Closing Date, including accrued additional rent, excess operating costs, utility surcharges, property taxes, assessments and amounts due to damage to the premises that occurred on or before the Closing Date; and

(iii) any other charges or fees customarily prorated by a charge to the seller in Tennessee, on customary terms.

(iv) the Five Thousand Dollar ($5,000.00) deposit provided to Seller from Buyer upon execution of that certain letter of intent between the parties dated April 8, 2016.

The intent of the foregoing is to credit or charge, as the case may be, Seller with all revenues and expenses respecting the Purchased Assets which are attributable to operations before the Closing Date and to credit or charge, as the case may be, Buyer with all such revenues and expenses attributable to operations on and after the Closing Date.

2.3 **Post-Closing Adjustments.** (a) Subject to Section 2.2(b), if the calculation of an item listed in Section 2.2 above shall prove to be incorrect or either party discovers an item which should have been included in the adjustments but which was omitted therefrom, the party in whose favor the error or omission was made shall pay the sum necessary to correct such error or omission to the other party promptly following receipt of proof of such error or omission from such other party, provided that such proof is delivered to the party from whom payment is requested within thirty (30) days of the Closing Date.

(b) For additional rent, excess operating costs, utility surcharges, property taxes,
assessments and amounts due to damage to the premises that occurred on or before the Closing Date for the current year that are not known on the Closing Date, then those additional rent, excess operating costs, utility surcharges, property taxes, assessments and amounts due to damage to the premises that occurred on or before the Closing Date shall be apportioned pro-rata based upon the Closing Date when assessed for the preceding year. The amounts as computed shall be adjusted when the final additional rent, excess operating costs, utility surcharges, property taxes, assessments and amounts due to damage to the premises that occurred on or before the Closing Date are determined, and this adjustment shall not be subject to the thirty (30) day limitation set forth in the preceding paragraph, but rather shall be subject to a 275 day limitation.

The provisions of this Section 2.3 shall survive the Closing Date.

2.4 Allocation. The Purchase Price and consideration for the covenant not to compete set forth in Section 2.5 shall be allocated among the Purchased Assets as set forth on Exhibit A attached hereto.

2.5 Noncompetition. As a condition to Buyer’s obligation to purchase the Purchased Assets and in order to ensure to Buyer the full benefits of the Purchased Assets and the Business, Seller and its Members hereby covenant and agree that for a period of two (2) years following the Closing Date, they will not in any manner, directly or indirectly, whether as an owner, manager, lender, consultant, partner or agent, engage in a restaurant business that derives more than 10% of its revenue from selling [redacted] within the area defined by a three mile radius extending from [redacted] Seller acknowledges that any breach of the covenants of this Section 2.5 will result in irreparable damage and continuing injury to Buyer. Therefore, in the event of any breach or threatened breach of the covenants in this Section, Seller acknowledges that Buyer shall be entitled, without limiting any other remedies, to an injunction restraining Seller from committing any such violation, and Seller hereby consents to the issuance of such injunction without Buyer having to show irreparable harm, without having to post bond and without having to show actual damage.

Seller acknowledges and agrees that (a) the covenants of this Section 2.5 are narrowly tailored and reasonably necessary to protect the Business interest of Buyer; (b) such covenants are reasonably limited with respect to the activities prohibited, the duration thereof, the geographical area thereof, the scope thereof and the effect thereof on Seller and the public; (c) the purpose and effect of such covenants is solely to protect Buyer for a limited period of time from unfair competition by Seller; and (d) the purchase of the Purchased Assets is expressly conditioned upon Seller agreeing to abide by and be bound by all of the covenants and provisions of this Section. In the event that any provision of this Section 2.5 shall be determined by any court to be unenforceable, this Section 2.5 shall be interpreted to extend over the maximum time periods for which it may be enforceable, and to the maximum extent in any and all other respects as to which it may be enforceable, all as shall be determined by such court.
ARTICLE III
REPRESENTATIONS AND WARRANTIES OF SELLER

Seller represents and warrants to Buyer as follows:

3.1 **Authority.** Seller is a duly organized Tennessee Limited Liability, in good standing with the State of Tennessee, with its principal place of business in [County], State of Tennessee. This Agreement has been authorized, duly executed and delivered by Seller and constitutes a valid and binding obligation of Seller, enforceable against Seller in accordance with its terms. The meeting minutes of Seller showing the authorization for the transaction contemplated by this Asset Purchase Agreement will be substantially in the same form as the meeting minutes attached hereto as Exhibit B.

3.2 **Effect of Agreement.** The execution, delivery and performance of this Agreement and other agreements contemplated herein do not and will not: (a) violate any law or any rule or regulation of any governmental body or administrative agency, or conflict with any judicial or administrative order or decree relating to Seller or the Purchased Assets; (b) constitute a breach or default under any contract or any other agreement or instrument by which Seller is bound or the Purchased Assets are affected, including but not limited to the Lease and the Vendor and Supply Contracts; (c) create any Lien on the Purchased Assets; or (d) except as set forth on Schedule 3.2, require any consent, notice to or filing with any governmental authority or administrative agency or any private person or firm on behalf of Seller. The matters described on Schedule 3.2 are referred to as the “Required Consents.”

3.3 **Financials: Books.** The unaudited financial statements of Seller delivered to or reviewed by the Buyer are in accordance with the books and records of the Seller; (b) present fairly the assets, liabilities and financial condition of Seller as of the respective dates thereof, and the results of operations for the periods then ending; and (c) fairly reflect the financial condition of Seller.

3.4 **Title to and Sufficiency of Assets.** Seller has good and marketable title to all of the Purchased Assets, free and clear of any Liens, except for Liens described on Schedule 3.4, all of which will be removed at or prior to Closing and except as set forth in Section 1.4 of this Agreement.

3.5 **Purchased Assets.** All items included on Schedule 1.2(b), Schedule 1.2(c), and Schedule 1.2(f) (a) are currently being used and have been used within the ordinary course of Business of the Business; (b) are located at [Location]; (c) have been acquired by Seller in bona fide transactions entered into in the ordinary course of the Business; or (d) have been created by Seller in the ordinary course of the Business. All of the furniture, fixtures and equipment of Seller that constitute part of Purchased Assets are in good operating condition and repair, except for reasonable wear and tear, as of the Closing Date and are fit for use in the Business.

3.6 **Material Contracts.** Schedule 3.6 lists all contracts, commitments, agreements (including agreements for the borrowing of money or the extension of credit), leases,
licences, understandings and obligations, whether written or oral, to which Seller is party or by which Seller or the Purchased Assets is bound or affected, that are material to the operation of the Business. Seller has delivered to Buyer true and complete copies of all written contracts and true and complete memoranda of all oral contracts, including any and all amendments thereto. Except as disclosed on Schedule 3.6, each such contract, commitment, agreement, lease, license, understanding or obligation is valid, binding and enforceable in accordance with its terms and is in full force and effect. Except as disclosed on Schedule 3.6, there are no existing defaults, and no events or circumstances have occurred which, with or without notice or lapse of time or both, would constitute defaults under those instruments listed on Schedule 3.6, including without limitation the Lease and any of the Vendor and Supply Contracts.

3.7 Intellectual Property. Seller owns no intellectual property rights that may be assigned or transferred to Buyer without the consent of a third party. There are no claims or suits alleging that the Business infringes any intellectual property rights of any third parties.

3.8 Litigation. There are no claims, actions, suits or investigations ("Claims") pending, or to the best knowledge of Seller, threatened, against Seller or the Business affecting the Purchased Assets and/or the Business.

3.9 Compliance with Laws; Permits. There is not outstanding or, to the best knowledge of Seller, threatened, any order or decree of any court, governmental agency or arbitration tribunal against or involving Seller, the Business or the Purchased Assets. Seller is currently, and has been at all times, in full compliance with all laws, rules, regulations and licensing requirements of all federal, state, and local authorities applicable to the Purchased Assets and operations of the Business. Seller has obtained all permits, certificates and licenses required for the conduct of the Business and the ownership of the Purchased Assets. Seller is not in violation of any of the Permits, and no proceedings are pending or, to the best knowledge of Seller, threatened to revoke or limit any Permit.

3.10 Taxes. Seller or Seller’s tax adviser has properly completed and timely filed all tax returns and reports required to be filed by it (the "Tax Returns"). To the best of its knowledge, all Tax Returns are accurate, complete and correct as filed, and Seller has paid in full or made adequate provision in the Financial Statements for all amounts shown to be due thereon. Seller has not been notified by any governmental authority that an audit or review of any tax matter is contemplated.

