Group Litigation: Strategic Considerations for Cases Involving Numerous Parties, Mass Actions, Class Actions and Claims Brought by Franchise Associations

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I. INTRODUCTION TO GROUP LITIGATION

A class action can be the “death-knell” of a franchise system, to borrow a phrase from earlier class action cases. The mere assertion of a franchisee class action raises the stress level for any franchisor, but the certification of a class action presents franchisors with few attractive choices beyond settlement. Moreover, only the most healthy franchise systems can afford to mount an aggressive defense to a class action. Multi-party franchise litigation is not far behind class actions in their in terrorem effect on franchisors. And lawsuits by franchisee associations, historically rejected by the courts for want of standing, have received new life as a result of a recent decision involving the Fantastic Sams franchise system.

For the franchisor, the defense against class actions and multi-party lawsuits begins with the franchise agreement. The near bullet-proof defense against multi-party litigation is a commitment to arbitrate in the franchise agreement.

Where the parties are not compelled to arbitrate their claims, class actions are typically won or lost before they ever reach a jury. The battleground is the certification stage. If the franchisee class representatives can convince a court to certify the class – and if the certification survives an appeal – then it is highly likely that the franchisor will pay significant dollars (or make significant changes to its conduct) to avoid a trial on the merits. If the franchisor defeats certification, the case is just another one-off lawsuit.

In the pages that follow, we begin with commitments to arbitrate as the franchisors savior against multi-party actions, focusing in particular on a trilogy of recent United States Supreme Court decisions that have greatly increased the ability of franchisors to use arbitration to preclude group litigation – the Rent-a-Center, Stolt-Nielsen, and Concepcion cases. We then tackle class actions by reviewing the impact of a forum-selection clause, the impact of CAFA, the elements of a class action, the rules for appealing the trial court’s certification decision, settlement classes, and the like. We next discuss the pressure points attendant to the joinder of claims and parties in franchise litigation, followed by a review of franchisee association litigation. We conclude with a number of practical considerations for franchise lawyers handling group litigation.

II. ARBITRATION: THE FRANCHISOR’S SA VIR FROM CLASS ACTIONS AND MULTI-PARTY LAWSUITS?

A properly drafted arbitration clause can altogether preclude class actions and group lawsuits in franchise disputes. If the goal is to avoid group actions by franchisees, then franchisors should include an arbitration clause in the franchise agreement and expressly bar class and multi-party arbitration. You can then stop reading this paper because a trilogy of recent decisions from the United States Supreme Court (Rent-a-Center, Stolt-Nielsen, and Concepcion) largely restrict the power of courts to circumvent the directives of the Federal Arbitration Act (“FAA”) and to use state law to void arbitration provisions, including those that altogether prohibit the parties from proceeding with a class action or multi-party lawsuit.

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1 Rent-a-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010).
As a private means of dispute resolution, arbitration is governed by the terms of the arbitration agreement. Parties to a franchise agreement can thus agree upon the procedural and substantive rules that will control resolution of their disputes. This includes who will decide issues as between the court and an arbitrator (including enforceability of the arbitration clause), the locale of the arbitration, limitations on damages, the qualifications of the arbitrator, and whether the parties can or cannot sustain a claim in arbitration on behalf of a class or group of similarly situated individuals. State legislatures and the courts can do little about it because the FAA precludes the states from restricting arbitration, with one significant exception: the enforceability of the commitment to arbitrate is governed by the same laws that apply to the enforceability of all contracts.

A. Rent-A-Center

On April 26, 2010, the United States Supreme Court decided the first of three decisions arguably putting arbitration beyond attack by the courts and state legislators. In Rent-A-Center, the Court held that the FAA permits contractual solutions that trump the gatekeeping function of the courts and leave questions of unconscionability and other defenses often invoked to undermine the arbitration provision in the hands of arbitrators. The Court found that where the arbitration commitment clearly and unmistakably delegates such functions to the arbitrator, the delegation should be enforced unless a court finds that the delegation provision itself is subject to a valid contractual defense. A party seeking to avoid arbitration will then have to prove to a court that the delegation provision should not be enforced due to duress, fraud, unconscionability, or another valid contract defense—often a difficult burden.

B. Stolt-Nielsen

On April 27, 2010, a day after the Supreme Court decided Rent-A-Center, the Court issued its decision in Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp. The plaintiff was a producer of raw ingredients (including liquids) for animal feed that plaintiff shipped around the world. The defendants were shipping companies that provided “partial tankers” to customers wishing to ship liquids in small quantities. When the plaintiff learned that the Department of Justice had conducted a criminal investigation revealing price-fixing by the defendants, plaintiff brought a putative class action in federal court alleging antitrust violations.

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4 Rent-a-Center, 130 S. Ct. at 2772.
5 Rent-a-Center, 130 S. Ct. at 2779.
6 Id.
7 Id. at 2777-2779.
8 Stolt-Nielsen, 130 S. Ct. at 1758.
9 Id. at 1764.
10 Id.
11 Id.
The contract governing the shipment of the plaintiff’s products contained a commitment to arbitrate “any dispute.” The agreement specified that “such arbitration shall be conducted in conformity with the provisions and procedures of the [FAA].” The Second Circuit Court of Appeals held that the plaintiff’s claims were subject to arbitration, and once in arbitration, the plaintiff made a demand for class arbitration.

The parties entered a supplemental agreement providing that the panel of arbitrators would decide the question of whether the commitment to arbitrate allowed for class arbitration. The parties stipulated that the contract was “silent” on the subject. The arbitrators concluded that the arbitration clause allowed for class arbitration. The arbitrators stayed the proceeding so that the parties might seek judicial review. On appeal, the Second Circuit held that an arbitrator’s award could be set aside where the arbitrator “manifestly disregarded” the law but found that the arbitrators there had not manifestly disregarded the applicable law. The Supreme Court reversed.

