The Five Most Litigated Provisions in the Franchise Disclosure Document

Gregg A. Rubenstein
Nixon Peabody LLP

Robert Salkowski
Zarco Einhorn Salkowski & Brito, P.A.

October 19 – 21, 2011
Baltimore, Maryland
TABLE OF CONTENTS

I. INTRODUCTION ........................................................................................................ 1

II. ITEM 19 -- FINANCIAL PERFORMANCE REPRESENTATIONS ....................... 1
A. Oral FPR Claims When There is No Item 19 Disclosure ......................... 2
B. Claims Based on Inaccurate Item 19 Disclosure ............................... 4
C. Use of Disclaimers and Disclosures to Defeat FPR Claims ............. 5

III. ITEMS 5-7 -- FINANCIAL INFORMATION REGARDING START-UPS .... 6

IV. ITEM 8 -- SUPPLIER REBATES ........................................................................... 8

V. ITEM 12 -- TERRITORIAL RIGHTS/RESTRICTIONS ..................................... 10

VI. ITEM 20 -- DEVELOPMENT AND/OR COMPETING UNITS ..................... 14

VII. COMMON DAMAGES/REMEDIES SOUGHT FOR FDD VIOLATIONS .... 17

VIII. CONCLUSION ..................................................................................................... 18

APPENDIX .................................................................................................................. 19
I. INTRODUCTION

Although franchising is designed to produce wonderful symbiotic relationships that never result in litigation, the length of each year's Judicial Update suggests that we have not yet reached that utopia. Inevitably, it seems, franchisors and franchisees are involved in litigation. When that happens, a recurring theme is franchisors' compliance with the FTC Rule on Franchising, 16 C.F.R. § 436 ("FTC Rule"). Franchisees use a franchisor's alleged lack of compliance with the FTC Rule both offensively to bring claims for recession and damages and defensively to thwart franchisors' claims for unpaid royalties and other relief. This paper discusses the five most litigated FTC Rule claims: financial performance representations (Item 19), fees and start-up costs (Items 5, 6 and 7), supplier rebates (Item 8), territorial rights/restrictions (Item 12) and development rights (Item 20). Although several common themes run through each type of claim, as discussed below, each also has its own particular nuance that franchisors and franchisees should learn.

II. ITEM 19 -- FINANCIAL PERFORMANCE REPRESENTATIONS

Although the authors did not perform any statistical analysis, Item 19 is likely the most litigated of the FTC Rule provisions. As its title suggests, Item 19 addresses how and whether franchisors talk to prospective franchisees about how much money they are likely to make as a franchise owner. The Rule begins by addressing a common theme in franchise sales and litigation: whether a franchisor is legally permitted to even make a representation about financial performance. As the text makes clear: prospective franchisees must be told that franchisors are legally permitted to make financial representations, but are not required to do so. This is to address the commonly reported claim that franchise salespersons tell prospective franchisees that franchisors are not permitted to make any financial performance representation, presumably to excuse the lack of a financial performance representation ("FPR") in a franchise disclosure document ("FDD"). In addition, if a franchisor chooses not to make a financial performance representation, Item 19 specifies language the franchisor must include in the FDD explaining this decision.

Should a franchisor choose to make a financial performance disclosure, Item 19 sets forth the rules it must follow to do so. Generally, any financial representation must be "reasonable" and based on "written substantiation." In addition, Item 19 requires the disclosure of certain specific information about financial representations, including what units were considered in creating the representation, the dates of data on which the representation is based, notice that the underlying data will be made available upon request and a warning to prospective franchisees that their results may vary from the representation. Franchisors must update this information on a quarterly basis in the event of any material change in the information disclosed.

Compliance with Item 19 is perhaps one of the most challenging requirements of the FTC Rule. While many franchisors meet this challenge (or don't) by choosing not to make an FPR, other systems rely heavily on their Item 19 disclosure for an edge in franchise sales. The key to making an Item 19 disclosure is having a reasonable basis for the claim and disclosing each required item as detailed in the Rule. Importantly, there is no single type of earnings...

---

1 The full text of the Rules discussed herein appears in the Appendix.
2 16 C.F.R. § 436.5(s).
claims that franchisors are required to make. The claim may be based upon revenues, particular types of locations or anything else the franchisor believes is reasonable and can substantiate. Where franchisors get into trouble is not fully disclosing the basis for a claim. For example, is the claim based on numbers from a limited set of locations? If so, what are the particular characteristics of those locations, such as geography, length of time in business and local competition? If one carefully reviews the requirements of Item 19, however, the types of claims that can be made are almost limitless.

FPR claims are among the most common brought by franchisees and arise in a seemingly infinite variety of contexts. They include start-up franchisors providing pro formas with expected expenses but no outlets open upon which to base the estimate of expenses, promises of a specific rate of return on investment and claims that every franchisee in the system is successful and profitable. So long as people purchase franchises to make money (as opposed to making the world a better place) franchisors seem destined to litigate FPR claims.

Not surprisingly, franchisors have developed a variety of defenses available to FPR claims. They include integration clauses in the franchise agreement, specific disclaimers that franchisees are often asked to complete when closing on the franchise purchase, the predictive nature of many alleged FPRs, limitations defenses and failure to meet the heightened pleading requirements for fraud. As the cases below establish, these defenses have met with varied success.

A. Oral FPR Claims When There is No Item 19 Disclosure

The most common FPR claim appears to be oral claims made by either management or sales personnel during the sales process, even though the franchisor does not make an Item 19 disclosure in the FDD. Examples of these claims abound, but the following two cases should give the reader a good understanding of their common attributes. In Travelodge Hotels, Inc. v. Honeysuckle Enterprises, Inc., the franchisee, who previously owned an unaffiliated hotel, claimed that he purchased a franchise based on a salesperson's assurances that he would experience at least a 15% increase in revenues. At a subsequent meeting with the salesperson and a sales supervisor, the franchisee received a report showing that Travelodge was unable to fill 13,000 reservation requests in the locale, substantiating the earlier claim that a 15% increase was easily obtainable. Despite these assurances and documents, the franchisee also received a disclosure document that contained no Item 19 disclosure and stated that the

---

3 The most common "claims" based on FPRs are common law fraudulent inducement and misrepresentation and violation of state mini FTC acts. See e.g., Hetrick v. Ideal Image Dev. Corp., C.A. No. 8:07-cv-871-T-33TBH, 2010 U.S. Dist. LEXIS 135065 (M.D. Fla. Dec. 21, 2010) (asserting FPR claim under fraud and Unfair Trade Practices claims). This is because there is no private right of action for violation of the FTC Rule on Franchising. Alfred Dunhill Ltd. v. Interstate Cigar Co., 499 F.2d 232, 237 (2d Cir. 1974) ("Nowhere does the [FTCA] bestow upon either competitors or consumers standing to enforce its provisions."); Brill v. Catfish Shaks of Am., Inc., 727 F. Supp. 1035, 1041 (E.D. La. 1989) ([T]here is no private right of action for violation of the FTC's franchise disclosure rules.) (citation omitted).

4 244 Fed. Appx. 522, 524 (3d Cir. 2007).

5 Id.
franchisor does not authorize its salespersons to provide information about financial performance.\(^6\)

Travelodge successfully defended against this FPR by relying upon provisions in its franchise agreement. Specifically, it argued that because the key alleged misrepresentation, that the franchisee’s sales would increase by at least 15%, was not explicitly stated in the franchise agreement the franchisee could not reasonably rely upon it.\(^7\) Despite the court’s assumption that the sales documents provided to the franchisee were false and that the franchisee said he was not interested in the deal if it would not produce at least a 15% sales increase, because the franchisee agreement: (1) disavowed any express or implied covenant; (2) released Travelodge from any oral or written representation not in the franchise agreement; and (3) contained an acknowledgement that the franchisor had not provided any information about projected sales, the Third Circuit affirmed dismissal on summary judgment.\(^8\) If the 15% had truly been a “deal breaker,” the court reasoned, the franchisee would have insisted it be a term of the franchise agreement.

Another example is Randall v. Lady of Am. Franchise Corp., where several franchisees of a women’s-only fitness center alleged fraud based on alleged oral FPRs.\(^9\) Specifically, plaintiffs alleged that during “discovery day” they were told how many members they would have upon opening their franchises, how much profit they could expect to make each month, provided financial statements showing anticipated revenues, how long it would take to break even on their investment and that all existing franchise locations were profitable.\(^10\) As in Honeysuckle, the disclosure document the Randall plaintiffs received contained a negative earnings claim and expressly disclaimed salespersons’ authorization to “furnish any oral or written information concerning the actual or potential sales, costs, income or profits of your Franchise.”\(^11\)

The franchisor in Randall did not fare as well as Travelodge, as the court refused to dismiss the franchisees’ claims on summary judgment for multiple reasons.\(^12\) First, the court limited the scope of the parole evidence rule in Minnesota to prohibiting fraud claims that directly contradict substantive contract terms.\(^13\) As the alleged earnings claims did not directly contradict the franchise agreement’s general disclaimer clause, it was no bar to the claims proceeding. Next, again relying upon Minnesota-specific case law, the court rejected the franchisor’s argument that plaintiffs could not have justifiably relied on the alleged FPRs due to the contract disclaimer.\(^14\) Likewise, the disclosure document disclaimer was unavailing because it violated the Minnesota Franchise Act by being both false in and of itself, i.e., it claimed that

\(^6\) Id. The franchise agreement also contained an integration clause that “superseded[ed] all previous oral and written representations, agreements and understandings of the parties.” Id. at 525.