3.11 Labor Matters. No employees of Seller who work in the Business have been or are represented by a union or other labor organization or covered by any collective bargaining agreement. There is no unfair labor Business complaint, labor organizational effort, strike, slowdown or similar labor matter pending or, to the best knowledge of Seller, threatened against or affecting Seller or the Business. Further, there are no pending complaints or claims by any of the employees regarding violations of law related to the Business, including, but not limited to, complaints or claims under the federal and state False Claims Acts, the Civil Rights Act of 1964, the Age Discrimination in Employment Act and the Americans with Disabilities Act.
3.12 Employees' Benefits. There are no Plans, as defined below, contributed to, maintained or sponsored by Seller, to which Seller is obligated to contribute or with respect to which Seller has any liability or potential liability, whether direct or indirect, including all Plans contributed to, maintained or sponsored by each member of the controlled group of companies, within the meaning of Sections 414(b), 414(c), and 414(m) of the Internal Revenue Code, of which Seller is a member to the extent Seller has any potential liability with respect to such Plans. For purposes of this Agreement, the term "Plans" shall mean: (a) employee benefit plans as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), whether or not funded and whether or not terminated; (b) employment agreements; and (c) personnel policies or fringe benefit plans, policies, programs and arrangements, whether or not subject to ERISA, whether or not funded, and whether or not terminated, including, without limitation, stock bonus, deferred compensation, pension, severance, bonus, vacation, travel, incentive and health, disability and welfare plans.

3.13 Absence of Changes. Except as set forth on Schedule 3.13, since March 31, 2007, Seller has conducted the operations of the Business only in the ordinary course, and has not:

(a) Suffered any damage to any asset of the Business, whether or not covered by insurance;
(b) Sold or disposed of any material assets used in the operation of the Business;
(c) Made any general wage increase for its employees as a group;
(d) Amended or terminated any contract, lease or agreement relating to the conduct of the Business or the Purchased Assets;
(e) Incurred any obligation or liability, except normal trade or Business obligations incurred in the ordinary course of Business;
(f) Introduced any new method of management, operations or accounting;
(g) Suffered any material adverse change in the condition (financial or otherwise) of the operations of the Business or the Purchased Assets, or any other event that might reasonably be expected to have an adverse effect on the Business or the Purchased Assets; or
(h) Agreed, whether in writing or otherwise, to take any action described in this Section.

3.14 Related Party Transactions. None of the contracts or agreements listed on Schedule 3.6 include any agreement with, or any other commitment to (a) Seller; (b) any person related by blood or marriage to Seller; or (c) any corporation, partnership, trust or other entity in which Seller, or related person, has an equity or participating interest.
3.15 **Disclosure.** No representation, warranty or statement made by Seller in this Agreement, or any document furnished or to be furnished to Buyer pursuant to this Agreement, contains or will contain any untrue statement of a material fact, or omits or will omit to state any material fact necessary to make the statements contained herein or therein not misleading.

**ARTICLE IV**

**REPRESENTATIONS AND WARRANTIES OF BUYER**

Buyer represents and warrants to Seller as follows:

4.1 **Organization and Good Standing.** Buyer is a professional limited liability company duly organized, validly existing and in good standing under the laws of the Tennessee.

4.2 **Authority.** Buyer has all requisite power and authority to execute and deliver this Agreement and to perform the transactions contemplated hereby. The execution, delivery and performance of this Agreement, and the consummation of the transactions contemplated hereby, have been duly and validly authorized by all necessary corporate and shareholder action on the part of Buyer. This Agreement has been authorized, duly executed and delivered by Buyer and constitutes a valid and binding obligation of Buyer, enforceable against Buyer in accordance with its terms. The meeting minutes of Buyer showing the authorization for the transaction contemplated by this Asset Purchase Agreement are attached hereto as Exhibit C.

4.3 **Effect of Agreement.** The execution, delivery and performance of this Agreement do not and will not (a) conflict with the Articles of Organization or Operating Agreement of Buyer; (b) violate any law or any rule or regulation of any governmental body or administrative agency, or conflict with any judicial or administrative order or decree relating to Buyer; or (c) require any consent, notice to or filing with any governmental authority on behalf of Buyer.

**ARTICLE V**

**COVENANTS OF SELLER**

Seller covenants and agrees with Buyer as follows:

5.1 **Conduct of Business.** Between the date of this Agreement and the Closing Date, Seller shall:

(a) Conduct the operations of the Business in the normal and customary manner in the ordinary course of Business;

(b) Maintain the tangible Purchased Assets in their current operating order, repair and condition;

(c) Perform all of its obligations under the Vendor and Supply Contracts and Commitments and not amend any provision thereof;

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(d) Use its best efforts to preserve Seller's organization intact and maintain its relationships with its employees, suppliers and vendors and facilitate the assumption of any agreements, unless doing so will, in the sole discretion of Seller, not be in the best interests of the Business;

(c) Promptly advise Buyer of any material adverse change in the condition (financial or otherwise) of the Business or the Purchased Assets;

(f) Promptly advise Buyer of the occurrence of any event or circumstance which affects the consummation of the transactions contemplated by this Agreement or which, if in existence on the date of this Agreement, would have been required to have been disclosed in a Schedule to this Agreement;

(g) Not create any new Lien or permit to exist any undisclosed Lien with respect to any of the Purchased Assets;

(h) Not sell or dispose of any Purchased Assets, except in the ordinary course of Business of the Business;

(i) Promptly advise Buyer of any change in the list of employees referred to in Section 3.12 or in the compensation payable to any such employee; and

(j) Not make any capital improvement or expenditure, except with the prior written consent of the Purchaser.

5.2 Access and Information. Seller shall permit Buyer and its counsel, accountants and other representatives full access during the normal Business hours to all the properties, assets, books, records, agreements and other documents of the Business. Seller shall make available to Buyer and its representatives all information concerning the Purchased Assets or the Business as Buyer may reasonably request, the cost of copies of which shall be borne by the Buyer. To the extent necessary to consummate the transaction contemplated by this Agreement, as determined by Purchaser in its sole discretion, Seller shall permit and facilitate communications between Buyer and Seller's suppliers, vendors, landlords and other persons having relationships with the Business.

5.3 Employees. At Closing, all people working at the Business shall cease to be employees of Seller and Seller shall pay all costs associated with the termination of all such employees, including, but not limited to, severance pay, vacation pay and contribution to benefit plans for the period prior to Closing. Seller shall permit Buyer to hire the employees of the Business at Closing or any time thereafter at Buyer's sole discretion.

ARTICLE VI
CONDITIONS PRECEDENT TO BUYER'S OBLIGATIONS

The obligations of Buyer to consummate the transactions contemplated by this
Agreement are subject to the satisfaction of the following conditions on or before the Closing Date:

6.1 Representations, Warranties and Covenants. The representations and warranties of Seller contained in this Agreement shall have been true and correct on the date of this Agreement shall be true and correct on the Closing Date as though made on and as of the Closing Date, and Seller shall have duly performed and complied with all covenants and obligations required by this Agreement to be performed or complied with by it on or prior to the Closing.

6.2 Absence of Litigation. No action or proceeding shall be pending by or before any court or other governmental body or agency seeking to restrain, prohibit or invalidate the transactions contemplated by this Agreement or which would adversely affect the right of Buyer to own, operate or control the Purchased Assets or the Business after the Closing Date.

6.3 Absence of Change. Between the date of this Agreement and the Closing, no material adverse change shall have occurred in the Business, operations or financial or other condition of the Business or the Purchased Assets, nor shall there have occurred any material casualty loss or destruction of, or damage to, any of the Purchased Assets.

6.4 Consents and Approvals. All (a) Required Consents; (b) licenses; (c) other orders or notifications; or registrations, declarations or filings with, or expiration of waiting periods imposed by, any applicable governmental or judicial authority; (d) consents, approvals, authorizations or notifications of any other third parties, including but not limited to all necessary consents by [Redacted] Franchise, Inc., all as required in connection with consummation of the transactions contemplated by this Agreement, including the operation of the Business by Buyer, shall have been made or obtained or shall have occurred; and (e) the transfer or assignment of any Material Contracts from Seller to Buyer shall have occurred or shall be accomplished by virtue of Closing.

6.5 Removal of Liens. All Liens against the Purchased Assets, including but not limited to those indicated to exist by record searches made by Buyer prior to the Closing Date, shall have been removed, and Seller shall have provided evidence satisfactory to Buyer of such removal.

6.6 The Lease. Buyer shall receive a letter from the landlord under the Lease addressed to the Buyer providing the Lessors' consent to the assignment of said lease from Seller to Buyer.