The Court had previously held in *Hall St. Assocs., L.L.C. v. Mattel, Inc.* that Section 10(a)(4) of the FAA contains the exclusive grounds for vacating an arbitration award. The Court found in *Stolt-Nielsen* that an arbitration award may be vacated under Section 10(a)(4) of the FAA on the ground that the arbitrator “exceeded [his] powers” when he “strays from interpretation and application of the agreement and effectively ‘dispense[s] his own brand of industrial justice’. . . .” According to the Court:

> Petitioners contend that the decision of the arbitration panel must be vacated, but in order to obtain that relief, they must clear a high hurdle. It is not enough for petitioners to show that the panel committed an error—or even a serious error. “It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively ‘dispense[s] his own brand of industrial justice’ that his decision may be unenforceable.” In that situation, an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator “exceeded [his] powers,” for the task of an arbitrator is to interpret and enforce a contract, not to make public policy. In this case, we must conclude that what the arbitration

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12 *Id.*

13 *Stolt-Nielsen*, 130 S. Ct. at 1765.

14 *Stolt-Nielsen*, 130 S. Ct. at 1765-1766.

15 *Id.* at 1765.

16 *Id.* at 1766.

17 *Id.* at 1766-1767.

18 *Id.*

19 *Id.*


21 *Stolt-Nielsen*, 130 S. Ct. at 1767.
The Court concluded that “[r]ather than inquiring whether the FAA, maritime law, or New York law contains a ‘default rule’ under which an arbitration clause is construed as allowing class arbitration in the absence of express consent, the panel proceeded as if it had authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation.”23

The Court further found that the proper objective of the panel was to ascertain the intent of the parties regarding class action arbitration, but here there was no evidence of intent because the agreement was “silent” on the subject in that the parties neither agreed to class arbitration nor did they not agree to it. The arbitrators were therefore duty-bound to look beyond the language of the agreement itself at the “governing rule applicable in a case in which neither the language of the contract nor any other evidence established that the parties had reached any agreement on the question of class arbitration . . .”24

The Court held that “an implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties’ agreement to arbitrate.”25 It reached this conclusion because in bilateral arbitration the parties forgo the “procedural rigor and appellate review of the courts” in favor of lower cost, greater efficiency, speed, and the ability to choose expert arbitrators.26 The Court concluded that “the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties’ mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.”27

Stolt-Nielsen’s legacy will only be determined over time; to date, numerous lower courts have used it both to prohibit and allow class arbitration, including in at least one franchise case.28

C. Concepcion

On April 27, 2011, the Supreme Court decided Concepcion. Vincent and Liza Concepcion purchased a mobile phone from AT&T Mobility that AT&T advertised as “free.”

22 Id. at 1767-68 (citations omitted).
23 Id. at 1768-69.
24 Id. at 1770.
25 Id. at 1775.
26 Id.
27 Id. at 1776.
28 See, e.g., Fantastic Sams Franchise Corp. v. FSRO Association Fantastic, Inc., 683 F.3d 18 (1st Cir. 2012) (affirming district court decision ordering individual arbitration as to 25 franchisees bound by express class action waivers but allowing 10 other franchisees without such waivers to proceed based on an implicit agreement to allow for class arbitration); Reed v. Florida Metropolitan University Inc., 681 F.3d 630 (5th Cir. 2012) (rejecting the pursuit of class arbitration on the basis that a class action is not a remedy); Sutter v. Oxford Health Plan, 675 F.3 215 (3d Cir. 2012) (finding that arbitrator had not exceeded his authority by finding an implicit agreement to arbitrate); Jock v. Sterling Jewelers, Inc., 646 F.3d 113 (2d Cir. 2011) (finding an implicit agreement to allow for class arbitration).
However, AT&T charged the Concepcions approximately $30 in sales taxes for the phone. The Concepcions filed suit in California alleging that having to pay the sales tax did not fulfill AT&T’s promise of a “free” phone. Their complaint was later consolidated with a putative class action. The problem for the Concepcions was that the mobile phone contract with AT&T required them to arbitrate their claims individually and not as a part of a class action. AT&T moved to compel individual arbitrations. The Concepcions resisted, arguing that the arbitration commitment was void under *Discover Bank v. Superior Court* because it precluded class proceedings. The District Court and Ninth Circuit Court of Appeals Court agreed, but the Supreme Court disagreed.

The fundamental issue for the Court was whether to uphold what it called the “Discover Bank rule.” In *Discover Bank*, the California Supreme Court established a “rule classifying most collective-arbitration waivers in consumer class contracts as unconscionable.” There was no dispute on the appeal over the general rule that commitments to arbitrate are enforceable, “save upon such grounds as exist at law or in equity for” making any contract unenforceable. As the Court put it, “courts must place arbitration agreements on an equal footing with other contracts.” The Concepcions argued that the *Discover Bank* rule was the product of application of the same California rules that apply to all contracts, but the Court disagreed. Although the rule does not require class proceedings in consumer disputes, “it allows any party to a consumer contract to demand it ex post” because the elements of an unenforceable agreement to arbitrate under *Discover Bank* (adhesion, small damages, and claims of a scheme to cheat) are always present in modern consumer contract litigation.

The Court held that the purpose of the FAA is “to ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings” and “[r]equiring the availability of class wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” The Court stated that the switch from bilateral to class arbitration (1) sacrifices the advantages of arbitration, an informal process that is less costly and more efficient, (2) requires procedural formality in the class certification process and the like, and (3) greatly increases risks to the defendants that arises from multiple claimants due to the absence of appellate review.