\(^7\) 244 Fed. Appx. at 526-27.

\(^8\) Id. at 527.

\(^9\) 532 F. Supp. 2d 1071 (D. Minn. 2007). Mr. Salkowski’s firm of Zarco Einhorn Salkowski & Brito, P.A. represented the franchisor in this matter.

\(^10\) Id. at 1076-79.

\(^11\) Id. at 1075.

\(^12\) 532 F. Supp. 2d at 1082-87.

\(^13\) Id. at 1083-84.

\(^14\) Id. at 1085-87.
the franchisor did not make earnings claims when in fact it did, and because the earnings claims made were allegedly false. Finally, the court rejected the argument that future sales predictions could not be the basis of a fraud claim or violation of the Minnesota Franchise Act.16

B. Claims Based on Inaccurate Item 19 Disclosure

Another common type of FPR claim is based on inaccurate information in an Item 19 disclosure. Again, Item 19 requires there to be a reasonable basis for the information disclosed and disclosure of the information's limitations. In General Retail Servs., Inc. v. Wireless Toyz Franchise, LLC, the franchisor made an Item 19 earnings claim that forecasted a franchise would be profitable with gross sales of $589,327.17 The model was based on five franchisor-owned locations, but the FPR explicitly stated that other than physical location, there was no difference between franchised locations and those in the model.18 After providing the disclosure document, the franchisor asked the franchisee if he had used the Item 19 disclosure to make his own financial estimates. When the franchisee said yes and disclosed those estimates, the franchisor responded by saying he wouldn't be selling franchises if the franchisee did not earn more than the franchisee was estimating.19 Ultimately the franchisee purchased the franchise, exceeded the gross sales figure listed in the disclosure document, but still could not turn a profit.20

Wireless Toyz successfully moved to dismiss all claims against it.21 With respect to the FPR claims, it relied on Fed. R. Civ. P. 9(b) to claim that the franchisee had not plead fraud with the required particularity. The Fifth Circuit reversed dismissal on this count, holding that the allegations above put the franchisor on sufficient notice of the who, what, when, and where of the alleged FPR and that if ultimately proven, the allegations were sufficient to support a fraud claim.22

In Rocky Mountain Chocolate Factory, Inc. v. SDMS, Inc., the franchisor brought suit for unpaid royalties, but the franchisee counterclaimed for fraud, fraud in the inducement and violation of the California Franchise Investment Law based on the franchisor's allegedly incorrect Item 19 claim.23 The specific numbers disclosed in Item 19 were not at issue, but rather the accuracy of the franchisor's claim that "[w]e do not have access to nor knowledge of the expenses or costs incurred by each of the franchised Stores."24 In fact, the franchisee argued, the franchisor had expense/cost data not only for the locations it owned and operated, but for each of the franchised locations by virtue of the franchise agreement requirement that

15 Id. at 1087-88.
16 Id. at 1089-90.
17 255 Fed. Appx. 775, 779 (5th Cir. 2007).
18 Id.
19 Id.
20 Id. at 780.
21 Id. at 778.
22 Id. at 795-96.
24 Id. at *7-8. The disclosure listed only revenues from various locations, not expenses.
franchisees provide quarterly profit and loss statements. These allegations were sufficient, the court held, to defeat the franchisor's motion for summary judgment on the fraud counterclaim.25

C. Use of Disclaimers and Disclosures to Defeat FPR Claims

In addition to integration clauses in franchise agreements, many franchisors attempt to prevent FPR claims by having franchisees sign specific disclaimers of having received an FPR when closing on their franchise purchase. This, franchisors argue, avoids the pitfalls of "generic" integration clauses and makes reasonable reliance on earlier statements legally impossible. In *Emfore Corp. v. Blimpie Assocs., Ltd.*, the franchisee signed this type of specific disclaimer separate from the franchise agreement stating that he had not received an FPR.26 Despite this specific disclaimer, the court held it to be insufficient to defeat a fraud claim under the New York Franchise Act because the Act required disclosures to be registered with the state and the alleged FPRs had not been registered.27 The court nevertheless held the rider sufficient to bar the franchisee's common law fraud claim because they were specific and not "boilerplate exclusions."28

Disclaimers met with greater success in *Westerfield v. The Quizno's Franchise Co.*, where the court relied upon them to dismiss fraud claims based on alleged FPRs.29 In *Westerfield*, the franchisees claimed that they received FPRs concerning the amount of profit they would make.30 The court dismissed the claim based on the limiting language in the Item 19 disclosure, the integration clause in the franchise agreement and "Disclosure Acknowledgment Statement" each franchisee signed denying the receipt of any FPR beyond that in the Item 19 disclosure.31 "In the face of these clear and unambiguous disclaimers and non-reliance clauses, plaintiffs cannot plausibly claim that they reasonably relied on oral statements concerning likely profits and expenses in deciding whether to invest in a Quiznos franchise."32 This dismissal was later affirmed when the court refused to reverse itself despite learning that the franchisor directed franchisees to write "none" on the Acknowledgement.33

Another defense upon which franchisors rely is the specific disclosures in the FDD. For example, to defend against an unauthorized FPR a franchisor may rely upon the specific disclaimer Item 19 requires to demonstrate unreasonable reliance. Having been told in writing that a franchisor does "not authorize [its] employees or representatives to make any such

---

25 Id. at *7-9.
26 51 A.D.3d 434, 435 (1st Dep't 2008).
27 Id.
28 Id.
30 527 F. Supp. 2d at 846. The franchisees also complained that the franchisor failed to disclose certain required information about kick backs and costs. Id.
31 Id. at 848-49.
32 Id. at 849.
representation either orally or in writing," how could the franchisee have relied upon an oral FPR.34

III. ITEMS 5-7 -- FINANCIAL INFORMATION REGARDING START-UPS

Items 5, 6 and 7 of an FDD respectively address initial fees, other fees and estimated initial investment.35 Specifically, Items 5 and 6 address the initial and recurring fees that franchisees are or may be liable to pay as a franchisee. Common examples include initial franchise fees, royalty fees, advertising fees, training fees, transfer fees, renewal fees and security deposit fees. Item 7 is a list of anticipated start-up costs a franchisee will incur. Although the start-up costs may be stated as a range, as with earnings claims described above, there must be an identifiable and reasonable basis for the start-up costs listed. When franchisors fail to accurately disclose this data, it becomes the basis for claims and affirmative defenses by franchisees.

The most common ways that franchisors fail to meet the requirements of Items 5, 6 and 7 is simple error and use of old data. Items 5 and 6 are sufficiently straight forward that inaccuracies should largely be the result of errors rather than difficulty in identifying the initial fees and recurring fees. Of course, franchisors must also be alert to the representations they actually make in these sections as the Motor City Bagels case discussed below makes clear.

Calculating start-up costs in Item 7 presents a more challenging exercise. Unlike Items 5 and 6, which are likely to remain the same from year-to-year, Item 7 should be updated on an annual basis for two reasons. First, start-up costs are likely to change from year-to-year such that reliance on old data may misinform franchise purchasers of this significant cost. Second, if the system is opening new units every year it should have new information about start-up costs available that may or may not comport with those listed in the disclosure document. Having but not disclosing more timely and relevant information than previously disclosed may be a violation of the Item 7 requirements.

Although less common than FPR claims, franchisees have also based their fraud and misrepresentation claims on inaccuracies in the fees and costs franchisors are required to detail in Items 5, 6 and 7 of the disclosure document.

Motor City Bagels, LLC v. The Am. Bagel Co., is one example of an Item 7-based claim.36 In Motor City Bagels, the disclosure document listed start-up costs ranging from $240,400 to $304,500 based on "the latest available data."37 The franchisee, however, incurred start-up of $425,000 and $500,000 for its two locations and claimed the disclosure was materially false.38 Moreover, the franchisee alleged that regardless of the accuracy of the estimate, it was

35 16 C.F.R. §§ 436.5(e), (f) & (g).
37 Id. at 469.
38 Id. at 467.
not based on the “latest available data” and therefore false because the franchisor failed to provide an updated disclosure document that was available prior to the franchise sale.39

Perhaps not surprisingly, the franchisor failed in its summary judgment motion to dismiss the claims for several reasons. First, the court held that because there was in fact more recent data, the statement in the disclosure document that listed costs were based on “the latest available data” was false and misleading.40 Second, the cost figures themselves were misleading and false as they were off by between 40%-108%. Third, the court recognized that accurate start-up cost disclosures are “unquestionably material as it would significantly alter the total mix of information available to a prospective franchisee.”41

An example of a franchisee attempting to use Item 6 defensively occurred in Lady of Am. Franchise Corp. v. Arcese, where the franchisee sought to avoid paying future lost royalties following her decision to close her franchise.42 The franchisee denied any potential liability because “the damage was not within her reasonable contemplation [as franchisor] failed to include future royalties as a franchise fee in Item 6 of the UFOC . . . ”43