ARTICLE VII
CONDITIONS PRECEDENT TO SELLER'S OBLIGATIONS

The obligations of Seller to consummate the transaction contemplated by this Agreement are subject to the satisfaction of each of the following conditions on or before the Closing Date:
7.1 **Representations, Warranties and Covenants.** The representations and warranties of Buyer contained in this Agreement shall have been true and correct on the date of this Agreement and on the Closing Date as though made on and as of the Closing Date, and Buyer shall have duly performed and complied with all covenants and obligations required by this Agreement to be performed or complied with by it on or before the Closing Date.

7.2 **Absence of Litigation.** No action or proceeding shall be pending by or before any court or other governmental body or agency seeking to restrain, prohibit or invalidate the transactions contemplated by this Agreement.

7.3 **The Lease.** Seller shall have received a release from the Landlord under the Lease addressed to the Seller for all obligations of the lease, including the release of the personal guarantors, effective as of the date of the assignment of said lease from Seller to Buyer.

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**ARTICLE VIII**

**CLOSING**

8.1 **Closing.** It is anticipated that the closing of the sale of the Purchased Assets (the "Closing") shall be accomplished through the use of facsimile signatures and the exchange of funds without the necessity for a formal Closing. However, if a formal Closing becomes necessary, it shall take place at the law office of [Law Firm Name]. The Closing shall be accomplished so as to be effective as of 12:01 a.m., Central Time, on June 13, 2016 (the "Closing Date").

8.2 **Deliveries.** At the Closing, each party shall execute and deliver to the other such instruments of conveyance or assumption and other documents as may be reasonably required or contemplated by this Agreement, all of which shall be in form and substance reasonably satisfactory to the other party.

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**ARTICLE IX**

**INDEMNIFICATION**

9.1 **Indemnification by Seller.** Seller shall indemnify, defend and hold harmless Buyer and its officers, directors, agents and affiliates (the "Buyer Indemnitees") from, against and with respect to any and all loss, damage, claim, obligation, liability, cost and expense, including, without limitation, reasonable attorneys' fees and costs and expenses incurred in investigating, preparing, defending against or prosecuting any litigation, claim, proceeding or demand, of any kind or character (a "Loss") arising out of or in connection with any of the following:

(a) any breach of any of the representations or warranties of Seller contained in or made pursuant to this Agreement;

(b) any failure by Seller to perform or observe, in full, any covenant, agreement or condition to be performed or observed by it pursuant to this Agreement;

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(c) any and all liabilities and obligations of Seller, of any kind or nature whatsoever, whether accrued, absolute, contingent or otherwise, known or unknown, except for the Assumed Liabilities; or

(d) Seller's ownership and operation of the Business and the Purchased Assets prior to the Closing Date, including any and all liabilities under the Vendor and Supply Contracts which relate to events occurring prior to the Closing Date.

9.2 Indemnification by Buyer. Buyer shall indemnify, defend and hold harmless Seller and its officers, directors and affiliates (the "Seller Indemnitees") from, against and with respect to any Loss, as defined in Section 9.1, arising out of or in connection with any of the following:

(a) any breach of any of the representations and warranties of Buyer contained in or made pursuant to this Agreement;

(b) any failure by Buyer to perform or observe, in full, any covenant, agreement or condition to be performed or observed by it pursuant to this Agreement;

(c) the Assumed Liabilities; or

(d) Buyer's ownership and operation of the Business and the Purchased Assets on and after the Closing Date.

9.3 Notice of Claim. Any party seeking to be indemnified hereunder (the "Indemnified Party") shall, within 30 days following discovery of the matters giving rise to a Loss, as defined in Section 9.1 of this Agreement, notify the party from whom indemnity is sought (the "Indemnity Obligor") in writing of any claim for recovery, specifying in reasonable detail the nature of the Loss.

9.4 Defense. If the facts pertaining to a Loss arise out of the claim of any third party, or if there is any claim against a third party available by virtue of the circumstances of the Loss, the Indemnity Obligor may, by giving written notice to the Indemnified Party within 30 days following its receipt of the notice of such claim, elect to assume the defense or the prosecution thereof, including the employment of counsel or accountants at its cost and expense; provided, however, that during the interim the Indemnified Party shall use its best efforts to take all action (not including settlement) reasonably necessary to protect all parties against further damage or loss with respect to the Loss. The Indemnified Party shall have the right to employ counsel separate from counsel employed by the Indemnity Obligor in any such action and to participate therein, the fees and expenses of such counsel being borne by the Indemnity Obligor. Whether or not the Indemnity Obligor chooses so to defend or prosecute such claim, all the parties hereto shall cooperate in the defense or prosecution thereof. The Indemnity Obligor shall not be liable for any settlement of any such claim effected without its prior written consent, which shall not be unreasonably withheld.
ARTICLE X
MISCELLANEOUS

10.1 Survival of Representations and Covenants. All representations, warranties and covenants of the parties hereto contained in this Agreement or otherwise made in writing in connection with the transactions contemplated hereby shall survive the execution and delivery of this Agreement and the Closing for a period of one year, except for the representations and warranties contained in Subsections 3.4 (Title to Assets), 3.10 (Taxes), and 3.12 (Employees; Benefits), which shall in each case survive for the period of the applicable statute of limitations.

10.2 Risk of Loss. The risk of loss, damage or condemnation of any of the Purchased Assets from any cause whatsoever shall be borne by Seller at all times prior to the completion of the Closing.

10.3 Brokers. Each party represents and warrants to the other (a) that no brokers, agents, or intermediaries have been retained or employed by it, and (b) that there are no claims for any brokerage commission, finder’s fee or similar payment due or claimed to be due from it with respect to this transaction. Seller and Buyer shall hold harmless the other party with respect to any broker’s, finder’s or intermediary’s fee with respect to the transactions contemplated hereby claimed by any broker, finder, or intermediary engaged, employed, or otherwise acting on behalf of the indemnifying party.

10.4 Tax Filings. Each of the parties acknowledges its understanding of the requirement under Section 1060 of the Internal Revenue Code for the filing by each of Form 8294 for its respective tax year in which the Closing occurs. Each of Seller and Buyer agrees to allocate the Purchase Price among the Purchased Assets in accordance Exhibit A attached hereto.

10.5 Expenses. Except for damages in the event of a breach of this Agreement, all costs and expenses incurred in connection with this Agreement and the transactions contemplated hereby shall be paid by the party incurring such expense, whether or not the sale of the Purchased Assets is consummated. Sales taxes (if any), and recording and filing fees on the transfer of the Purchased Assets shall be borne by the party legally obligated therefor.

10.6 Publicity. Any press releases or other announcements concerning the transactions contemplated by this Agreement shall be approved by both Buyer and Seller prior to their issuance.

10.7 Best Efforts. Each party agrees to use its best efforts to satisfy the conditions to the Closing set forth in this Agreement and otherwise to consummate the transactions contemplated by this Agreement.

10.8 Notices. All notices, demands and other communications made hereunder shall be in writing and shall be given either by personal delivery, by certified U.S. Mail, Return Receipt Requested, by nationally recognized overnight courier with charges prepaid and confirmation of delivery or by telecopy with confirmation, and shall be deemed to have been given or made when received by the person to whom notice is being given:

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If to the Seller:

With a copy (which shall not constitute notice) to:

If to Buyer:

With a copy (which shall not constitute notice) to:

10.9  **Governing Law and Venue.** This agreement shall be governed by the laws of the State of Tennessee applicable to agreements made and to be performed entirely within such state, the conflicts provisions of which are specifically disclaimed. Any action by either party to enforce this agreement shall be brought in a state or federal court located within Tennessee, each party specifically consenting to personal jurisdiction in that court, the defense of *forum non conveniens* being specifically waived by both parties.

10.10  **Counterparts and Facsimile Signatures.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.
10.11 Assignment. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their permitted assignees. This Agreement may not be assigned by any of the parties hereto without the prior written consent of all other parties hereto, and any purported assignment without such consent shall be void.

10.12 Third Party Beneficiaries. None of the provisions of this Agreement or any document contemplated hereby is intended to grant any right or benefit to any person or entity which is not a party to this Agreement.

10.13 Headings. The article and section headings contained in this Agreement are solely for the purpose of reference, are not part of this Agreement and shall not in any way affect the meaning or interpretation of this Agreement.

10.14 Amendments. Any waiver, amendment, modification or supplement of or to any term or condition of this Agreement shall be effective only if in writing and signed by all parties hereto, and the parties hereto waive the right to amend the provisions of this Section orally.

10.15 Specific Performance. Each party hereto acknowledges that the Purchased Assets are unique and that if either party fails to consummate the transactions contemplated by this Agreement such failure will cause irreparable harm to the other party, for which there will be no adequate remedy at law. Buyer and Seller shall each be entitled, in addition to its other remedies at law, to specific performance of this Agreement if the other party shall, without cause, refuse to consummate the transactions contemplated by this Agreement.