As a result of *Concepcion*, there are two situations in which the FAA preempts a state law. First, “[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.” The second, and more complex, situation occurs “when a doctrine normally thought to be generally applicable,

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30 *Concepcion*, 131 S. Ct. at 1743.

31 *Id.* at 1746.

32 *Id.* at 1745.

33 *Id.* at 1750.

34 *Id.* at 1744 (emphasis added).

35 *Id.* at 1748.

36 *Id.* at 1747.
such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration.\textsuperscript{37} In that case, a court must determine whether the state law rule “stand[s] as an obstacle to the accomplishment of the FAA’s objectives,” which are principally to “ensure that private arbitration agreements are enforced according to their terms.”\textsuperscript{38} If the state law rule is such an obstacle, it is preempted.

There is a danger in over- and under-stating the significance of Concepcion. On the one hand, the decision seems to make arbitration commitments and waiver of class proceedings bulletproof in the great majority of cases, including franchise disputes. On the other hand, a number of courts continue to adhere to state law rules to challenge the enforceability of group action prohibitions.\textsuperscript{39} Only time will tell of Concepcion’s long-term impact.

III. LITIGATING GROUP ACTIONS IN THE ABSENCE OF AN ARBITRATION PROVISION

When their franchise agreement does not contemplate arbitration, litigants must be prepared to navigate the waters of multi-party action. Given the lengthy term of most franchise agreements, it may take years for franchisors to incorporate arbitration clauses in an effort to avoid group actions. While avoidance of a mass action is certainly a strategic consideration for every franchisor, there are advantages and disadvantages to arbitration—avoidance of a class action being only one of many considerations.\textsuperscript{40}

For this reason, we turn to the practical aspects of group litigation because it is likely that the reader will be confronted with it in his or her practice even if arbitration provisions govern more and more franchise relationships over time.

A. Forum Considerations: Where to Litigate a Group Action

Litigation in court presents a number of procedural considerations that practitioners are well advised to heed when confronting group actions.

1. Forum Selection and Choice of Law Clauses

It is common for franchisors to provide dispute resolution clauses in their franchise agreements that govern both the forum and choice of law to be used in the event of a conflict with their franchisees. Nearly everyone has seen a clause that goes something like this:

\textsuperscript{37} Id.

\textsuperscript{38} Id. at 1750 n.6.


\textsuperscript{40} See Joseph S. Goode, et al., Arbitration in 2011, Int'l Franchise Ass’n, 44\textsuperscript{th} Annual Legal Symposium, May 15-17, 2011, at 2-13.
This Agreement shall be interpreted under the laws of the State of Mississippi, and any dispute between the parties, whether arising under this Agreement or from any other aspect of the parties relationship, shall be governed by and determined in accordance with the substantive laws of the State of Mississippi, which laws shall prevail in the event of any conflict of law. The parties further agree that the exclusive forum for disputes between them shall be the state and federal courts of Jackson, Mississippi. Each party hereby waives any objection it might have to the personal jurisdiction or venue in such courts.

A primary purpose of such clauses is to provide the franchisor with consistency in the enforcement of a uniform franchise agreement. Forum selection clauses also provide convenience to the franchisor, which can more easily manage its litigation affairs from its principal place of business in courts more familiar to the franchisor. In the end, though, the enforcement of a forum-selection clause simply recognizes the “legitimate expectations of the parties, [as] manifested in their freely negotiated agreement . . . .” For this reason, since at least 1972 when the Supreme Court decided M/S Bremen v. Zapata Off-Shore Co., a party challenging a forum selection clause must meet the relatively high burden that its application would be unreasonable. Requiring a franchisee to litigate in the franchisor’s home state is thus presumptively legal in many jurisdictions. Franchisors should be vigilant in enforcing their forum selection clauses and franchisees should expect a motion to dismiss for improper venue or a transfer motion if they decide to ignore such provisions when filing suit against their franchisor in a jurisdiction other than the one prescribed by the franchise agreement.

This is not, however, the case in some jurisdictions where statutory schemes may render forum selection clauses unenforceable. Some states, like Nebraska, have adopted the Model Uniform Choice of Forum Act, which essentially codifies the reasonableness standard used by the Supreme Court in M/S Bremen. New Jersey, on the other hand, applies a specific limitation on the general presumption of the enforceability of forum-selection clauses, concluding in its New Jersey Franchise Practices Act that they are presumptively invalid. Similarly, courts in Wisconsin reject the application of a boilerplate forum selection clause selecting a non-Wisconsin forum where the claims involve the Wisconsin Fair Dealership Law (“WFDL”), reasoning that enforcement would undermine the public policy set forth in the WFDL. Similarly, California prohibits enforcement of forum selection clauses “with respect to

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44 M/S Bremen, 407 U.S. at 12.
47 Wis. Stat. § 135.01, et seq.
any claim arising under or relating to a franchise agreement involving a franchise business operating within [California].

Choice of law clauses fare far worse than forum selection clauses in those states that aggressively regulate franchise and dealership practices. For example, it has been presumptively illegal since 1987 for a franchisor to seek to apply a non-Wisconsin choice of law clause to a dispute with a Wisconsin franchisee to the extent that clause seeks to prohibit application of the WFDL.

2. State or Federal Court After CAFA
   a. State Court

   Although class actions are viable in state court, the 2005 enactment of the Class Action Fairness Act (“CAFA”) has made it far easier for defendants to remove a class action to federal court. Depending on the size and scope of the class and the amount of damages sought, franchisees may be able to prevent a class action filed in state court from being removed to federal court. Indeed, some commentators suggest that there are benefits to pursuing class relief in state court, including “easier class certification rules” and “less than unanimous jury trial requirements.”