Here the franchisor was more successful at defeating the franchisee’s claims. There the court held the franchisee’s reliance on the absence of future lost royalties in Item 6 unavailing.44 Rejecting in toto the franchisee’s arguments, the court stated that “[w]hether [Lady of America] complied with the UFOC guidelines does not impact whether, as a result of the plain language of the parties’ agreement, Arcese contemplated the possibility of paying future royalties upon breach of the agreement.”45

Another Item 7 case demonstrates that individuals may be personally liable for statements they may make in connection with fees and start-up costs. In Schwartz v. Pillsbury, Inc., a failed franchisee brought suit against his franchisor for misstating the start-up costs for a Haagen Dazs franchise.46 According to the franchisee, a Haagen Dazs representative made oral and written representations concerning the financial performance and start-up costs of a franchise over a series of meetings, some of which were attending by a Haagen Dazs supervisor.47 Specifically, the representative allegedly stated that start-up costs for the particular location would come in at the low end of the $55,000 to $105,000 range listed in Item 7 despite having no knowledge of actual construction costs.48 In fact, the franchisee’s start-up costs totaled $175,000. Having personally vouched for the accuracy of the Item 7 disclosure

39  Id. at 468-69.
40  Id. at 469.
41  Id. at 470.
43  Id. at *19. The franchisee also claimed that future lost royalties must be listed in Item 17.  Id.
44  Id. at *19 n.8.
45  Id.
46  969 F.2d 840,842-43 (9th Cir. 1992).
47  Id. at 842.
48  Id. at 843.
and the fact that costs would be at the low end, the court refused to dismiss claims against the representative and supervisor.49

IV. ITEM 8 -- SUPPLIER REBATES

Another common area of disagreement between franchisors and franchisees is the appropriate ways for franchisors to make money and how much control a franchisor should have in mandating franchisees’ purchases of certain goods. Item 8 of the FDD provides no substantive answers to these concerns, but establishes the ground rules for disclosing how a franchise system resolves the issues.50 At its most basic, Item 8 requires franchisors to disclose any rebates they receive from franchisee purchases and what goods, services or other things franchisees must purchase from specific sources. What need not be disclosed, however, are goods or services a franchisee is required to purchase that are part of larger required fee. For example, if a franchise fee covers initial franchisee training, although the training is required, it need not be listed in Item 8.

As the text of the rule makes clear, Item 8 has two primary components: (1) the disclosure of items franchisees are required to purchase to operate the franchise, e.g., particular supplies, branded merchandise or advertising from a specific vendor; and (2) whether the franchisor (or an affiliate) receives compensation based on the franchisee’s required purchase. The rebate can take a variety of forms, including a direct payment to the franchisor or affiliate or a reduced purchase price on the same or similar goods that the franchisor purchases. While the requirements of Item 8 appear to be straightforward, as the cases below demonstrate, looks can be deceiving.

Supplier rebates seem to be a never ending source of claims by franchisees. Whether this is the result of franchisors not wanting to acknowledge all their relationships with affiliates and suppliers or because franchisees do not understand the nature of the business they decide to purchase likely varies from case to case. Regardless, as with other claims based on disclosure documents, franchisees have raised Item 8 violations both affirmatively and defensively in litigation and will likely continue to do so.

The Cleaning Authority, Inc. v. Neubert is one example of franchisees using an Item 8 claim defensively against enforcement claims brought by a franchisor.51 In Neubert, the franchisor brought suit based on the franchisee’s alleged improper termination of the franchise.52 The franchisee counterclaimed that it was fraudulently induced to purchase the franchise based on the franchisor’s failure to disclose “rebates, kickbacks or other payments it receives from” an affiliate.53 Specifically, the franchisee claimed that there was no disclosure concerning payments that a franchisor affiliate made to the franchisor from required payments to the affiliate.54

49 Id. at 844.
50 16 C.F.R. § 436.(h).
52 Id. at *2.
53 Id. at *4.
54 Id. at *5-7.
To defeat the franchisee’s claims the franchisor and court relied upon the most venerable of defenses: common sense. In rejecting the franchisees’ claim, the court went through exactly what was disclosed in the offering circular.\textsuperscript{55} On the first page of the preamble to the FOC, it is stated, “You must also pay an affiliate of ours an initial mailer set up fee of $2,000.”\textsuperscript{56} In Item 1, the franchisor disclosed its two affiliates, one of which was the company allegedly paying the kickback to the franchisor. In Items 5 and 8 the franchisors again disclosed the required services that must be purchased from the affiliate, but in Item 8 also stated “we do not currently receive rebates from any of our approved suppliers.”\textsuperscript{57} Based on the multiple disclosures that franchisees are required to purchase certain services for a disclosed franchisor affiliate, the court dismissed the Item 8 claim. “What was required was for [franchisor] to disclose whether it or its affiliate [] ‘will or may derive revenue’ from required purchases.”\textsuperscript{58} As that is exactly what the franchisor disclosed, the fact that it may have transferred certain monies between the affiliate and franchisor after receipt of the funds was of no legal consequence.

In Tubby’s #14, Ltd. v. Tubby’s Sub Shops, Inc., franchisees went on the offensive with their claim of undisclosed rebates.\textsuperscript{59} Tubby’s concerns a franchisor affiliate, SDS, from which franchisees were required to purchase all products used in the operation of their sub shop franchises. SDS entered into agreements with product manufacturers, purchased product from the manufacturers, warehoused the purchased product and then re-sold and delivered it to franchisees.\textsuperscript{60} Although franchisees’ obligation to purchase product exclusively from SDS was disclosed, franchisees complained that the kickbacks SDS received were not disclosed. Specifically, franchisees alleged that SDS had manufacturers increase their invoice price to SDS by 30%-90% which SDS then billed to franchisees after adding its own overhead and profits.\textsuperscript{61} After SDS received payment from the franchisees, it would pay the entire manufacturer’s invoice and in return, the manufacturers would pay SDS the kickback.

Perhaps not surprisingly Tubby’s had a different ending than Neubert. The franchisor first argued that there was no violation because the rebates and kickbacks occurred after the sale and the disclosure requirements only concern pre-sale activity.\textsuperscript{62} Second, the franchisor argued that there could be no reasonable reliance because there were conflicting statements in the disclosure document about rebates being limited to less than the disclosed markups.\textsuperscript{63} Third, the franchisor argued that there was no representation about the prices its affiliate would charge and therefore it was free to set its prices as it saw fit. The court rejected each of these arguments.\textsuperscript{64} Finding it quite plausible that franchisees in fact relied on the misstatements in the

\textsuperscript{55} Id. at *10.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at *11.
\textsuperscript{58} Id. at 19.
\textsuperscript{60} Id. at *8.
\textsuperscript{61} Id. at *9.
\textsuperscript{62} Id. at *17-18.
\textsuperscript{63} Id. at *18.
\textsuperscript{64} The court did, however, dismiss claims by certain franchisees that were beyond the four year limitations period. Id. at *21.
disclosure document and that franchisees had every right to do so, despite the conflicting statements, the court denied the franchisor's summary judgment motion.

A third kickback case from the District of Colorado again involves Quizno's. In *C.K.H., LLC v. The Quizno's Master, LLC*, an action brought on behalf of three franchisees, the franchisees challenged Quizno’s disclosure statement that it "negotiation[s] arrangements with suppliers for the benefit of Franchisees, which often include volume discounts," but instead kept those discounts for itself.65 Doing so, the franchisees argued, constituted negligent and intentional misrepresentation.66

Quizno’s successfully resisted C.K.H.'s Item 8 claims. While acknowledging that the disclosure states that Quizno’s will "negotiation arrangements with suppliers for the benefit of Franchisees, which often include volume discounts," the court held that nothing suggested that such discounts must be passed on to franchisees.67 Moreover, the disclosure documents stated that Quizno’s had the right “to receive payments from suppliers on account of [its] dealings with you and other Franchisees and to use the amounts we receive without restriction for any purpose we deem appropriate.”68 Interestingly, the court also rejected plaintiffs’ negligent and intentional misrepresentation claims based on Item 8 because it deemed them to be tantamount to a claim directly under the Franchise Rule, which the court said did not exist.69

V. ITEM 12 -- TERRITORIAL RIGHTS/RESTRICTIONS

Item 12 requires the franchisor to make detailed disclosures regarding both the franchisor’s and franchisee’s rights and duties concerning market territory and business location. When the Franchise Rule was amended in 2007, the changes to Item 12 were significant. The drafters of the Amended Rule made explicit their intent to address growing franchisee concerns concerning encroachment and cannibalization issues.70 Additional requirements under the Amended Rule include: (a) an explicit disclaimer if the franchisee will not be granted an exclusive territory; (b) disclosures regarding alternative channels of distribution, such as the Internet, catalog sales, or telemarketing within a franchisee’s territory; (c) the extent to which a franchisee will be restricted from soliciting business or accepting orders outside of its designated territory; and (d) the conditions, if any, under which the franchisor will approve the relocation of the franchisee’s business and the franchisee’s establishment of additional outlets.

Franchisors are well-advised to give significant thought into crafting their territory policy, as a comprehensive and unambiguous statement will serve to head off any potential franchisee confusion or misunderstanding. While the initial reaction to expanded disclosure requirements under the Amended Rule may be to decry them as onerous, the truth is that the new requirements for Item 12 will benefit franchisors just as much as franchisees. As will be explained below, much of territory litigation brought by franchisees whose disclosure documents

---

66 *Id.* at *12.
68 *Id.* at *11.
69 *Id.* at *12-13.
were drafted under the old Rule may very well have been precluded had the Amended Rule's additional disclosures been made.