10.16 Severability. In the event that any provision in this Agreement shall be determined to be invalid, illegal or unenforceable in any respect, the remaining provisions of this Agreement shall not be in any way impaired, and the illegal, invalid or unenforceable provision shall be fully severed from this Agreement and there shall be automatically added in lieu thereof a provision as similar in terms and intent to such severed provision as may be legal, valid and enforceable.

10.17 Entire Agreement. This Agreement and the Schedules and Exhibits hereto, constitute the entire contract between the parties hereto pertaining to the subject matter hereof, and supersede all prior and contemporaneous agreements and understandings between the parties with respect to such subject matter.

10.18 Confidentiality. The parties to this Agreement agree that the terms of this Agreement will be kept strictly confidential. Neither party may disclose the terms of this Agreement except as allowed to their professional advisers, by the prior written authorization of the other party or as required by law.

10.19 Legal Advice. The parties acknowledge that they have received the advice of legal counsel or have had the opportunity to seek the advice of legal counsel to fully explain to them the effect of this Agreement. The parties acknowledge that they have read this Agreement and fully understand it and that they are entering into this Agreement freely and voluntarily.
Neither party shall be deemed to have drafted this Agreement, and no presumption against any drafter shall attach.

IN WITNESS WHEREOF, each of the parties hereto has caused this Agreement to be signed by its duly authorized officer as of the date first above written.

SELLER: [Redacted]
By: [Redacted] Managing Member

BUYER: [Redacted]
By: [Redacted] Managing Member
FF & E

Exterior: Building sign.
Wall Clock
Wall Mural
Everbrite window disc
88 inch stainless steel 3 compartment sink.
Everbrite neon
"Your mom wants you to eat" neon
Everbrite sign
88 inch stainless steel 3 compartment sink.

Lighting Package: 11 hanging lights over tables, 6 track lights package, 1 ceiling fan,
Lighting Package cont. 6 lights in restrooms, 3 menu board lights, 7 spot lights, 6 kitchen lights
lighting package cont. 4 back room lights.

1. safe
2. wall mount menu Board
3. over counter Menu Board
4. Windowsign
5. 1770 refrigeration unit Dasani
6. Mid West Cabinet
7. 127 inch straight wall
8. angled cash register counter
9. Driver box
10. Drink station Cabinet
11. Desk Shelving
12. 195" sneeze guard
13. cup dispensers
14. Bread Racks
15. 189" Prep Table
16. Prep Table w/ over shelf including all shelving & equipment for both tables.
17. cutting boards
18. cutting board connectors
19. slicer table
20. stainless work table
21. oven & proofer
22. Ice maker
23. ice bin
24. hand sink
25. 2 compartment walk in freezer & cooler
26. Dunnage shelving 24" by 24" 
27. 12 posts 7 1/2 adjustable bolt
28. Dunnage shelving 18" by 60"
4 wire shelves 24" BY 30" 8 post leveling bolts
16 post hooks
8 wire shelving
16 18" post hooks
8 wire shelving
16 18" w wire shelving
4 18" by 30" wire shelving
18 65/8 leveling bolts
6 5" hooks
1 Bizerba Meat Slicer
1 paper towel dispenser
1 soap dispenser
5 30" round tabletops
44" single booth bench
4 44" Double Booth Bench
5 24" by 42" table tops
10 bases 2-per table
1 water filter system
20 bar stools with cherry finish
1 Laminated waste receptacles
1 receptacle inserts
2 toilet paper dispensers
2 soap dispensers & 2 paper towel dispensers
2 rest room mirrors
2 36" stainless grab bars
2 42" stainless grab bars
1 sanitary napkin dispenser
1 Dining Room sign package
1 small wares package
1 base of round table
3 table guides
4 side chairs
1 back office computer
3 high chairs
1 ice scoop
9 kitchen knives
1 coke rack
1 onion dicer
1 wall picture
1 coke dispenser
1 Lipton tea maker
2 tea urns
32 sheet trays
2 tray racks 1 ice bucket
1 stainless bowl
1 stainless strainer for bowl
1 pair of oven gloves
1 water cup
1 Stanley ladder
1 mop bucket w/ mop
2 file cabinets
1 scale Digital
1 scale w/ dial
1 tomato slicer

POS system, 2 counter, 3 wall mounts, 4 line caller ID, 3 printers, 2 cash drawers &
one hub router. 1 dedicated server, Network cabinet, W/KVM switch & cable. Network

cabinet complete, caller id box, shelves, switch router & modem, all in one station.
Also included on line ordering & credit card terminals.
Schedule 1.2(d)

Vendor and Supply Contracts

<table>
<thead>
<tr>
<th>Vendor</th>
<th>Supply</th>
<th>Contract Details</th>
<th>Supplier</th>
<th>Duration</th>
<th>Start Date</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

6/13/2016

Schedule 1.2(d)
Schedule 1.2 (f)

Intangibles

Telephone numbers: [redacted]
Fax number: [redacted]
Domain Name: None
Web Site Address: None
Dedicated IP Address: None.
Schedule 1.3

Excluded Assets

1. Cash.

2. Business Financial Records not provided through Section 1.1(e).
Schedule 3.2

Required Consents

1. Consent of Landlord for the assignment and transfer of the Lease;

2. Consent of telephone company for the assignment and transfer of the telephone number;

3. Consent of any vendor to the Business of the assignment and transfer of any vendor or supply contract;

4. Consent of [Redacted] Franchise, Inc. to the transfer of the franchise rights and any other ancillary consents, agreements, or documents required by [Redacted] Franchise Inc. as a condition of such approval or transfer.
Schedule 3.4

License

None.
Schedule 3.6

Material Contracts

1. Franchise Agreement with an Effective Date of November 13, 2005 by and between [redacted] Franchise, Inc. and [redacted] LLC.

2. Leasehold estate pursuant to that certain Lease Agreement, dated July 10, 2006, with a Commencement Date, as extended on December 15, 2011, by and between [redacted] as Lessee, and [redacted] (the successor in interest to [redacted]) or its assigns, as Lessor, the term existing term of which expires on March 31, 2017.
Schedule 3.13

Material Changes

None.
Exhibit A

Allocation of Purchase Price

1. $63,960 FF&E
2. $5,000 inventory
Exhibit B

Meeting Minutes of [Company Name]

A regular meeting of the Members of [Company Name] was held on June 13, 2016 at the company's principal place of business. [Address].

Present were: [Names] and [Names].

A quorum was declared based on the presence of [Names] and [Names], who collectively hold 100% of the membership interests in the company.

The purpose of the meeting was to authorize the sale of substantially all the assets of [Company Name] to [New Company].

The following corporate actions were taken:

3. [Name] made a Motion to approve the sale of substantially all the assets of the company to [New Company].
4. [Name] seconded the motion; and
5. The Motion passed and was adopted unanimously.

There being no further business, the meeting was duly adjourned.

[Signature]
Managing Member
Exhibit C

Meeting Minutes of [Company Name]

A regular meeting of the Members of [Company Name] was held on June 13, 2016 at company’s principal place of business.

Present were: [Name 1] and [Name 2].

A quorum was declared based on the presence of [Name 1] and [Name 2], who collectively hold 100% of the membership interests in the company.

The purpose of the meeting was to authorize the purchase of substantially all the assets of [Target Company] by [Company Name].

The following corporate actions were taken:

1. [Name 1] made a Motion to approve the purchase of substantially all of the assets of [Target Company] by [Company Name].
2. [Name 2] seconded the motion; and
3. The Motion passed and was adopted unanimously.

There being no further business, the meeting was duly adjourned.

[Company Name]
Managing Member

6/13/2016
BILL OF SALE AND GENERAL ASSIGNMENT

This BILL OF SALE AND GENERAL ASSIGNMENT (this "Bill of Sale"), is entered into as of [13th day of June, 2016 (the "Effective Date")], is entered into by and between [Seller], appearing herein through its duly authorized Member, [Buyer], appearing herein through its duly authorized Member, [Tennessee Limited Liability Company, with its registered office located at [principal place of Business located at [Tennessee Limited Liability Company], with its registered office and principal place of Business located at [principal place of Business located at [principal place of Business located at [principal place of Business located at [principal place of Business located at [principal place of Business located at [principal place of Business located at [principal place of Business located at [principal place of Business located at

Recitals

A. Assignor and Assignee are parties to an Asset Purchase Agreement dated as of June 13, 2016 (the "Purchase Agreement"), related to the conveyance by Assignor to Assignee of the assets of a [franchised business located in [principal place of Business located at [principal place of Business located at [principal place of Business located at [principal place of Business located at [principal place of Business located at [principal place of Business located at [principal place of Business located at [principal place of Business located at

B. Assignor desires to convey to Assignee the Purchased Assets, as defined in the Purchase Agreement.

Assignment

Therefore, for and in consideration of the premises and for the consideration recited in the Purchase Agreement, the parties hereto agree as follows:

1. Assignment of Purchased Assets. Assignor hereby assigns, transfers, conveys, and delivers to Assignee the Purchased Assets (other than the Assumed Leases, which are assigned and assumed pursuant to separate assignment and assumption agreement).