   Counsel looking to assert claims on behalf of a national class of franchisees must consider whether they can (or even want to) pursue a class action in state court. First, a state court may be unwilling to certify a class where the laws of various jurisdictions are implicated. In a large franchise system, where members of the putative class likely reside in jurisdictions throughout the United States, it is likely that multiple state laws will apply. Some could fall from applicability of the WFDL to a case may render a forum selection clause unenforceable.

49 Cal. Bus. & Prof. Code § 20040.5 (West 2012); see also, Jones v. GNC Franchising, Inc., 211 F.3d 495, 498 (9th Cir. 2000).


51 28 U.S.C. §§ 1332(d), 1453, 1711-1715.


53 See, e.g., Osborne v. Subaru of Am., Inc., 198 Cal. App. 3d 646, 243 Cal. Rptr. 815 (1988) (holding that conflicts of law between different states with regard to contributory negligence, implied warranty, and damages as well as the inability to feasibly create subclasses made the trial court’s denial of certification appropriate); Baltimore Football Club v. Superior Court, 171 Cal. App. 3d 352, 215 Cal. Rptr. 323 (1985) (holding that “when legal questions vary from state to state and hence require the trial court to make diverse legal rulings on an emerging theory of recovery in a multitude of jurisdictions, the questions of law necessarily would be more individual than common to all . . . [and a case is, thus,] ill-suited for prosecution as a class action.”).
operative choice of law provisions in the franchise agreement. Or, a court may be required to apply statutory protections to certain members of the class (e.g. the WFDL, California Franchise Investment Law, etc.) and not others. Proceeding in federal court, if feasible, may present the most viable means to have the entire case heard by a single judge who can then divide the class into sub-classes for purpose of class adjudication. Second, plaintiffs pursuing a claim in state court must also consider the restrictions they will place on themselves in discovery. Unlike in federal court, where attorneys are empowered to engage in nationwide service of subpoenas to third parties, the ability to obtain service of third party subpoenas from a state court proceeding requires the timely and expensive process of obtaining a commission from the forum court—with fewer guarantees of cooperation from the recipient in a foreign jurisdiction if and when that commission is granted. Finally, unless the scope of the class action dictates the pure application of state law, proceeding in state court may deny the putative class of powerful federal remedies, including the racketeering provisions of the RICO statute, the antitrust prohibitions of the Sherman Act, and rights afforded them under the Lanham Act. While a RICO claim can actually be pursued in state court (and some states maintain so-called “baby RICO” statutes or antitrust statutes not unlike the Sherman Act), practitioners may find federal adjudication of such laws easier before judges who more routinely experience them.

b. Federal Court

Perhaps the largest obstacle to maintaining a class action in state court is CAFA. CAFA expanded federal jurisdiction over class action lawsuits in an attempt by Congress to assure fair and prompt recoveries for class members with legitimate claims, restore the intent of the framers to the Constitution by providing federal court consideration of interstate cases of national importance under diversity jurisdiction, and benefit society by encouraging innovation and lowering consumer prices.

Congress thus amended the law to expand diversity jurisdiction in class action litigation and provide the federal judiciary with original jurisdiction in class action cases involving 100 or more class members, provided: (i) the amount in controversy exceeds the aggregate sum or value of $5,000,000, exclusive of interest and costs; and (ii) there is diversity of citizenship such that (a) any member of a class of plaintiffs is a citizen of a state different from any defendant; (b) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a state; or (c) any member of a class of plaintiffs is a citizen of a state and any defendant is a foreign state or a citizen or subject of a foreign state. Significantly, CAFA further eliminated longstanding impediments to removal by no longer placing a deadline on removal, allowing removal where the defendant is a citizen of the state in which the suit is filed, and no longer requiring the defendant to obtain the consent of its co-defendants. CAFA did not change the burden on removal; the duty of establishing the right to removal remains with the defendant seeking to remove the case to federal court.

54 Fed. R. Civ. P. 45(a)(3)(A) and (B).
Franchisees seeking to avoid removal to federal court should be aware of CAFA’s four exceptions. First, the “Discretionary/Interests of Justice Exception” provides that a district court may decline jurisdiction in the interests of justice and looking at the totality of circumstances if greater than one-third but less than two-thirds of the members of all proposed plaintiff classes (in the aggregate) and the primary defendants are citizens of the state in which the case was filed.  

Second, the “Local Controversy Exception” authorizes the district court to decline jurisdiction where three conditions are met. The first condition is that greater than two-thirds of the members of the putative class (in the aggregate) are citizens of the state in which the case was filed. Second, at least one of the defendants from whom relief is sought must be a citizen of the forum state whose conduct forms a significant basis for the asserted claims that occurred within the forum state. The third condition is that during the 3-year period preceding the filing of the class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons. The third exception is known as the “Home State Exception” which gives the district courts the power to decline jurisdiction when two-thirds or more of the putative class and the primary defendants are citizens of the state in which the class action was originally filed. Finally, the “State Action Exception” excludes federal jurisdiction if the primary defendants are states, state officials, or other governmental entities against which the district court is prohibited from ordering relief.

B. Class Action Procedure

Federal Rule of Civil Procedure 23 controls the scope of class action litigation in the federal court system. By allowing parties to consolidate into one case, Rule 23 not only affords courts greater efficiency in managing their case dockets but also gives plaintiffs legal redress where they otherwise might not have it. Before plaintiffs can be certified as a class however, all four requirements of Rule 23(a) must be satisfied and the prospective class must be shown to fit within one of the three provisions of Rule 23(b).