Surely one of the most unanticipated territory issues to arise in the past 25 years was the ascension of the Internet and the myriad novel legal problems that came with it. In the franchise context, a franchisor's ability to make sales into a franchisee's territory through its web site became a hot button topic. In one early case, Emporium Drug Mart Inc. v. Drug Emporium, Inc., an arbitration panel granted a preliminary injunction in favor of the franchisee, finding that it was likely that the franchisor's operation of a web site breached the franchise agreement's grant of exclusive territory to the franchisee.71 The franchisor argued that the web site, which used the franchise system's trademarks, was an alternative means of distribution permitted under the terms of the franchise agreement.72 The arbitration panel, however, was not convinced, and found as a matter of fact that the franchisor's web site constituted a "drug store" that fell within the purview of the franchise agreement's prohibition against the franchisor operating a "drug store" within the franchisee's exclusive territory.73

The result in Emporium Drug was contradicted a few years later in the arbitration of In re Arbitration Between Franklin 1989 Irrevocable Family Trust & H&R Block, Inc.74 Here, the franchise agreement restricted the franchisor from "operating from a location" within the franchisee's exclusive territory. The panel found that the parties never contemplated Internet sales at the time the franchise agreement was executed; therefore, the term "operating from a location" became ambiguous in light of the franchisor's move into Internet sales. Applying the doctrine of the implied covenant of good faith and fair dealing, the panel reasoned that so long as the franchisor's Internet business did not unreasonably intrude on the franchisee's brick-and-mortar business, the franchisor would not be in violation of the franchisee's exclusive territory. Because the panel found that the franchisor's Internet services served a different market and did not divert business from the franchisee, there was no breach of the franchise agreement.

In Stillwell v. RadioShack Corp.,75 RadioShack franchisees sued alleging that the franchisor's operation of its web site violated the franchisees' exclusive territory. The franchise agreement described the exclusive territory as an "Area of Primary Responsibility" "within which area [Franchisor] will not open a company store or authorize the establishment of a franchise store without first giving the Franchisee an option to open such unit[.]" The franchise agreements were drafted in 1979, well before the Internet existed in any form that allowed commercial transactions. Unlike the panel in H&R Block, the court in Radio Shack did not find that advent of an unanticipated development like the Internet rendered the parties' franchise agreements ambiguous making it necessary to resort to principles of good faith and fair dealing. On the contrary, it refused to impute any additional limitations on the ways in which the franchisor may conduct business or otherwise compete with its franchisees aside from those explicitly delineated in the franchise agreement. The RadioShack court found it particularly persuasive that in all the years prior to the franchisor's entrance into online sales, the franchisor regularly engaged in catalog and telephone sales. The court noted that nothing in the franchise

72 Id.
73 Id.
agreement prohibited this conduct, and that the parties' actual course of conduct evidenced an intent to not limit RadioShack's ability to sell through alternative channels of distribution.

Franchisors, in addition to defending territorial claims based on the advent of the internet, also face territorial disputes concerning other alternative channels of distribution. For example, in Silverman v. Carvel Corp., a franchisee brought suit against its franchisor for breach of contract and tortious interference. The franchisee alleged that its franchisor breached the franchise agreement when the franchisor began selling ice cream and related products in supermarkets and convenience stores. Although the franchisor agreed in the franchise agreement that it would not develop another franchise within a quarter mile of the franchisee's location, the franchise agreement did not contain any provision that prohibited the distribution of the franchisor's products in supermarkets and convenience stores. On appeal, the court affirmed the decision of the lower court, which dismissed the franchisee's claim based on the silence contained within the franchise agreement itself.

Territorial claims that could have been avoided through proper disclosure have also included disputes over a franchisor and/or its parent company operating similar businesses to those being franchised, albeit under different trademarks. In Auto-Chlor System of Minn., Inc. v. JohnsonDiversey, a group of eight dealers involved in the sale of commercial dishwashing equipment alleged that their manufacturer breached each of the dealer agreements when the manufacturer acquired a competitor, who thereafter began selling "essentially identical products" as sold by each dealer within their exclusive territory. Despite the inclusion of an exclusivity provision contained in each dealer agreement that provided the dealers with exclusive use of the manufacturer's trademarks and trademarks in the sale of the manufacturer's products within the respective territories, the court dismissed the dealers' breach of contract claims. The court held that the dealer agreements did not allow each dealer to control the sale of a competitor's products within their respective territories, even though the competitor was now owned by the manufacturer.

One of the most common defenses raised by franchisors in response to allegations of encroachment or cannibalization is the text of the franchise agreement itself. Many franchisee lawsuits allege that the franchisor made representations regarding territory not contained in the franchise agreement, and then failed to live up to those promises. If the text of the franchise agreement and disclosure documents is clear, and especially if the franchise agreement contains a merger clause, it appears that courts have no problem disposing of these cases on a caveat emptor basis.

77 See also, Carvel Corp. v. Baker, 79 F. Supp. 2d 53 (D. Conn. 1997) (granting in part and denying in part franchisor's action seeking declaratory action that its policy of selling products to supermarkets did not violate the express and implied terms of the respective franchise agreements).
79 See also, Hotel Assocs., Inc. v. Howard Johnson Franchise Sys., Inc., Bus. Franchise Guide (CCH) ¶13,400 (1st Cir. 2006) (franchisor did not breach franchise agreement when it licensed another property to operate in the protected geographic territory of the original franchisee since newly licensed hotel was never integrated into the franchisor's reservation system); Kazmierski v. GNC, Inc., 2000 WL 35506403 (D. N.J. 2000) (despite existence of a protected territory term in franchise agreement, franchisor did not breach franchise agreement when a large drug store chain began selling products manufactured by franchisor within the franchisee's protected territory.
In *Cook v. Little Caesar Enter., Inc.*\(^{80}\), the Little Caesars franchise agreement provided that the franchisor would not establish or license another unit within a one mile radius of the franchisee’s store. The franchisee, however, claimed that he signed the franchise agreement in reliance upon documents and representations outside the franchise agreement, wherein the franchisor promised to give him exclusive rights to develop the eastern half of the Fresno market. Before signing any agreements with Little Caesars, the franchisee stated that Little Caesar’s real estate representative promised him this exclusive market, and memorialized the exact territory on area maps. The franchisee also presented evidence that further oral and written representations confirming the exclusive territory were made after he signed his first franchise agreement. When Little Caesars later gave the green light for another franchisee to open a unit in what Cook claimed was his territory, that same real estate representative apparently even drafted a memo voicing his opposition to the territory incursion. Despite this significant amount of parol evidence, the district court found none of it could overcome the franchise agreement’s express language denying an exclusive territory coupled with an integration provision disclaiming all representations outside the franchise agreement, and granted summary judgment in favor of Little Caesar’s on Cook’s contract claims. The court also entered judgment in favor of Little Caesar’s on Cook’s fraudulent misrepresentation claim, holding that forward-looking statement and future promises could not form the basis for a fraud claim under Michigan law. The franchise appealed the decision to the Sixth Circuit, which affirmed the decision in its entirety.\(^{81}\)

Because damages on account of territorial violations can be hard to quantify, it is common to see franchisees seeking both mandatory and prohibitive injunctive relief for such grievances.

There is at least one instance where a valuation for damages for territorial incursions was fixed by both a jury, and then later, in a settlement agreement on appeal. In 2002, three cases involving a dispute over Carvel Corporation’s use of alternative distribution channels within the franchisee’s territory went to trial before three separate juries in Connecticut.\(^{82}\) A bit of background on these cases is helpful. For decades prior to the 1990s, Carvel ice cream was distributed only through Carvel branded franchised stores.\(^{83}\) When Carvel began distributing its product through supermarkets, its franchisees objected vociferously.\(^{84}\) In November 1994, Carvel pre-emptively filed suit against over 50 franchisees, seeking a declaration that its supermarket program (1) did not violate any franchise agreements and (2) did not breach the covenant of good faith and fair dealing.\(^{85}\) The district court granted in part and denied in part Carvel’s motion for summary judgment.\(^{86}\) Significantly, the district court found that all defendants could continue with their counterclaims for breach the implied covenant of good faith and fair dealing.


\(^{81}\) *Cook v. Little Caesar Enter., Inc.*, 210 F.3d 653 (6th Cir. 2000).

\(^{82}\) *Carvel Corp. v. Noonan*, 350 F.3d 6, 13 (2d Cir. 2003).

\(^{83}\) Id. at 9.


\(^{85}\) *Noonan*, 350 F.3d at 11.