2. Excluded Assets. Nothing herein shall be deemed to sell, transfer, assign, or convey the Excluded Assets to the Assignee, and the Assignee retains all right, title, and interest to, in, and under, and all obligations with respect to, the Excluded Assets.

3. Definitions. All terms capitalized but not defined herein shall have the definitions ascribed thereto set forth in the Purchase Agreement.

This Bill of Sale and General Assignment is executed and effective as of the date first set forth above.

All terms of this Bill of Sale shall be binding upon, inure to the benefit of, and be enforceable by the parties hereto and their respective legal representatives, successors and assigns.

This Bill of Sale is subject in its entirety to the terms and conditions of the Agreement of Purchase and Sale. To the extent the terms and conditions hereof and thereof are inconsistent, the terms and conditions of the Agreement of Purchase and Sale shall control. This Bill of Sale
shall be governed by the laws of the State of Tennessee (except for the choice of law provisions thereof). No modification, waiver, amendment, discharge or change of this Bill of Sale shall be valid unless the same is in writing and signed by the party against which the enforcement of such modification, waiver, amendment, discharge or change is or may be sought.

This Bill of Sale may be executed in separate counterparts, none of which need contain the signatures of all parties, each of which shall be deemed to be an original, and all of which taken together constitute one and the same instrument.
IN WITNESS WHEREOF, Assignor has executed this Bill of Sale as of the date first written above.

SELLER:

By: Managing Member

STATE OF TENNESSEE
DAVIDSON COUNTY

The foregoing instrument was acknowledged before me this 13th Day of June 2016, by , who after having provided sufficient proof of his identity, executed it as managing member of , a Tennessee Limited Liability Company, on behalf of said entity.

NOTARY PUBLIC for the State of Tennessee
Print Name:
My Commission Expires:
IN WITNESS WHEREOF, Assignee has executed this Bill of Sale as of the date first written above.

Tennessee Limited Liability Company

[Redacted]
Managing Member

STATE OF TENNESSEE
DAVIDSON COUNTY

The foregoing instrument was acknowledged before me this 13th day of June 2016, by [Redacted], managing member of [Redacted], a Tennessee Limited Liability Company, on behalf of said entity.

[Notary Public]
NOTARY PUBLIC for the State of Tennessee
Print Name: [Redacted]
My Commission Expires: [Redacted]
REPRESENTATION OF BUYER AND SELLER
TO: [REDACTED], FRANCHISE, LLC

BUYER'S REPRESENTATION:

1. Neither [REDACTED], nor its affiliates, agents, or employees (collectively, "[REDACTED]") had any
   part in bringing about the sale of the above-referred to franchise and no representations of any
   kind regarding sales or earnings of the franchise have been made to me (us) by [REDACTED].

2. No Broker was involved in this transaction other than [REDACTED]. I (we) agree to hold
   harmless from any claim or any broker for a commission alleged to be owed as a result of this
   transaction.

3. I (we) acknowledge receipt of the copies of the Franchise Agreement, addenda and any other contract
   relating to this franchise at least five (5) business days prior to the closing of the transaction.

4. I (we) have read the Current Transfer Letter and agree to be bound by all of the terms and conditions
   stated therein. I understand that if monies are owed for the franchise and/or obligations prior to the date
   of closing, I (we) will be responsible for the payment of those amounts owed. If the franchise is "out of
   compliance" after transfer to me (us), I (we) understand that the franchise and/or trademarks may be
   terminated in accordance with the terms of these agreements.

5. I (we) agree to attend the certified management training course at a site designated by the
   franchise, and I (we) pay the course.

6. I (we) confirm that upon notification to me that the transfer of ownership was to take place, I (we)
   advised me to obtain the services of an attorney and accountant to guide me (us) through this transaction.

7. I (we) confirm that any entity by me is not an endorsement by me of the transaction, purchase price or
   other terms which are a part of any agreement.

SELLER'S REPRESENTATIONS:

1. No Broker was involved in this transaction other than [REDACTED]. I (we) agree to hold
   harmless from any claim or any broker for a commission alleged to be owed as a result of this
   transaction.

2. I (we) confirm upon notification to me that this transfer of ownership was to take place. I (we) advised
   me to obtain the services of an attorney and accountant to guide me (us) through this transaction.

3. I (we) warrant that seller owns all rights, title and interest to and in the Franchise Agreement, lease and other
   personal property that is related to this transaction.

4. I (we) represent that any and all debts of Seller which are owed to me are paid as of the effective date
   of the transfer of the franchise identified above.

BUYER'S AND SELLER'S REPRESENTATIONS:

I (we) acknowledge that neither of us, our representatives, agents, officers or directors have given any
prospect or commitment regarding financial assistance or financing in relation to the proposed transaction.

SIGNED:

[REDACTED] as a [REDACTED]
[REDACTED] as attorney in fact

78
<table>
<thead>
<tr>
<th>Item</th>
<th>Corrective Action</th>
<th>Due Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interior painted surfaces</td>
<td>Patch all damage (dents, stains, damage, wear, etc) to interior painted surfaces and repaint so there is no evidence of painting. This is to include walls, useful, ceiling, doors, windows and junctions, paint trim specific color.</td>
<td>By Closing</td>
</tr>
<tr>
<td>Signage</td>
<td>Purchase and install current specs covering items in approved locations, surfaces, if Check with current specs.</td>
<td>By Closing</td>
</tr>
<tr>
<td>Stairs</td>
<td>Re-install 3-stops, rail, hand rail, map rail, remove run from legs on 3-step disk</td>
<td>By Closing</td>
</tr>
<tr>
<td>Small spaces</td>
<td>Replace kitchen, catch boards, spacers, spouts, dough scraper, best bread mix, broom, breadboard, table, stool cushions, potato peeler handles and feet, wall bars, damaged lenses, damaged clock cases.</td>
<td>By Closing</td>
</tr>
<tr>
<td>Ice Tea server</td>
<td>Install current specs for server and urns</td>
<td>By Closing</td>
</tr>
<tr>
<td>Tile</td>
<td>Replace all damaged and cracked wall and floor tile; replace all loose and missing grout; tile all wall grout joints.</td>
<td>By Closing</td>
</tr>
<tr>
<td>Mugs/Parallel</td>
<td>Replace damaged mugs/pitchers.</td>
<td>By Closing</td>
</tr>
<tr>
<td>Barstools</td>
<td>Repair scratches and wear or replace damaged booths and chairs and tables and glass receptacles.</td>
<td>By Closing</td>
</tr>
<tr>
<td>Ovens</td>
<td>Seal bottom of oven to keep, not damaged</td>
<td>By Closing</td>
</tr>
<tr>
<td>Shelving</td>
<td>Ensure that shelves and speakers are current specs installed at approved locations.</td>
<td>By Closing</td>
</tr>
<tr>
<td>Ceiling</td>
<td>Replace all damaged, missing and作案 ceiling tiles, replace missing grout cover and bolts</td>
<td>By Closing</td>
</tr>
<tr>
<td>Cart/Counter</td>
<td>Repair damaged fixtures.</td>
<td>By Closing</td>
</tr>
<tr>
<td>Doors</td>
<td>Repair interior door jams to ensureujący, remove, dust ball</td>
<td>By Closing</td>
</tr>
<tr>
<td>With us</td>
<td>Repair internal tank in freezer</td>
<td>By Closing</td>
</tr>
<tr>
<td>--------</td>
<td>--------------------------------</td>
<td>------------</td>
</tr>
<tr>
<td>Room Remodel</td>
<td>The room is to be repainted/renovated to the then-current design for all interior surfaces, decor, design, equipment, signage, fixtures and furnishings.</td>
<td>3-16-17</td>
</tr>
</tbody>
</table>

Dated: May 21, 2016
Franchise Representative: [Redacted]

Seller: [Redacted]
Signature: [Redacted]

Buyer: [Redacted]
Signature: [Redacted]
<table>
<thead>
<tr>
<th>Walk Ins</th>
<th>Repair internal leak in freezer</th>
<th></th>
<th>By Closing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Store Remodel</td>
<td>The store is to be remodeled / refreshed to the then-current design for all interior/exterior surfaces, decor, design, equipment, signage, fixtures and furniture etc.</td>
<td></td>
<td>3-16-17</td>
</tr>
</tbody>
</table>

**Dated:** May 21, 2016  
**Franchisee Representative:** [Redacted]  
**By:** [Redacted]

**Seller:** [Redacted]  
**Print name:** [Redacted]  
**Signature:** [Redacted]

**Buyer:** [Redacted]  
**Print name:** [Redacted]  
**Signature:** [Redacted]
ESTOPPEL CERTIFICATE

The undersigned represents that he/she is the Landlord or lease representative of the Landlord, of the premises located at: __________________________. He/She further represents that the following statements are true and accurate:

The fixed or minimum monthly rental presently payable under the terms of the lease is $3,593.33 per month and has been paid through May 31, 2016.