1. Fed. R. Civ. P. 23(a)

Rule 23(a) is often referred to as the prerequisites section for class actions because the party seeking certification bears the burden of establishing all the elements thereunder. Under the rule, a class action may be brought if: (a) The class is so numerous that joinder of all members is impracticable (i.e., numerosity); (b) there are questions of law or fact common to the class (i.e., commonality); (c) the claims or defenses of the representative plaintiffs are typical of

61 Id.
62 Id.
63 Id.
the claims or defenses of the class (i.e., typicality); and (d) the representative plaintiffs will fairly and adequately protect the interests of the class (i.e., adequacy).67


The first prerequisite under Rule 23(a) is “numerosity” and while it calls for the number of class members to be large enough to make joinder impracticable, it need not be established that such joinder is impossible.68 In determining impracticability, courts normally look at several different factors (including the size of the potential class) to see if Rule 23(a) is satisfied.69 Generally speaking, establishing the numerosity requirement should not be overly difficult when dealing with a franchise system.

While there is no set number that satisfies the numerosity requirement, less than twenty-five potential class members appears from the case law to be insufficient.70 On the other hand, generally when the potential class exceeds one hundred members, the numerosity requirement appears to be satisfied.71 When the number of potential class members falls in between this range (twenty-five to one-hundred), results differ from jurisdiction to jurisdiction.72 While this is generally one of the easier requirements to establish in a class proceeding (particularly when dealing with franchise systems), it is nevertheless the first step in establishing a right to class certification. Because an underlying goal of a franchise system is to uniformly provide its services and products to the general population (be it on state, regional or national level), a


68 See, e.g., Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC, 504 F.3d 229, 244-45 (2d Cir. 2007); Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993); Daigle v. Shell Oil Co., 133 F.R.D. 600, 603 (D. Colo. 1990).

69 See Colo. Cross-Disability Coal v. Taco Bell Corp., 184 F.R.D. 354, 357 (D. Colo. 1999) (listing factors of: (i) class size; (ii) geographic diversity of class members; (iii) ease or difficulty in identifying members of the class; (iv) financial resources of class members; and (v) the ability of class members to institute individual lawsuits); Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 624 (listing reluctance to sue individually because of fear of retaliation among its factors).


72 See, e.g., John Doe v. Meese, 690 F. Supp. 1572 (S.D. Tex. 1988) (holding a potential class of sixty-two members was insufficient to satisfy the numerosity requirement); Trevizo v. Adams, 455 F.3d 1155 (10th Cir. 2006) (holding a potential class of eighty-four members insufficient); but see, e.g., Bachman v. Collier, 73 F.R.D. 300 (D.D.C. 1976) (holding a potential class of sixty-three members sufficient to satisfy the numerosity requirement); In re Cincinnati Radiation Litig., 187 F.R.D. 549 (S.D. Ohio 1999) (holding a potential class of more than eighty members sufficient).
given franchise is likely to have a large enough number of similarly situated franchisees to satisfy the numerosity requirement.\textsuperscript{73}


The second requirement under Rule 23(a) is “commonality” and it is established when there are common issues of fact among the parties to a class.\textsuperscript{74} Commonality has traditionally been construed liberally and normally will be found where “claims arise from the same set of broad circumstances.”\textsuperscript{75} Due to franchisors’ desire to maintain uniformity in their system, it is usually not difficult to establish commonality. After all, franchising lends itself to common approaches in the sales process and operational administration of a system. Franchisors rely on standard-form franchise agreements, uniform franchise disclosure documents (“FDDs”), and consistent operations manuals to ensure uniformity before and after franchisees join the system. Uniform approaches like this provide a foundation for franchisees to assert common facts and legal theories in a class action.\textsuperscript{76} Despite the liberal standard typically invoked by courts to find commonality under Fed. R. Civ. P. 23(a)(2), practitioners should be mindful when considering the use of legal theories and facts that put an emphasis on individual issues rather than common ones (e.g., fraud allegations on which individual reliance must be established, damages theories that vary from franchisee to franchisee).\textsuperscript{77}

\textit{i. Common Approach to Franchise Sales}

Franchisors approach franchise sales in similar ways by design, often times training their development staff to rely on scripts so as to ensure compliance with state and federal regulations on franchise sales, including 16 C.F.R. 436 (“Rule 436”) and baby FTC acts adopted by various states. Franchisors also use multiple channels to advertise and promote the sale of franchises.\textsuperscript{78} As a result, franchisees are often solicited into purchasing a franchise via the same advertisements and marketing tools, sale pitches and franchisor representations.\textsuperscript{79}


\textsuperscript{74} J.B. v. Valdez, 186 F.3d 1280, 1288 (10th Cir. 1999); Stewart v. Abraham, 275 F.3d 220, 227 (3d Cir. 2001).


\textsuperscript{76} See Joseph v. General Motors Corp., 109 F.R.D. 635, 640 (D. Colo. 1986).

\textsuperscript{77} See, e.g., Broussard, 155 F.3d at 340-42 (finding that final oral review sessions where some claims arose from were a “shaky basis” for establishing commonality); but see, George Lussier Enterprises, Inc. v. Subaru of New England, Inc., No. Civ. 99-109-B, 2001 WL 920060 (D.N.H. Aug. 3, 2001) (holding that documents sent to dealerships containing company policies established common misrepresentations).

\textsuperscript{78} See Bonanno, 2009 WL 1068744 at *5 (franchisor using the Internet, print media, radio, television, and live seminars to sell franchisees).