\(^{86}\) *Baker*, 79 F. Supp. 2d at 66.
and fair dealing, as well as for interference with prospective economic advantage under New York law.87

After this adverse summary judgment decision, Carvel paid a total of $1,657,500 to settle with 34 franchisees in the August 2001 through December 2001 time frame.88 Three franchisees, Marsella, Noonan, and Giampapa, took their claims to trial in 2002. The juries awarded the franchisees a total of $439,599 in compensatory damages, and $600,000 in punitive damages.89 Carvel appealed; before the appeal was fully adjudicated, Carvel settled with Marsella, Noonan and Giampapa for a total of $575,000.90

VI. ITEM 20 -- DEVELOPMENT AND/OR COMPETING UNITS

During the Rule amendment proceedings that preceded the implementation of the amended Rule, commentators almost unanimously voiced their concern that the reporting requirements of Item 20 often resulted in a franchisor "double-counting" changes in franchised outlet ownership that resulted in inflated turnover rates.91 To remedy the imprecision and overlapping categories required by the earlier rule, the amended Rule set forth precise definitions of "transfer," "termination," "non-renewal," and "reacquisition" in an effort to assist the franchisor.92 93 Still, franchisors who do not take the time to understand these fairly straightforward definitions (or those who are otherwise unable to meet the reporting requirements because of poor records keeping, for example) continue to face the threat of disclosure violations. In other instances, franchisors fail to satisfy the rule by over projecting the number of franchised and company owned outlets in its next fiscal year.

In addition to the information required by the amended Rule to be disclosed in the five statistical tables, Item 20 now requires franchisors to disclose information when (i) a franchisor is selling a previously-owned franchised outlet now under its control; (ii) whether franchisees signed confidentiality clauses during the last three fiscal years; and (iii) to the extent known, information regarding each trademark-specific franchisee organization associated with the franchise system being offered.94

The information disclosed in Item 20 is considered by many prospective franchisees and their counsel as a potential treasure trove of relevant information. From the disclosures made in

---

87 Id.
89 Noonan, 350 F.3d at 13.
92 Id., ¶ 6015, pp. 9031 to 9033.
93 Id., ¶ 6062, pp. 9129-18 to 9219-19.
94 Perhaps because these requirements were introduced and were a requirement beginning in 2008, or because compliance is fairly straightforward, there is currently a dearth of reported cases or enforcement actions pertaining to these provisions. As in all things, it's likely just a matter of time before a franchisee or an independent franchisee association raises an issue in this regard.
Item 20 a prospective franchisee can identify growth trends of the franchise, determine the risk of potential competition by others within the system, as well as undisclosed problems within a franchise system evidenced by high or excessive turn-over. Prospective franchises are also able to contact past and present franchisees disclosed in Item 20 to determine the benefits or problems within a system, and to understand whether the disclosures made by the franchisor in its FDD are in fact accurate.

From the perspective of a successful franchisor, Item 20 is an invaluable way to lawfully promote the strength of its current system, as well as the future of the system itself through projections of future growth. Still, even for scrupulous franchisors, Item 20 has its pitfalls.

Despite the importance of Item 20, there are surprisingly few reported decisions regarding it, and when an affirmative claim by a franchisee is made that implicates Item 20, it is often overshadowed by allegations involving other information required to be disclosed by the Rule.

The Federal Trade Commission believes that the disclosure by a franchisor of its current and former franchisees greatly assists prospective franchisees in their investigation of a franchise offering, thereby preventing misrepresentations in the offer and sale of franchises. To further assist the prospective franchisee during its due diligence period, and to overcome and counter any franchisor-bias in Item 20, including the possibility that some franchisors may hand-select franchisees listed in their disclosure document to reveal only successful franchisees with a good relationship with their franchisor, the Federal Trade Commission also requires Item 20 to disclosure the existence of independent franchisee associations.

The use by franchisors of "shills" during the due diligence process is one of the more common claims involving Item 20. A shill is defined generally as a person who poses as an innocent bystander at a confidence game but actually serves as a decoy for the perpetrators of the scheme.

FTC vs. Holiday Enterprises, Inc. involved an enforcement action by the FTC against a seller of distributorships who routinely utilized shills during the sales process. Targeting bogus business opportunities and work-at-home scams, the FTC alleged that Holiday Enterprises engaged in an unlawful scheme involving the sale of ink cartridge display distributorships by misrepresenting that purchasers would earn a substantial income, the locations available for the racks, and using shills to reinforce those false claims. Specifically, the FTC alleged that the defendants gave the potential purchasers of the distributorships a list of references, each of whom was portrayed as successful participants in the business opportunity. When a potential purchaser called, the references would tell her that he had a very successful and profitable distributorship, that he was considering the purchase of additional retail points, and that he had quickly recouped his initial investment. In reality, those references were either employees of the defendants or other distributors who were not actually successful, including one reference

96 Id., at ¶¶ 15507-08.
97 Black’s Law Dictionary, 8th ed.
whom defendants paid $400 a week to pose as a satisfied distributor. Finding that the defendants violated 16 C.F.R. §436.1(a)(16) by not providing a disclosure document that contained the information required by the Rule, the court entered summary judgment against the defendants and their individual shareholders for their egregious violations of the FTC Act and the Franchise Rule.99

In another enforcement action, FTC vs. Greeting Cards of America, Inc.,100 the FTC charged defendant and its officers with using deceptive tactics in the sale of greeting card business opportunities. Although the defendant provided prospective purchasers with a basic disclosure document in an attempt to comply with the Rule, that disclosure document was deficient in a number of important ways. Among those, the defendants' disclosure document failed to disclose the names, addresses and telephone numbers of defendants' previous customers, or, when that information was disclosed, it was incomplete and often illegible. Having prevented the prospective purchaser from contacting previous business owners, the defendants would instead urge their prospective purchasers to contact certain company-selected references, whom defendants said would provide reliable descriptions of their successful experiences with the greeting card business. Unfortunately for the prospective purchasers, the defendants' references were often the defendants themselves, who employed aliases to conceal their true identity. In all, defendants defrauded their prospective purchasers out of approximately $3 million before a final judgment and permanent injunction was entered against them.101

Beyond the use of shills, franchisors have also been found be in violation of Item 20 by providing misleading disclosures on the number and status of franchises within the system. In People of the State of California v. Speede Oil Change Systems, Inc.,102 an oil change service franchisor and two of its subfranchisors were alleged to have violated the California Franchise Investment Law, by, inter alia, materially misleading through its offering circular disclosure the number of franchises open and the number of franchises under construction and in the site selection phase. Here, the subfranchisors simply lumped all current franchises into either an "open" or "construction/site selection" category, despite the fact that the majority of the current franchises identified in the "construction/site selection" category were in the site selection phase. In categorizing its current franchisees in this manner, the franchisor and its subfranchisors were found to have distorted the actual status of the franchisees, making it appear to prospective franchisees that most, if not all, franchisees were closer to opening than they were, which in turn, gave the false impression that it was not as hard to find a site and build or lease as the evidence showed.103

For an interesting approach to unique use of a shill in the franchise sales process, see also, In the Matter of Blenheim Expositions, Inc., 120 FTC 1078, 1-1080 (1995). There, the FTC brought an enforcement action against a franchise seller who as part of its disclosure, disseminated information about the results of a Gallop Poll that purported to show the success of the franchise system. Unfortunately for this franchisor, the participants of this particular Gallop Poll, which the franchisor itself commissioned, were drawn exclusively from a list of current franchise owners, and no former franchise owners were polled. An injunction quickly followed.


Bus. Franchise Guide (CCH), ¶11548

See also, In the Matter of Blenheim Expositions, Inc., 120 FTC 1078, 1-1080 (1995), in which the FTC brought an enforcement action against a franchise seller who as part of its disclosure, disseminated information about the results of a Gallop Poll that purported to show the success of the franchise system. Unfortunately for this
On *Aurigemma vs. Arco Petroleum Products Co.*, a franchisee of gas stations and convenient stores brought suit against its franchisor under the Connecticut Unfair Trade Practices Act ("CUTPA"). The franchisee challenged the franchisor's announced intention to withdraw from Connecticut as allowed by the Petroleum Marketing Practices Act and terminate all franchises. The franchisee alleged that its franchisor violated CUTPA by failing to discuss in its disclosure document that it had conducted a similar market withdrawal from the mid-west just three years earlier, resulting in the termination or cancellation of five franchises. Because the franchisor was unable to show that the closure of the five mid-west franchises was something other than a termination or cancellation, the court found that the franchisor failed to comply with the disclosure requirements mandated by the Rule, resulting in a finding that the franchisor violated the CUTPA.

The defenses that are available to a franchisor facing an Item 20 claim are, in large part, similar to those defenses that are available to a franchisor that faces a claim for non-disclosure under the other items required to be included in an FDD. And, as discussed in the earlier sections of this paper, the available defenses will likely be fact specific, allowing counsel to craft a myriad of defenses that are only limited by the imagination.

**VII. COMMON DAMAGES/REMEDIES SOUGHT FOR FDD VIOLATIONS**

Franchisees assert FDD violation claims for a variety of reasons. Some franchisees assert them affirmatively to recoup funds they invested in a failed franchise. *Motor City Bagels* is an excellent example of using the claims offensively to recoup lost franchise investments and *Schwartz* demonstrates that employees and managers who focus only on making the sale, regardless of or in spite of their actual knowledge (or lack thereof) about the disclosure, put their own personal financial well being at risk. Claims based on Item 8 lend themselves to precise damage calculations. At issue is the amount of the undisclosed rebate, such that in addition to recession damages, franchisees may also seek as damages the undisclosed rebate to divide amongst themselves. Item 8 claims may also be the basis for injunctive relief addressing how future rebates will be handled.

Franchisees also assert FDD claims as an affirmative defense to past-due royalty claims brought by a franchisor or for recession. Alternatively, they have been used as an affirmative defense to enforcement of a post-termination non-competition agreement. Needless to say, as a potential means of escaping the obligations a franchise agreement imposes, FDD violation claims are likely to be made anytime the franchisor attempts to enforce those obligations.