As of this date, _________________, lease arrears are as follows:

<table>
<thead>
<tr>
<th>TYPE</th>
<th>AMOUNT DUE</th>
<th>AS OF:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rent</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Taxes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Common Area</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assessments</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Insurance</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Advertising</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The amount of the security deposit under the terms of the lease is $6,533.34.

Other than stated above, there are no monies owed under the lease for the premises located at: __________________________.


The expiration or the term of said lease is March 31, 2017. The Master Lease provides for 2 renewal terms. In the event the Master Lease provides for renewal, notification of renewal or non-renewal must be sent to the landlord no later than: __________________________

Dated: 01/12/2016.

Landlord: __________________________

Address: __________________________

Phone: __________________________

Signed By: __________________________
ADDENDUM TO FRANCHISEE'S
LEASE AGREEMENT

THIS LEASE ADDENDUM (the "Addendum") is made and entered into this 1st day of June __, 2016, by and between
hereinafter referred to as "Landlord," and
hereinafter referred to as "Tenant," and modifies certain lease (the "Lease") of even date herewith.

WITNESSETH:

WHEREAS, Landlord and Tenant are parties to a Lease dated ____________, 2006, concerning real estate commonly described as
in the Lease (the "Premises").

NOW, THEREFORE, in consideration of the mutual promises hereinafter contained, the sufficient of which is hereby acknowledged,
the parties agree as follows:

1. Landlord agrees that __________ FRANCHISE, LLC, or a Franchisee of the __________ Franchise System selected by
__________ FRANCHISE, LLC, shall have the right to receive an assignment of this Lease upon transfer, termination or
expiration of the Franchise Agreement between __________ FRANCHISE, LLC and Tenant, d/b/a __________. Upon such
transfer, termination or expiration of said Franchise Agreement, Landlord shall promptly execute an
acknowledgment of and consent to the assignment of the Lease.

2. Landlord shall provide __________ FRANCHISE LLC, its Franchisee, or its Agent, full access to the Premises upon
Expiration or Termination of either the Lease or Franchise Agreement, for a period of fifteen days to de-identify and remove from
the Premises any trademarked property, proprietary software, equipment, and any and all furniture and fixtures installed by the
Tenant or installed in connection with the Lease, including but not limited to colored wall tile or floor tile. __________
FRANCHISE, LLC, or an approved franchisor for the Premises, shall have the right, but not the obligation to repaint any portion
of the interior of the Premises. Landlord acknowledges that __________ FRANCHISE LLC has a prior right, title and
interest in and to any such trademarked property, proprietary software, equipment, and furniture and fixtures, notwithstanding any
agreement between the Landlord and any lender of the Landlord with respect thereto.

3. Landlord shall provide any written Notice of Default of Tenant to __________ FRANCHISE, LLC simultaneously with the
delivery thereof to Tenant. Such notice shall be delivered to __________ FRANCHISE, LLC in writing by overnight
delivery by FedEx or other nationally recognized overnight courier. Landlord and Tenant hereby acknowledge and agree that
__________ FRANCHISE, LLC has the right, but is under no obligation, to cure any deficiency under the Lease, if Tenant
should fail to do so, within fifteen (15) days after the expiration of the period shown in which to cure the default. All notices shall
be sent to: __________.

4. The Parties grant __________ FRANCHISE, LLC the right to display the registered trademark __________ standard
signage package, including logo and lighted neon window signs, subject only to the provisions of local ordinances.

5. The parties agree that the demised space be used only for the operation of a __________ Restaurant during the
entire term, and any extension(s), of the Lease.

This Addendum amends the Lease between the parties described hereinafore; and except as provided herein, all other terms of said
Lease shall remain unchanged.

DATED this __ day of June __, 2016.

LANDLORD:

Signature __________________________
Title ______________________________

TENANT:

Signature __________________________
Title ______________________________
FIRST AMENDMENT TO LEASE AGREEMENT

THIS FIRST AMENDMENT TO LEASE AGREEMENT, made and entered into by and among [Redacted], predecessor-in-interest to [Redacted] (hereinafter referred to as the "Landlord"), [Redacted] (hereinafter referred to as the "Assignor"), and [Redacted] (hereinafter referred to as the "Tenant") dated as of May 1, 2018.

WITNESSETH:

WHEREAS, Landlord and Tenant have entered into that certain Lease Agreement (hereinafter referred to as the "Lease") dated July 12, 2006 (which is incorporated herein by reference) (hereinafter referred to as the "Lease") concerning certain non-residential real property located in [Redacted] (the "Premises"). The Premises is described with more particularity in the Lease.

WHEREAS, the Landlord is the successor in interest to [Redacted], a Tennessee limited liability company;

WHEREAS, Assignor now seeks to assign its interest in the Lease to Tenant;

WHEREAS, the Landlord has consented to the assignment to Tenant and the Landlord and Tenant have agreed to extend the term of the Lease upon the same terms and conditions set forth in the Lease;

WHEREAS, the parties have agreed that the guaranty obligations of [Redacted] and [Redacted] shall hereby be terminated and released; and

WHEREAS, the parties hereto desire to make certain other modifications to the Lease to reflect the agreement contained herein.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto do hereby agree as follows:

1. Defined Terms.

   Unless otherwise specifically defined herein, capitalized terms used herein shall have the same meanings ascribed to them in the Lease.
2. Assignment.

Notwithstanding anything in the Lease to the contrary, Landlord hereby consents to the assignment of the Lease from Assignor to Tenant upon the same terms and conditions set forth in the Lease and the Tenant under the Lease is now "---------.


Landlord hereby releases "---------" and its guarantors, "---------" and "---------" from any further liability under the Lease as of the effective date of this Assignment.

4. Premises and Term.

Subject to the existing tenant vacating the space at "---------" and notwithstanding anything in the Lease to the contrary, Landlord hereby leases to Tenant, and Tenant hereby accepts and leases from Landlord, certain retail space consisting of "---------" together with the nonexclusive right to use all parking areas, driveways, sidewalks, and other common facilities which may be furnished by Landlord from time to time.

Tenant agrees to accept the Premises "as is, where is."

5. Tenant's Use of Premises.

Tenant shall use the Premises as a "---------" restaurant and for no other use without the prior written consent of Landlord.

6. Assignment and Sublet.

Tenant shall not have the right, directly or indirectly, to assign or encumber the Lease, or to sublet, in whole or part without the prior written consent of Landlord.
IN WITNESS WHEREOF, Landlord and Tenant have respectively signed this First Amendment to Lease Agreement on the dates set forth below.

EXECUTED BY LANDLORD, THIS 1ST DAY OF June 2016.

ATTEST WITNESS

LANDLORD:

By: [Sign]
Title: Managing Member

EXECUTED BY TENANT, THIS 13 DAY OF June 2016.

ATTEST WITNESS

TENANT:

By: [Sign]
Its: Managing Member

By: [Sign] Individually
and as Guarantor
EXECUTED BY ASSIGNOR, THIS 13th DAY OF June 2016.

ASSIGNOR:

ATTEST/WITNESS:

By: ____________________________
Title: Managing Member

EXECUTED BY ASSIGNOR, THIS 13th DAY OF June 2016.

ASSIGNOR:

ATTEST/WITNESS

By: ____________________________
Individually and as Guarantor

EXECUTED BY ASSIGNOR, THIS 13th DAY OF June 2016.

ASSIGNOR:

ATTEST/WITNESS

By: ____________________________
Individually and as Guarantor
# Asset Acquisition Statement

**Under Section 1060**

Attach to your income tax return.