\textsuperscript{79} Id.
often can use this common ground on franchise sales to assert similar facts and legal theories among the putative class in an effort to establish commonality.

ii. Common Terms in the Franchise Agreement and Operations Manual

Having executed boilerplate agreements, franchisees across a given franchise system will often find themselves adhering to the same contractual terms, including common provisions on termination and the franchisor’s power to enforce operational rules. Franchise class actions can implicate commonality when plaintiffs invoke these common contractual terms and avail themselves of common contractual theories.\(^{80}\) While franchise agreements tend to be uniform across the franchise, one area that can cause problems is where addenda or amendments to agreements have been made, particularly in registration states where the franchisor is obligated to make additional or different disclosures. Generally, it appears that so long as there are not numerous addenda with materially different language, the claims stemming from boilerplate agreements will satisfy the commonality requirement.\(^{81}\)


The third requirement of Rule 23(a), typicality, requires that the class representatives share a typical story to that of absent “members of the class who have the same or similar grievances as the plaintiff.”\(^{82}\) Like the requirement of commonality, typicality “ensure[s] that only those plaintiffs or defendants who can advance the same factual and legal arguments may be grouped together as a class.”\(^{83}\) The test for typicality is also similar to that of commonality in that it is not demanding,\(^{84}\) and is established where there is a sufficient nexus between the representatives’ claims and defenses and those of the missing class members.\(^{85}\) Many times courts will ultimately merge their analysis of typicality with that of commonality.

One of the two main reasons why Fed. R. Civ. P. 23(a) has the typicality requirement is to make sure that the interests of a class as a whole get advanced as opposed to just those of a smaller subset of the class. By ensuring that the claims of representatives are typical of those of the putative class, class members are given a greater chance at a remedy by the advancement of only non-conflicting legal theories. Consequently, it appears the only time when typicality becomes an issue is when there is a conflict of interest between the claims of

\(^{80}\) Id.; Bird Hotel, 246 F.R.D. at 604; Broussard, 155 F.3d at 340-42; Dupler v. Costco Wholesale Corp., 249 F.R.D. 29 (E.D.N.Y. 2008).

\(^{81}\) See Bird Hotel, 246 F.R.D. at 606 (holding that addendums to 20% of potential class members agreements did not adversely affect the commonality of a breach claim spawning from an identical contractual term); but cf., Broussard, 155 F.3d at 340 (holding that agreements which “vary from year to year and from franchisee to franchisee” and contain “materially different contract language” defeat the commonality of a breach claim from spawning from an identical contractual term).

\(^{82}\) Bird Hotel, 246 F.R.D. at 606 (quoting Alpern v. UtiliCorp United, 84 F.3d 1525, 1540 (8th Cir. 1996)).

\(^{83}\) Broussard, 155 F.3d at 340 (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 341 (7th Cir. 1997)).

\(^{84}\) Lightbourn v. Cnty. of El Paso, 118 F.3d 421, 426 (5th Cir. 1997).

\(^{85}\) Joseph, 109 F.R.D. at 640.
the representatives and the rest of the class. Generally, where the legal and remedial theories of both the plaintiff and potential class members remain substantially similar, typicality will be met.

The second reason why Fed. R. Civ. P. 23(a) has the typicality requirement is to make sure that a group of potential class members does not subject themselves to an unnecessary premature dismissal of their claims. In requiring typicality of a franchisor's defenses to the claims of the representative plaintiff, missing class members are assured that their claims will not die under a defense which otherwise would not apply to them. Put best, “[w]here it is predictable that a major focus of the litigation will be on an arguable defense unique to the named plaintiff or a small subclass, then the named plaintiff is not a proper class representative.” Unique defenses usually arise when claims are based on different legal theories. As long as the legal theories are consistent throughout, typicality will likely be satisfied.


The final requirement of Fed. R. Civ. P. 23(a) is adequacy of representation. It is established by showing that both the representative plaintiff’s interests in relation to the rest of the class and class counsel’s qualifications are sufficient to protect the class as a whole.

i. Representative Plaintiffs

Arguably the most important decision of the court with regard to adequacy is establishing that the representative plaintiff’s interests align with the rest of the class. To satisfy adequacy, a class representative “must be part of the class and possess the same interest and suffer the same injury as the class members.” While there is no consensus as to when adequacy is satisfied, courts generally see adequacy of the proposed representative in two parts: (i) possessing an interest in vigorously pursuing the claims of the class; and (ii) not having interests antagonistic to the interests of the rest of the class.

Applying this two part test upon an appeal after a $70 million class settlement, the Tenth Circuit Court of Appeals found that plaintiffs’ representatives met the adequacy requirement in *Rutter & Wilbanks Corp. v. Shell Oil Co.* Those challenging the settlement objected to the

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87 *See, Bird Hotel*, 246 F.R.D. at 607.
88 *Koos v. First Nat’l Bank*, 496 F.2d 1162 (7th Cir. 1974).
90 Because of this, some courts have noted that the adequacy provision of class representatives often overlaps with the typicality requirement of Fed. R. Civ. P. 23(a)(iii). See, e.g., *Stirman v. Exxon Corp.*, 280 F.3d 554, 563 (5th Cir. 2002).
92 *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006); *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187-88 (10th Cir. 2002).
93 314 F.3d 1180, 1187-88 (10th Cir. 2002).
existence of various subclasses as they argued the subclasses presented conflicts of interest among the class overall. The Tenth Circuit nevertheless held that the representative plaintiffs met the adequacy requirement and affirmed the district court’s approval of the settlement, noting that there were representatives from each subclass, each of their interests were aligned in achieving the overall settlement, and because the court was to determine the allocation of the settlement proceeds among the subclasses said to be in conflict.