---

franchisor, the participants of this particular Gallop Poll, which the franchisor itself commissioned, were drawn exclusively from a list of current franchise owners, and no former franchise owners were polled.


105 See e.g., *Randall*, 532 F. Supp. 2d at 1074; *Westerfield*, 527 F. supp. 2d at 844.


VIII. CONCLUSION

As evidenced in the preceding sections, while the rules may have altered the disclosures that franchisors are required to provide to prospective franchisees, constant and re-occurring themes continue to appear in cases that surround disclosure violations. Franchisors and their counsel must exercise vigilance in the disclosure process, and must understand the recent changes in the Rule. Regardless of how vigilant a franchisor may be, mistakes - intentional or not - will continue to be made. These mistakes will continue to be exploited by franchisees.
APPENDIX

TEXT OF ITEMS 5-8, 12 AND 19-20 OF FTC RULE ON FRANCHISING

Item 5: Initial Fees. Disclose the initial fees and any conditions under which these fees are refundable. If the initial fees are not uniform, disclose the range or formula used to calculate the initial fees paid in the fiscal year before the issuance date and the factors that determined the amount. For this section, "initial fees" means all fees and payments, or commitments to pay, for services or goods received from the franchisor or any affiliate before the franchisee's business opens, whether payable in lump sum or installments. Disclose installment payment terms in this section or in Sec. 436.5(j) of this part.

Item 6: Other Fees. Disclose, in the following tabular form, all other fees that the franchisee must pay to the franchisor or its affiliates, or that the franchisor or its affiliates impose or collect in whole or in part for a third party. State the title "OTHER FEES" in capital letters using bold type. Include any formula used to compute the fees.\(^{108}\)

<table>
<thead>
<tr>
<th>Column 1</th>
<th>Column 2</th>
<th>Column 3</th>
<th>Column 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of fee</td>
<td>Amount</td>
<td>Due Date</td>
<td>Remarks</td>
</tr>
</tbody>
</table>

(1) In column 1, list the type of fee (for example, royalties, and fees for lease negotiations, construction, remodeling, additional training or assistance, advertising, advertising cooperatives, purchasing cooperatives, audits, accounting, inventory, transfers, and renewals).

(2) In column 2, state the amount of the fee.

(3) In column 3, state the due date for each fee.

(4) In column 4, include remarks, definitions, or caveats that elaborate on the information in the table. If remarks are long, franchisors may use footnotes instead of the remarks column. If applicable, include the following information in the remarks column or in a footnote:

(i) Whether the fees are payable only to the franchisor.

(ii) Whether the fees are imposed and collected by the franchisor.

(iii) Whether the fees are non-refundable or describe the circumstances when the fees are refundable.

(iv) Whether the fees are uniformly imposed.

\(^{108}\) If fees may increase, disclose the formula that determines the increase or the maximum amount of the increase. For example, a percentage of gross sales is acceptable if the franchisor defines the term "gross sales."
(v) The voting power of franchisor-owned outlets on any fees imposed by cooperatives. If franchisor-owned outlets have controlling voting power, disclose the maximum and minimum fees that may be imposed.

**Item 7: Estimated Initial Investment.** Disclose, in the following tabular form, the franchisee’s estimated initial investment. State the title "YOUR ESTIMATED INITIAL INVESTMENT" in capital letters using bold type. Franchisors may include additional expenditure tables to show expenditure variations caused by differences such as in site location and premises size.

**Item 7 Table:**

<table>
<thead>
<tr>
<th>YOUR ESTIMATED INITIAL INVESTMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Column 1</strong></td>
</tr>
<tr>
<td>Type of expenditure</td>
</tr>
<tr>
<td><strong>Column 2</strong></td>
</tr>
<tr>
<td>Amount</td>
</tr>
<tr>
<td><strong>Column 3</strong></td>
</tr>
<tr>
<td>Method of payment</td>
</tr>
<tr>
<td><strong>Column 4</strong></td>
</tr>
<tr>
<td>When due</td>
</tr>
<tr>
<td>To whom payment is to be made</td>
</tr>
<tr>
<td><strong>Total.</strong></td>
</tr>
</tbody>
</table>

(1) In column 1:

(i) List each type of expense, beginning with pre-opening expenses. Include the following expenses, if applicable. Use footnotes to include remarks, definitions, or caveats that elaborate on the information in the Table.

- The initial franchise fee.
- Training expenses.
- Real property, whether purchased or leased.
- Equipment, fixtures, other fixed assets, construction, remodeling, leasehold improvements, and decorating costs, whether purchased or leased.
- Inventory to begin operating.
- Security deposits, utility deposits, business licenses, and other prepaid expenses.

(ii) List separately and by name any other specific required payments (for example, additional training, travel, or advertising expenses) that the franchisee must make to begin operations.

(iii) Include a category titled "Additional funds-- [initial period]" for any other required expenses the franchisee will incur before operations begin and during the initial period of operations. State the initial period. A reasonable initial period is at least three months or a reasonable period for the industry. Describe in general terms the factors, basis, and experience that the franchisor considered or relied upon in formulating the amount required for additional funds.
(2) In column 2, state the amount of the payment. If the amount is unknown, use a low-
high range based on the franchisor's current experience. If real property costs cannot be
estimated in a low-high range, describe the approximate size of the property and building and
the probable location of the building (for example, strip shopping center, mall, downtown, rural,
or highway).

(3) In column 3, state the method of payment.

(4) In column 4, state the due date.

(5) In column 5, state to whom payment will be made.

(6) Total the initial investment, incorporating ranges of fees, if used.

(7) In a footnote, state:

(i) Whether each payment is non-refundable, or describe the circumstances
when each payment is refundable.

(ii) If the franchisor or an affiliate finances part of the initial investment, the
amount that it will finance, the required down payment, the annual interest rate, rate factors, and
the estimated loan repayments. Franchisors may refer to Sec. 436.5(j) of this part for additional
details.

Item 8: Restrictions on Sources of Products and Services. Disclose the franchisee’s
obligations to purchase or lease goods, services, supplies, fixtures, equipment, inventory,
computer hardware and software, real estate, or comparable items related to establishing or
operating the franchised business either from the franchisor, its designee, or suppliers approved
by the franchisor, or under the franchisor’s specifications. Include obligations to purchase
imposed by the franchisor’s written agreement or by the franchisor’s practice.109

(1) The good or service required to be purchased or leased.

(2) Whether the franchisor or its affiliates are approved suppliers or the only approved
suppliers of that good or service.

(3) Any supplier in which an officer of the franchisor owns an interest.

(4) How the franchisor grants and revokes approval of alternative suppliers, including:

(i) Whether the franchisor’s criteria for approving suppliers are available to
franchisees.

(ii) Whether the franchisor permits franchisees to contract with alternative
suppliers who meet the franchisor’s criteria.

Franchisors may include the reason for the requirement. Franchisors need not disclose in this Item the
purchase or lease of goods or services provided as part of the franchise without a separate charge (such as initial
training, if the cost is included in the franchise fee). Describe such fees in Item 5 of this section. Do not disclose fees
already described in Sec. 436.5(f) of this part.

109
(iii) Any fees and procedures to secure approval to purchase from alternative suppliers.

(iv) The time period in which the franchisee will be notified of approval or disapproval.

(v) How approvals are revoked.

(5) Whether the franchisor issues specifications and standards to franchisees, subfranchisees, or approved suppliers. If so, describe how the franchisor issues and modifies specifications.

(6) Whether the franchisor or its affiliates will or may derive revenue or other material consideration from required purchases or leases by franchisees. If so, describe the precise basis by which the franchisor or its affiliates will or may derive that consideration by stating:

(i) The franchisor's total revenue.\(^{110}\)

(ii) The franchisor's revenues from all required purchases and leases of products and services.

(iii) The percentage of the franchisor's total revenues that are from required purchases or leases.

(iv) If the franchisor's affiliates also sell or lease products or services to franchisees, the affiliates' revenues from those sales or leases.

(7) The estimated proportion of these required purchases and leases by the franchisee to all purchases and leases by the franchisee of goods and services in establishing and operating the franchised businesses.

(8) If a designated supplier will make payments to the franchisor from franchisee purchases, disclose the basis for the payment (for example, specify a percentage or a flat amount). For purposes of this disclosure, a "payment" includes the sale of similar goods or services to the franchisor at a lower price than to franchisees.

(9) The existence of purchasing or distribution cooperatives.

(10) Whether the franchisor negotiates purchase arrangements with suppliers, including price terms, for the benefit of franchisees.

(11) Whether the franchisor provides material benefits (for example, renewal or granting additional franchises) to a franchisee based on a franchisee's purchase of particular products or services or use of particular suppliers.

\(^{110}\) Take figures from the franchisor's most recent annual audited financial statement required in Sec. 436.5(u) of this part. If audited statements are not yet required, or if the entity deriving the income is an affiliate, disclose the sources of information used in computing revenues.
Item 12: Territory. Disclose:

(1) Whether the franchise is for a specific location or a location to be approved by the franchisor.

(2) Any minimum territory granted to the franchisee (for example, a specific radius, a distance sufficient to encompass a specified population, or another specific designation).