Information about Form 8594 and its separate instructions is at www.irs.gov/form8594

---

**Part I** General Information

1. Name of other party to the transaction
   - [ ] Purchaser
   - [ ] Seller

   Other party’s identifying number

2. Address (number, street, and room or suite no.)

3. City or town, state, and ZIP code

4. Date of sale

5. Total sales price (consideration)
   - $60,960

---

**Part II** Original Statement of Assets Transferred

<table>
<thead>
<tr>
<th>Class</th>
<th>Description</th>
<th>Aggregate fair market value (actual amount for Class I)</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td></td>
<td>$</td>
</tr>
<tr>
<td>II</td>
<td></td>
<td>$</td>
</tr>
<tr>
<td>III</td>
<td></td>
<td>$</td>
</tr>
<tr>
<td>IV</td>
<td></td>
<td>$5,000 (Inventory)</td>
</tr>
<tr>
<td>V</td>
<td></td>
<td>$60,960 (Fixed)</td>
</tr>
<tr>
<td>VI and VII</td>
<td></td>
<td>$</td>
</tr>
</tbody>
</table>

Total $60,960

---

6. Did the purchaser and seller provide for an allocation of the sales price in the sales contract or in another written document signed by both parties?
   - [ ] Yes
   - [ ] No

If "Yes," are the aggregate fair market values (FMV) listed for each of asset Classes I, II, III, IV, V, VI, and VII the amounts agreed upon in your sales contract or in a separate written document?
   - [ ] Yes
   - [ ] No

---

6. In the purchase of the group of assets (or stock), did the purchaser also purchase a license or a covenant not to compete, or enter into a lease agreement, employment contract, management contract, or similar arrangement with the seller (or managers, directors, owners, or employees of the seller)?
   - [ ] Yes
   - [ ] No

If "Yes," attach a statement that specifies (a) the type of agreement and (b) the maximum amount of consideration (not including interest) paid or to be paid under the agreement. See instructions.

---

For Paperwork Reduction Act Notice, see separate instructions.
**Part III  Supplemental Statement**—Complete only if amending an original statement or previously filed supplemental statement because of an increase or decrease in consideration. See instructions.

7 Tax year and tax return form number with which the original Form 8594 and any supplemental statements were filed.

<table>
<thead>
<tr>
<th>Class I</th>
<th>Allocation of sales price as previously reported</th>
<th>Increase or (Decrease)</th>
<th>Redetermined allocation of sales price</th>
</tr>
</thead>
<tbody>
<tr>
<td>$</td>
<td>$</td>
<td></td>
<td>$</td>
</tr>
<tr>
<td>Class II</td>
<td>$</td>
<td></td>
<td>$</td>
</tr>
<tr>
<td>Class III</td>
<td>$</td>
<td></td>
<td>$</td>
</tr>
<tr>
<td>Class IV</td>
<td>$</td>
<td></td>
<td>$</td>
</tr>
<tr>
<td>Class V</td>
<td>$</td>
<td></td>
<td>$</td>
</tr>
<tr>
<td>Class VI and VII</td>
<td>$</td>
<td></td>
<td>$</td>
</tr>
<tr>
<td>Total</td>
<td>$</td>
<td></td>
<td>$</td>
</tr>
</tbody>
</table>

9 Reason(s) for increase or decrease. Attach additional sheets if more space is needed.

**SECTION 6 STATEMENT.** The Asset Purchase Agreement contains a non-competition covenant whereby the Seller and its members are prohibited from operating a restaurant business that derives more than 10% of its revenue from selling within the area defined by a three mile radius extending from The Seller is bound by a similar provision with franchising, LLC. There is no allocation being made for the value of this non-competition covenant because it is required by franchising, LLC. There is no goodwill associated with the assets because that goodwill is owned by and licensed from franchising, LLC.
TERMINATION AGREEMENT AND MUTUAL RELEASE

This Termination Agreement and Mutual Release (the “Agreement”) is made as of the “Effective Date,” regardless of the dates of the parties’ signatures) by and among [REDACTED], a Delaware limited liability company (“we,” “us,” or “our”), [REDACTED] (“you” or “your”), and the persons whose names appear as “Owners” on the signature page to this Agreement (collectively, the “Owners”).

Recitals

Whereas, we and you signed a Franchise Agreement, dated as of NOVEMBER 13, 2005 (the “Franchise Agreement”), pursuant to which we granted you the right to operate a Restaurant located at [REDACTED] (the “Restaurant”);

Whereas, the Owners, who you confirm are your only owners, guaranteed all of your obligations under the Franchise Agreement, and committed personally to comply with all obligations under the Franchise Agreement, by signing the Guaranty and Assumption of Obligations attached to the Franchise Agreement (the “Guaranty”) concurrently with your execution of the Franchise Agreement;

Whereas, you desire to sell the Restaurant’s assets and the related franchise rights to a third party, who will sign a new franchise agreement with us for the Restaurant (the “Transaction”);

Whereas, in conjunction with the Transaction, you desire to terminate the Franchise Agreement and your Owners’ obligations under the Guaranty;

Whereas, we are willing to terminate the Franchise Agreement and your Owners’ obligations under the Guaranty, and allow you to complete the Transaction, if you and your Owners comply with this Agreement’s terms and all transfer conditions described in the Franchise Agreement;

Whereas, you and your Owners are willing to comply with this Agreement’s terms and all transfer conditions described in the Franchise Agreement; and

Whereas, in connection with the termination of the Franchise Agreement and your Owners’ obligations under the Guaranty, we, on the one hand, and you and your Owners, on the other hand, desire to release each other and related parties from certain liabilities under the Franchise Agreement and the Guaranty, and otherwise arising as a result of your operation of the Restaurant, except as set forth in this Agreement.
Now, Therefore, in consideration of the mutual covenants and promises contained in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of all of which the parties acknowledge, the parties agree as follows:

1. Recitals. The recitals above are incorporated in and made part of this Agreement by this reference.

2. Termination. Except as otherwise provided in this Agreement:

(a) the Franchise Agreement, and our and your respective rights and obligations under the Franchise Agreement, are terminated as of the Effective Date; and

(b) the Owners’ obligations under the Guaranty are terminated as of the Effective Date.

3. Release of Parties and Covenant Not to Sue. You and the Owners, on behalf of yourself, yourselves, and your and their current and former affiliated entities (including parent, subsidiary, and other related companies), and on behalf of all of your and their respective officers, directors, owners, principals, partners, employees, agents, successors, assignees, personal representatives, predecessors, and assigns (all such parties collectively, the “Franchisee Parties”), hereby forever release and discharge us and our current and former affiliated entities (including parent, subsidiary, and other related companies), and all of our and their respective officers, directors, owners, principals, partners, employees, agents, successors, assignees, personal representatives, predecessors, and assigns (all such parties collectively, the “Purchaser Parties”), from any and all claims, damages, demands, debts, causes of action, suits, duties, liabilities, costs, expenses, promises, and agreements of any nature and kind, whether presently known or unknown, vested or contingent, suspected or unsuspected (all such matters collectively, “Claims”), that, as of the Effective Date, any of the Franchisee Parties has, had, or, but for this Agreement, would or could have against any of the Purchaser Parties (a) directly or indirectly related to or arising from any of the Franchisee Parties’ rights or any of the Purchaser Parties’ obligations under the Franchise Agreement, and (b) directly or indirectly related to or arising from any one or more of the Franchisee Parties’ relationship, from the beginning of time through the Effective Date, with any of the Purchaser Parties with respect to the Restaurant, but excluding any of the Franchisee Parties’ rights and any of the Purchaser Parties’ obligations arising under this Agreement.

You and the Owners, for yourself, yourselves, and the other Franchisee Parties, further covenant not to sue any Purchaser Party on any Claim released by this Section 3 or to act as a consultant, advisor, or expert witness for any other party that uses any Purchaser Party.

4. Representations of Franchisee Parties. You and the Owners, jointly and severally, represent and warrant to the Purchaser Parties that you and they (a) have full power and authority to execute this Agreement and bind all Franchisee Parties to its provisions, and (b) have not assigned or transferred any Claim released by Section 3 to any person or entity who is not bound by Section 3.
5. **Indemnification of Parties.** You and the Owners, jointly and severally, agree to indemnify any and all of the Parties against, any loss, cost, liability, or expense (including, without limitation, attorneys’ fees, arbitrators’ fees, expert witness fees, costs of investigation and proof of facts, and other costs of litigation or arbitration, whether or not litigation or arbitration is commenced) (collectively, “Losses”) directly or indirectly arising from or relating to: (a) the breach of any provision of this Agreement by any Franchisee Party; or (b) any claim asserted by third parties (other than any Franchisee Party) against a Party on account of your operation of the Restaurant before the Effective Date, including, without limitation, those alleged to be caused by an Party’s negligence or willful misconduct.