In Broussard v. Meineke Discount Mufflers Shops, Inc., the Fourth Circuit Court of Appeals reached a different result when it vacated a $390 million judgment against franchisor Meineke Discount Muffler Shops after determining that the class representatives did not meet the adequacy requirements imposed by Fed. R. Civ P. 23(a)(4). Similar to the class in Rutter, the plaintiffs in Broussard were apportioned into different subclasses, with one subclass representing former franchisees and two other groups representing current franchisees, which either had or had not signed a modification to their franchise agreement. Because it was shown that the ability of a franchisee to benefit from the damage award was contingent upon whether or not it had signed the modification, the Fourth Circuit held that parties’ interests were not aligned and that adequacy was not established. In so doing, it vacated the judgment and reversed.

ii. Class Counsel

The adequacy requirement under Fed. R. Civ P. 23(a)(4) also requires that class counsel possess the skills and resources necessary to properly litigate the claims. The court has considerable authority under the class counsel adequacy requirement as it can appoint new representation at any point during the course of litigation upon a finding of inadequacy. With the 2003 advent of Fed. R. Civ. P. 23(g), it is now clear that the district court maintains an express obligation to appoint suitable class counsel. The expanding vitality of this requirement can easily be seen in Martrano v. Quizno’s Franchise Co., LLC where the district court pointed out to plaintiffs that the “adequacy of representation is generally an important consideration in class certification . . . [and] will be particularly relevant in this case.”

94 Id. at 1188.
95 Id.
96 Broussard, 155 F.3d at 339.
97 Id. at 338.
98 Id. at 338-39.
101 Martrano v. Quizno’s Franchise Co., LLC, No. 08-0932, 2009 WL 1704469 at *23 (W.D. Pa. June 15, 2009). Martrano was a copycat class action where certain Quiznos franchisees in Pennsylvania filed suit, seeking certification of a Pennsylvania class of current and former franchisees. It came on the heels of several years of antecedent litigation pursued by one of the authors of this paper that ultimately resulted in a national class action settlement resolving the claims of more than 8,600 Quiznos franchisees. See Siemer, 2010 WL at *2. Unsurprisingly, the representative plaintiffs in Martrano opted out of that national settlement.
A lawyer representing the putative class maintains innumerable duties. They are responsible for protecting the class as a whole even in circumstances where the class representatives take a position that class counsel believes is contrary to the interests of the absent class members.\(^{102}\) They must timely and accurately communicate settlement offers to the representative plaintiffs.\(^{103}\) In a similar regard, class counsel must advise the court about any settlement offer approved by the representative plaintiffs that counsel believes is contrary to the interests of the class.\(^{104}\) Attorneys representing the class have an affirmative duty to answer questions brought forth by class members after the court issues notice of a preliminary approval.\(^{105}\) They must also be prepared to defend the settlement at the final fairness hearing and work openly and candidly with the court about the status and issues affecting the fairness and adequacy of the settlement.\(^{106}\)

Before certification occurs (whether through the adversarial process or via a settlement class under Fed. R. Civ. P. 23(e)), class counsel maintains duties to the putative class, but must be mindful of engaging in misconduct.\(^{107}\) Direct communications with class members, whether by class counsel or defendant’s counsel can lead to abuse.\(^{108}\) For example, a class action defendant may before certification attempt to extract releases from class members without informing them of the filing of the class action complaint.\(^{109}\) While courts are reluctant to interfere in such conduct, some have imposed conditions on pre-certification discussions with class members that require the defendant to advise of the existence of the pending class action.\(^{110}\) This means that a franchisor could theoretically be obligated to tell all of its franchisees about the existence of the pending lawsuit—even before the class is certified. Similarly, Fed. R. Civ. P. 23(a)(4) can be used by courts to curtail abuse by class counsel in its communication with the class under the notion that certain conduct may impair the fairness and adequacy of the representation.\(^{111}\) It may also affect the ability of the court to appoint class counsel under Fed. R. Civ. P. 23(g) or result in penalties or prohibitions under the court’s plenary authority found in Fed. R. Civ. P. 23(d)(2).\(^{112}\)


\(^{105}\) Id.

\(^{106}\) Id.

\(^{107}\) Id. at § 21.12, p. 370-71.


\(^{112}\) Id.
2. **Fed. R. Civ. P. 23(b)**

Once the requirements of Fed. R. Civ. P. 23(a) have been satisfied, plaintiffs must then establish that the proposed class falls into one of the three categories—prejudicial, injunctive, or monetary—under Fed. R. Civ. P. 23(b):

(b) **TYPES OF CLASS ACTIONS.** A class action may be maintained if Rule 23(a) is satisfied and if:

1. Prosecuting separate actions by or against individual class members would create a risk of:
   
   (A) Inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
   
   (B) Adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

2. The party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

3. The court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

   (A) The class members’ interests in individually controlling the prosecution or defense of separate actions;

   (B) The extent and nature of any litigation concerning the controversy already begun by or against class members;

   (C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
(D) The likely difficulties in managing a class action.\(^{113}\)

a. **Prejudicial Classes**

Fed. R. Civ. P. 23(b)(1) contemplates a process for certifying what has become known as the prejudicial class action and is appropriate when individual adjudication could adversely affect either the defendant or a potential class of plaintiffs. The main theory behind this form of class action is maintaining consistency in judgments.\(^{114}\) This type of class is often invoked in situations where proceeds from a limited fund are at stake.\(^{115}\)

b. **Injunctive Classes**

A Fed. R. Civ. P. 23(b)(2) class involves injunctive relief and is properly brought when potential class members share both a claim against a party and seek final declaratory relief to enjoin that party from doing or not doing something at issue.\(^{116}\) It is commonly invoked in race or gender discrimination cases.\(^ {117}\) When plaintiffs invoke this rule, courts become concerned when they seek monetary relief in addition to the injunctive relief they are entitled under the rule.\(^ {118}\) Generally, most courts will allow certification as long as the monetary claims do not predominate. Thus, classes certified under Fed. R. Civ. P. 23(b)(2) have become an attractive way for plaintiffs to seek monetary relief as it allows plaintiffs to avoid the more rigorous requirements of Fed. R. Civ. P. 23(b)(3) discussed below.\(^ {119}\) However, with the Supreme Court’s recent decision in *Wal-Mart v. Dukes*, it now appears settled that claims for individualized monetary relief will be more difficult to pursue under this rule.\(^ {120}\) Practitioners

\(^{113}\) Fed. R. Civ. P. 23(b).