(3) The conditions under which the franchisor will approve the relocation of the franchised business or the franchisee's establishment of additional franchised outlets.

(4) Franchisee options, rights of first refusal, or similar rights to acquire additional franchises.

(5) Whether the franchisor grants an exclusive territory.

   (i) If the franchisor does not grant an exclusive territory, state: “You will not receive an exclusive territory. You may face competition from other franchisees, from outlets that we own, or from other channels of distribution or competitive brands that we control.”

   (ii) If the franchisor grants an exclusive territory, disclose:

   (A) Whether continuation of territorial exclusivity depends on achieving a certain sales volume, market penetration, or other contingency, and the circumstances when the franchisee's territory may be altered. Describe any sales or other conditions. State the franchisor's rights if the franchisee fails to meet the requirements.

   (B) Any other circumstances that permit the franchisor to modify the franchisee's territorial rights (for example, a population increase in the territory giving the franchisor the right to grant an additional franchise in the area) and the effect of such modifications on the franchisee's rights.

(6) For all territories (exclusive and non-exclusive):

   (i) Any restrictions on the franchisor from soliciting or accepting orders from consumers inside the franchisee's territory, including:

   (A) Whether the franchisor or an affiliate has used or reserves the right to use other channels of distribution, such as the Internet, catalog sales, telemarketing, or other direct marketing sales, to make sales within the franchisee's territory using the franchisor's principal trademarks.

   (B) Whether the franchisor or an affiliate has used or reserves the right to use other channels of distribution, such as the Internet, catalog sales, telemarketing, or other direct marketing, to make sales within the franchisee's territory of products or services under trademarks different from the ones the franchisee will use under the franchise agreement.

   (C) Any compensation that the franchisor must pay for soliciting or accepting orders from inside the franchisee's territory.
(ii) Any restrictions on the franchisee from soliciting or accepting orders from consumers outside of his or her territory, including whether the franchisee has the right to use other channels of distribution, such as the Internet, catalog sales, telemarketing, or other direct marketing, to make sales outside of his or her territory.

(iii) If the franchisor or an affiliate operates, franchises, or has plans to operate or franchise a business under a different trademark and that business sells or will sell goods or services similar to those the franchisee will offer, describe:

(A) The similar goods and services.

(B) The different trademark.

(C) Whether outlets will be franchisor owned or operated.

(D) Whether the franchisor or its franchisees who use the different trademark will solicit or accept orders within the franchisee's territory.

(E) The timetable for the plan.

(F) How the franchisor will resolve conflicts between the franchisor and franchisees and between the franchisees of each system regarding territory, customers, and franchisor support.

(G) The principal business address of the franchisor's similar operating business. If it is the same as the franchisor's principal business address stated in Sec. 436.5(a) of this part, disclose whether the franchisor maintains (or plans to maintain) physically separate offices and training facilities for the similar competing business.

Item 19: Financial Performance Representations.

(1) Begin by stating the following:

The FTC's Franchise Rule permits a franchisor to provide information about the actual or potential financial performance of its franchised and/or franchisor-owned outlets, if there is a reasonable basis for the information, and if the information is included in the disclosure document. Financial performance information that differs from that included in Item 19 may be given only if: (1) a franchisor provides the actual records of an existing outlet you are considering buying; or (2) a franchisor supplements the information provided in this Item 19, for example, by providing information about possible performance at a particular location or under particular circumstances.

(2) If a franchisor does not provide any financial performance representation in Item 19, also state:

We do not make any representations about a franchisee's future financial performance or the past financial performance of company-owned or franchised outlets. We also do not authorize our employees or representatives to make any such representations either orally or in writing. If you are purchasing an existing outlet, however, we may provide you with the actual records of that outlet. If you
receive any other financial performance information or projections of your future income, you should report it to the franchisor's management by contacting [name, address, and telephone number], the Federal Trade Commission, and the appropriate state regulatory agencies.

(3) If the franchisor makes any financial performance representation to prospective franchisees, the franchisor must have a reasonable basis and written substantiation for the representation at the time the representation is made and must state the representation in the Item 19 disclosure. The franchisor must also disclose the following:

(i) Whether the representation is an historic financial performance representation about the franchise system's existing outlets, or a subset of those outlets, or is a forecast of the prospective franchisee's future financial performance.

(ii) If the representation relates to past performance of the franchise system's existing outlets, the material bases for the representation, including:

(A) Whether the representation relates to the performance of all of the franchise system's existing outlets or only to a subset of outlets that share a particular set of characteristics (for example, geographic location, type of location (such as free standing vs. shopping center), degree of competition, length of time the outlets have operated, services or goods sold, services supplied by the franchisor, and whether the outlets are franchised or franchisor-owned or operated).

(B) The dates when the reported level of financial performance was achieved.

(C) The total number of outlets that existed in the relevant period and, if different, the number of outlets that had the described characteristics.

(D) The number of outlets with the described characteristics whose actual financial performance data were used in arriving at the representation.

(E) Of those outlets whose data were used in arriving at the representation, the number and percent that actually attained or surpassed the stated results.

(F) Characteristics of the included outlets, such as those characteristics noted in paragraph (3)(ii)(A) of this section, that may differ materially from those of the outlet that may be offered to a prospective franchisee.

(iii) If the representation is a forecast of future financial performance, state the material bases and assumptions on which the projection is based. The material assumptions underlying a forecast include significant factors upon which a franchisee's future results are expected to depend. These factors include, for example, economic or market conditions that are basic to a franchisee's operation, and encompass matters affecting, among other things, a franchisee's sales, the cost of goods or services sold, and operating expenses.

(iv) A clear and conspicuous admonition that a new franchisee's individual financial results may differ from the result stated in the financial performance representation.
(v) A statement that written substantiation for the financial performance representation will be made available to the prospective franchisee upon reasonable request.

(4) If a franchisor wishes to disclose only the actual operating results for a specific outlet being offered for sale, it need not comply with this section, provided the information is given only to potential purchasers of that outlet.

(5) If a franchisor furnishes financial performance information according to this section, the franchisor may deliver to a prospective franchisee a supplemental financial performance representation about a particular location or variation, apart from the disclosure document. The supplemental representation must:

(i) Be in writing.

(ii) Explain the departure from the financial performance representation in the disclosure document.

(iii) Be prepared in accordance with the requirements of paragraph (s)(3)(i)-(iv) of this section.

(iv) Be furnished to the prospective franchisee.

Item 20: Outlets and Franchisee Information.

(1) Disclose, in the following tabular form, the total number of franchised and company-owned outlets for each of the franchisor’s last three fiscal years. For purposes of this section, “outlet” includes outlets of a type substantially similar to that offered to the prospective franchisee. A sample Item 20(1) Table is attached as appendix B to this part.

<table>
<thead>
<tr>
<th>Column 1 Outlet type</th>
<th>Column 2 Year</th>
<th>Column 3 Outlets at the Start of the Year</th>
<th>Column 4 Outlets at the End of the Year</th>
<th>Column 5 Net Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Franchised</td>
<td>2004</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>2006</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Company-Owned</td>
<td>2004</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>2006</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Outlets</td>
<td>2004</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>2006</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(i) In column 1, include three outlet categories titled “franchised,” “company-owned,” and “total outlets.”

(ii) In column 2, state the last three fiscal years.
(iii) In column 3, state the total number of each type of outlet operating at the beginning of each fiscal year.

(iv) In column 4, state the total number of each type of outlet operating at the end of each fiscal year.

(v) In column 5, state the net change, and indicate whether the change is positive or negative, for each type of outlet during each fiscal year.

(2) Disclose, in the following tabular form, the number of franchised and company-owned outlets and changes in the number and ownership of outlets located in each state during each of the last three fiscal years. Except as noted, each change in ownership shall be reported only once in the following tables. If multiple events occurred in the process of transferring ownership of an outlet, report the event that occurred last in time. If a single outlet changed ownership two or more times during the same fiscal year, use footnotes to describe the types of changes involved and the order in which the changes occurred.

(i) Disclose, in the following tabular form, the total number of franchised outlets transferred in each state during each of the franchisor's last three fiscal years. For purposes of this section, "transfer" means the acquisition of a controlling interest in a franchised outlet, during its term, by a person other than the franchisor or an affiliate. A sample Item 20(2) Table is attached as appendix C to this part.

<table>
<thead>
<tr>
<th>Column 1</th>
<th>Column 2</th>
<th>Column 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>State</td>
<td>Year</td>
<td>Number of Transfers</td>
</tr>
<tr>
<td></td>
<td>2004</td>
<td></td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td></td>
</tr>
<tr>
<td></td>
<td>2006</td>
<td></td>
</tr>
<tr>
<td></td>
<td>2004</td>
<td></td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td></td>
</tr>
<tr>
<td></td>
<td>2006</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>2004</td>
<td></td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td></td>
</tr>
<tr>
<td></td>
<td>2006</td>
<td></td>
</tr>
</tbody>
</table>

(A) In column 1, list each state with one or more franchised outlets.

(B) In column 2, state the last three fiscal years.

(C) In column 3, state the total number of completed transfers in each state during each fiscal year.