6. **Release of Franchisee Parties and Covenant Not to Sue.** Except as noted below in this Section 6, we, on behalf of ourselves and the other Parties, hereby forever release and discharge each of the Franchisee Parties from any and all claims (as defined in Section 3) that, as of the Effective Date, any of the Franchisee Parties has, ever had, or, but for this Agreement, would or could have against any of the Franchisee Parties (a) directly or indirectly related to or arising from any of the Parties’ rights or any of the Franchisee Parties’ obligations under the Franchise Agreement; and (b) directly or indirectly related to or arising from any one or more of the Parties’ relationship, from the beginning of time through the Effective Date, with any of the Franchisee Parties with respect to the Restaurant, but excluding any of the Parties’ rights and any of the Franchisee Parties’ obligations arising under this Agreement.

However, this release by the Parties excludes, and does not relieve the Franchisee Parties from their duty to comply with, the following obligations, and the Franchisee Parties (jointly and severally) agree:

(a) simultaneously with signing this Agreement, to pay us all monies owed as of the Effective Date for Royalties, Advertising and Development Fund contributions, or otherwise on account of your operation of the Restaurant up to and including __________;

(b) to pay, or arrange for the payment of, all taxes due as a result of your operation of the Restaurant before the Effective Date;

(c) not to identify themselves, directly or indirectly at any time or in any manner (except with other Restaurants, except under valid franchise agreements with us, in any business as a current or former Restaurant or as one of our current or former franchisees; use any Mark, any copy of a Restaurant in any manner or for any purpose; use for any purpose any trade name, trademark or service mark, or other commercial symbol that indicates or suggests a connection or association with us; or engage in any activity that would adversely affect the goodwill associated with us or our Marks;
(d) within ten (10) days after signing this Agreement, to take the action
required to cancel all fictitious or assumed name or equivalent registrations relating to
your use of any Mark in connection with the Restaurant;

(e) immediately to cease using (except with other Restaurants operating under valid franchise agreements with us) any of our Confidential Information (including computer software or similar technology and digital passwords and identifications that we have licensed to you or that otherwise are proprietary to us or the Franchise System) in any business or otherwise and return to us all copies of the
Operations Manual and any other confidential materials to which we have given you
access; and

(f) to comply with the post-term noncompetition provisions in the Franchise
Agreement.

We, for ourselves and the other Parties, further covenant not to sue any
Franchisee Party on any Claim released by this Section 6.

7. **Representations of Parties.** We represent and warrant to the
Franchisee Parties that we (a) have full power and authority to execute this Agreement and bind all Franchisee Parties to its provisions, and (b) have not assigned or transferred any Claim
released by Section 6 to any person or entity who is not bound by Section 6.

8. **Indemnification of Franchisee Parties.** We agree to indemnify any and all of
the Franchisee Parties for, and to defend and hold harmless any and all of the Franchisee Parties
against, any Losses directly or indirectly arising from or relating to the breach of any provision
of this Agreement by any Party.

9. **Binding Effect.** This Agreement is binding upon and inures to the benefit of the
parties and their respective successors, assigns, and legal representatives and may not be
modified except by a written agreement signed by all parties to this Agreement.

10. **Acknowledgment of Counsel Representation.** The parties stipulate that they
have been represented by their own choice of counsel in this matter (or have had the opportunity
to be represented by their own choice of counsel), and their counsel has advised them (or they
otherwise are aware) of all their rights, duties, and obligations. Each party has cooperated in
drafting and preparing this Agreement. Therefore, in any construction of this Agreement, it will
not be construed against any party.

11. **Miscellaneous.**

(a) This Agreement, including the Recitals, constitutes the entire
understanding among the parties with respect to the matters this Agreement contemplates.
No oral statement, agreement, promise, undertaking, understanding, or arrangement made
before or contemporaneously with the execution of this Agreement will bind any party
unless expressly set forth in this Agreement. In addition, no oral statement, agreement,
promise, undertaking, understanding, arrangement, or act or omission of any party occurring after the Effective Date will be deemed an amendment of this Agreement unless reduced to writing and signed by the parties.

(b) This Agreement will be construed and interpreted in accordance with the laws of the State of Illinois, without regard to its conflict of laws principles.

(c) The captions and headings are only for convenience of reference, are not a part of this Agreement, and will not limit or construe the provisions to which they apply.

(d) This Agreement may be executed by facsimile or scanned (pdf) signature and in one or more counterparts, any one of which need not contain the signature of more than one party and all of which taken together will constitute one and the same Agreement. This Agreement will become effective when fully executed and delivered by all parties, whether in one or more counterparts. Except for execution and delivery of this Agreement, there are no conditions precedent to this Agreement’s becoming effective.

(e) Each Party and Franchisee Party will be deemed to be a third party beneficiary of the releases, covenants not to sue, and indemnification provisions contained in this Agreement with an independent right to enforce them.

(f) The dispute resolution procedures contained in the Franchise Agreement, including, without limitation, the arbitration obligations, are incorporated in this Agreement by this reference and will govern any disputes among the parties regarding this Agreement or the parties’ respective rights and obligations under this Agreement.

In Witness Whereof, the parties have duly executed this Agreement on the dates appearing next to their signatures, although this Agreement is deemed to be effective as of the Effective Date stated on page one above.
FRANCHISE, LLC, a Delaware limited liability company

By: ____________________________
Title: __________________________
Date: __________________________

THE OWNERS:

By: ____________________________
Title: Chief Manager
Date: 6-4-16

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Roland W. Baggott III is the member of Baggott Law, PLLC, located in Nashville, Tennessee. He is licensed to practice before all state and federal courts in Tennessee and Louisiana, as well as the United States Court of Appeals for the 5th and 6th Circuits. His practice primarily focuses on franchise and distribution law and litigation. He represents both franchisors and franchisees in all aspects of the franchise relationship. He works with franchisors to develop, update and register Federal Disclosure Documents, on sales compliance, trademark registration and maintenance, on corporate issues, and in litigation. For franchisee clients, he performs pre-sale review and counseling on the FDD, negotiation of the franchise agreement and related agreements, lease review and negotiation, business entity and formation, and in transactions. He also represents franchisees in litigation. Roland has been qualified as an expert on Franchise law in legal malpractice proceedings.

Roland also represents non-franchised businesses in commercial litigation, including in bankruptcy. Roland regularly works with other lawyers as co-counsel and as local counsel. His practice includes representation of residential home builders. He has been named a Mid-South Super Lawyer every year since 2015. Roland has published eleven articles on intellectual property law, anti-trust and trade regulation law, and civil procedure. He has been a speaker, presenter, and producer at six continuing education seminars. Roland has been an active member of the ABA Forum on Franchising since 2000 and is a past Steering Committee member of the Litigation and Dispute Resolution Division.

Kathryn M. Kotel is the founding and sole member of Kotel Law, PLLC. She provides project based legal advice to franchisors, including assisting clients with compliance with franchise laws, developing or revising franchise compliance programs, drafting new form agreements, negotiating the sale of franchised territories, and assisting clients with operational issues. Kathy was Senior Vice President, General Counsel and Head of Business Affairs for TGI Friday’s Inc. from 2009-2017. She worked for McDonald’s Corporation from 1995-2009, most recently as Vice President, U.S. General Counsel. Prior to joining McDonald’s, she was a partner in Keck, Mahin & Cate in its Franchise and Distribution Practice Group. She also served as in-house counsel for Convenient Food Mart. Kathy was a member of the ABA’s Forum on Franchising Governing Committee and its Membership Officer from 2008-2014. She is a frequent speaker and author on various franchise related topics.

Julie Lusthaus is the founding owner of Lusthaus Law PC. She has substantial experience representing franchise and business clients. For franchisor clients, Julie assists with the development of franchise business programs, the structuring of franchise business entities, preparation and registration of franchise disclosure documents (FDDs), onboarding franchisees, compliance with franchise sales and relationship laws and ongoing operational issues. For franchisee clients, Julie assists single unit and multi-unit operators with the purchase and sale of franchises and development territories. For these clients, she reviews FDDs, negotiates franchise agreements, renewals and commercial leases and provides ongoing legal support.

Julie also has extensive experience representing independent business owners and serial entrepreneurs, assisting them in all stages of growth. She is a frequent author and speaker on franchising topics for various professional and business organizations including the American Bar Association, the International Franchise Association and the New York State Bar Association. She is recognized by Franchise Times as a “Legal Eagle,” having been nominated by her peers each of the past six years as a leading practitioner in the franchise field. Julie is a member of the
Governing Committee of the American Bar Association Forum on Franchising and is a past Director of the Litigation and Dispute Resolution Division of the American Bar Association Forum on Franchising.