(ii) Disclose, in the following tabular form, the status of franchisee-owned outlets located in each state for each of the franchisor's last three fiscal years. A sample Item 20(3) Table is attached as appendix D to this part.
Item 20 Table No. 3
Status of Franchised Outlets
For years [ ] to [ ]

<table>
<thead>
<tr>
<th>Column 1 State</th>
<th>Column 2 Year</th>
<th>Column 3 Outlets at Start of Year</th>
<th>Column 4 Outlets Opened</th>
<th>Column 5 Terminations</th>
<th>Column 6 Non-Renewals</th>
<th>Column 7 Reacquired by Franchisor</th>
<th>Column 8 Ceased Operations-Other Reasons</th>
<th>Column 9 Outlets at End of the Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2005</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2006</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Totals</td>
<td>2004</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>2005</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>2006</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(A) In column 1, list each state with one or more franchised outlets.

(B) In column 2, state the last three fiscal years.

(C) In column 3, state the total number of franchised outlets in each state at the start of each fiscal year.

(D) In column 4, state the total number of franchised outlets opened in each state during each fiscal year. Include both new outlets and existing company-owned outlets that a franchisee purchased from the franchisor. (Also report the number of existing company-owned outlets that are sold to a franchisee in Column 7 of Table 4).

(E) In column 5, state the total number of franchised outlets that were terminated in each state during each fiscal year. For purposes of this section, "termination" means the franchisor's termination of a franchise agreement prior to the end of its term and without providing any consideration to the franchisee (whether by payment or forgiveness or assumption of debt).

(F) In column 6, state the total number of non-renewals in each state during each fiscal year. For purposes of this section, "non-renewal" occurs when the franchise agreement for a franchised outlet is not renewed at the end of its term.

(G) In column 7, state the total number of franchised outlets reacquired by the franchisor in each state during each fiscal year. For purposes of this section, a "reacquisition" means the franchisor's acquisition for consideration (whether by payment or forgiveness or assumption of debt) of a franchised outlet during its term. (Also report franchised outlets reacquired by the franchisor in column 5 of Table 4).

(H) In column 8, state the total number of outlets in each state not operating as one of the franchisor's outlets at the end of each fiscal year for reasons other than termination, non-renewal, or reacquisition by the franchisor.

(I) In column 9, state the total number of franchised outlets in each state at the end of the fiscal year.
(iii) Disclose, in the following tabular form, the status of company-owned outlets located in each state for each of the franchisor's last three fiscal years. A sample Item 20(4) Table is attached as appendix E to this part.

**Item 20 Table No. 4**  
**Status of Company-Owned Outlets**  
**For years [ ] to [ ]**

<table>
<thead>
<tr>
<th>Column 1 State</th>
<th>Column 2 Year</th>
<th>Column 3 Outlets at Start of Year</th>
<th>Column 4 Outlets Opened</th>
<th>Column 5 Outlets Reacquired by Franchisor</th>
<th>Column 6 Outlets Closed</th>
<th>Column 7 Outlets Sold to Franchisee</th>
<th>Column 8 Outlets at End of the Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2005</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2006</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Totals</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(A) In column 1, list each state with one or more company-owned outlets.

(B) In column 2, state the last three fiscal years.

(C) In column 3, state the total number of company-owned outlets in each state at the start of the fiscal year.

(D) In column 4, state the total number of company-owned outlets opened in each state during each fiscal year.

(E) In column 5, state the total number of franchised outlets reacquired from franchisees in each state during each fiscal year.

(F) In column 6, state the total number of company-owned outlets closed in each state during each fiscal year. Include both actual closures and instances when an outlet ceases to operate under the franchisor's trademark.

(G) In column 7, state the total number of company-owned outlets sold to franchisees in each state during each fiscal year.

(H) In column 8, state the total number of company-owned outlets operating in each state at the end of each fiscal year.

(3) Disclose, in the following tabular form, projected new franchised and company-owned outlets. A sample Item 20(5) Table is attached as appendix F to this part.
(i) In column 1, list each state where one or more franchised or company-owned outlets are located or are projected to be located.

(ii) In column 2, state the total number of franchise agreements that had been signed for new outlets to be located in each state as of the end of the previous fiscal year where the outlet had not yet opened.

(iii) In column 3, state the total number of new franchised outlets in each state projected to be opened during the next fiscal year.

(iv) In column 4, state the total number of new company-owned outlets in each state that are projected to be opened during the next fiscal year.

(4) Disclose the names of all current franchisees and the address and telephone number of each of their outlets. Alternatively, disclose this information for all franchised outlets in the state, but if these franchised outlets total fewer than 100, disclose this information for franchised outlets from contiguous states and then the next closest states until at least 100 franchised outlets are listed.

(5) Disclose the name, city and state, and current business telephone number, or if unknown, the last known home telephone number of every franchisee who had an outlet terminated, canceled, not renewed, or otherwise voluntarily or involuntarily ceased to do business under the franchise agreement during the most recently completed fiscal year or who has not communicated with the franchisor within 10 weeks of the disclosure document issuance date. State in immediate conjunction with this information: "If you buy this franchise, your contact information may be disclosed to other buyers when you leave the franchise system."

(6) If a franchisor is selling a previously-owned franchised outlet now under its control, disclose the following additional information for that outlet for the last five fiscal years. This information may be attached as an addendum to a disclosure document, or, if disclosure has already been made, then in a supplement to the previously furnished disclosure document.

(i) The name, city and state, current business telephone number, or if unknown, last known home telephone number of each previous owner of the outlet;

(ii) The time period when each previous owner controlled the outlet;

111 Franchisors may substitute alternative contact information at the request of the former franchisee, such as a home address, post office address, or a personal or business email address.
(iii) The reason for each previous change in ownership (for example, termination, non-renewal, voluntary transfer, ceased operations); and (iv) The time period(s) when the franchisor retained control of the outlet (for example, after termination, non-renewal, or reacquisition).

(7) Disclose whether franchisees signed confidentiality clauses during the last three fiscal years. If so, state the following: "In some instances, current and former franchisees sign provisions restricting their ability to speak openly about their experience with [name of franchise system]. You may wish to speak with current and former franchisees, but be aware that not all such franchisees will be able to communicate with you." Franchisors may also disclose the number and percentage of current and former franchisees who during each of the last three fiscal years signed agreements that include confidentiality clauses and may disclose the circumstances under which such clauses were signed.

(8) Disclose, to the extent known, the name, address, telephone number, email address, and Web address (to the extent known) of each trademark-specific franchisee organization associated with the franchise system being offered, if such organization:

(i) Has been created, sponsored, or endorsed by the franchisor. If so, state the relationship between the organization and the franchisor (for example, the organization was created by the franchisor, sponsored by the franchisor, or endorsed by the franchisor).

(ii) Is incorporated or otherwise organized under state law and asks the franchisor to be included in the franchisor's disclosure document during the next fiscal year. Such organizations must renew their request on an annual basis by submitting a request no later than 60 days after the close of the franchisor's fiscal year. The franchisor has no obligation to verify the organization's continued existence at the end of each fiscal year. Franchisors may also include the following statement: "The following independent franchisee organizations have asked to be included in this disclosure document."
Gregg A. Rubenstein  
Partner  
100 Summer Street • Boston, MA 02110  
Phone: 617-345-6184 • Fax: 866-369-4747  
E-mail: grubenstein@nixonpeabody.com  
Website: www.nixonpeabody.com

Practice  
Business Litigation Group  
Franchise & Distribution

Experience  
Gregg Rubenstein is a member of the firm’s Franchise & Distribution group. He focuses his practice in the areas of franchise and distribution litigation, complex commercial litigation, and trade secret matters. Mr. Rubenstein represents franchise clients on a nationwide basis in a variety of forums. Past representations include enforcement of post-termination covenants not to compete, enforcement of arbitration agreements and franchise terminations.

Mr. Rubenstein also has experience with and represents clients in a variety of labor and employment matters, including arbitration proceedings and defense of wrongful termination and employment discrimination claims before federal and state courts.

Mr. Rubenstein has co-authored multiple papers on franchise matters. These papers include: Current Ethical Issues in Arbitration and Mediation which was presented at the 2006 International Franchise Association Legal Symposium and the 2007 Franchise Law Update which was presented at the 2007 Ontario Bar Association Annual Franchise Law Conference. Mr. Rubenstein was a featured speaker at the 2008 and 2010 International Franchise Association Legal Symposium and has hosted several webinars on franchise topics, including vicarious liability and claims by franchisees for “employee” status under Massachusetts’ Wage Payment Act. Mr. Rubenstein was also featured in the October 22, 2007 edition of Massachusetts Lawyers Weekly.

Admissions  
Mr. Rubenstein is admitted to practice in Massachusetts, New York, the United States Court of Appeals for the First Circuit and the United States District Courts for the District of Massachusetts, Southern District of New York and Northern District of New York.

Education  
Boston University, J.D., magna cum laude  
Cornell University, School of Industrial and Labor Relations, B.S.
Affiliations
Mr. Rubenstein is a member of the American Bar Association, Massachusetts Bar Association, Boston Bar Association, and New York State Bar Association.
Robert Salkowski has practiced franchise and hospitality law for over 16 years. Although representing primarily franchisees, Robert has represented a number of franchisors in both litigation and transactional matters. In addition to his franchise practice, Robert has extensive experience in intellectual property, having represented both plaintiffs and defendants in a wide range of various industries. Robert has received a Peer Review rating of “AV” by Martindale-Hubbell, and has been recognized by several magazines and publications for his franchise experience.