\(^{114}\) Because of this, there is no possibility for an individual to opt out of a Fed. R. Civ. P. 23(b)(1) class action. It is thus considered a mandatory class where notice of the action need not be given to class members. See *Wal-Mart*, 131 S. Ct. at 2558.


\(^{116}\) As with classes certified under Fed. R. Civ. P. 23(b)(1), there is also no possibility in a class certified under Fed. R. Civ. P. 23(b)(2) for an individual to opt out of the certified class. Thus, it is also considered a mandatory class where notice of action need not be given to class members. See *Wal-Mart*, 131 S. Ct. at 2558.


\(^{118}\) See, e.g., *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986) (money damages for asbestos hazards were predominate, and thus, certification under R. 23(b)(2) was inappropriate); *Elkins v. Am. Showa, Inc.*, 219 F.R.D. 414 (S.D. Ohio 2002) (certification under R. 23(b)(2) not appropriate where both compensatory and punitive damages were sought in a sexual-harassment case); but see, *Chang v. U.S.*, 217 F.R.D. 262 (D.D.C. 2003) (allowing certification under R. 23(b)(2) where monetary damages sought were incidental to the declaratory relief in action following an unlawful detention of protestors); *Mulder v. PCS Health Sys., Inc.*, 216 F.R.D. 307 (D.N.J. 2003) (monetary damages for breach of fiduciary duty were incidental to the injunctive relief sought, and thus, certification under R. 23(b)(2) was appropriate).


\(^{120}\) *Wal-Mart*, 131 S. Ct. at 2558. For an extensive discussion of Wal-Mart’s impact on class proceedings and its applicability to franchising, see § II-G, infra.
should thus be mindful that if plaintiffs seek both injunctive and monetary relief they would likely need to satisfy both Fed. R. Civ. P. 23(b)(2) and (b)(3).

c. Monetary Classes

Fed. R. Civ. P. 23(b)(3) provides for a class action seeking money damages. Maintaining a monetary class action requires proof of predominance and superiority.\footnote{Unlike classes pursued under Fed. R. Civ. P. 23(b)(1) and 23(b)(2), predominance and superiority are not inherent to the class and must be established. For this reason, notice to all the potential class members is required. See \textit{Wal-Mart}, 131 S. Ct. at 2558.} Predominance is met when "common questions represent a significant aspect of the case [such that] they can be resolved for all members of the class in a single adjudication."\footnote{\textit{Joseph}, 109 F.R.D. at 641 (quoting 7A C. Wright & A. Miller, \textit{Federal Practice and Procedure} § 1778 at 53.)} In determining predominance, courts will look at relevant claims, issues, and defenses, but should not evaluate the merits of the case.\footnote{Id. at 641; \textit{cf. Wal-Mart}, 131 S. Ct. at 2552.} To meet the superiority requirement, plaintiffs must establish that a class action is the superior means of adjudication using the four factors set out in Fed. R. Civ. P. 23(b)(3).\footnote{See Fed. R. Civ. P. 23(b)(3)(A-D).} While the superiority of class actions tends to be the reason they are filed, establishing predominance tends to be the biggest hurdle for a potential class.\footnote{See, \textit{e.g., DT Woodward, Inc. v. Mail Boxes Etc., Inc.}, No. B194599, 2007 WL 3018861 (Cal. App. Oct. 17, 2007).}

In \textit{Bird Hotel}, the court certified a Fed. R. Civ. P. 23(b)(3) class where the franchisees of a motel system asserted a breach of contract based on the franchisor’s decision to impose an additional five percent fee on reserved rooms that was not expressly provided for in the franchise agreement.\footnote{\textit{Bird Hotel}, 246 F.R.D. at 603.} In addressing predominance, the court reasoned that because there was an identical fee rate and the proof of liability would be the same for every single class member, common questions predominated over individual questions affecting only individual members.\footnote{Id. at 607-08.} In addressing superiority, the court went down the line with the Rule 23(b)(3) factors noting that a comprehensive lack of subsequent litigation, the desire of plaintiffs to bring suit individually, conflicting law, and concerns over case manageability evidenced class proceedings as the superior mechanism.\footnote{Id. at 608.}

To the contrary, in \textit{Amchem Prods., Inc. v. Windsor}, the Supreme Court struck down a Rule 23(b)(3) certification of a class of individuals injured by exposure to asbestos.\footnote{\textit{Amchem Prods.}, 521 U.S. at 597.} The court’s decision to de-certify the class focused largely on a lack of predominance.\footnote{Id. at 623-25. However, the court also mentions in haste that the difference in state laws is a factor which worked against certification, thus, indirectly addressing superiority. \textit{Id.} at 624.} In noting that plaintiffs were exposed to different types of asbestos-containing products, suffered varying degrees of injuries, and were subject to various preexisting health concerns, the court held that
these factors posed individual questions which far outweighed the common issue of general asbestos exposure. Finding the lower court’s predominance requirement “irreconcilable with the Rule’s design,” the court further cautioned that where individual stakes are high and disparities among class members are great, certification is likely unwarranted.

C. Interlocutory Appeals of Orders Granting or Denying Class Certification

Under Fed. R. Civ. P. 23(f), “[a]n appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals.” The discretion afforded the Court of Appeals in deciding whether to accept an interlocutory appeal of a class certification decision is similar to the discretion of the Supreme Court on granting certiorari.

A party seeking to appeal a class certification ruling must file a petition seeking the appellate court’s permission within fourteen days after the order on certification is entered. The petition must include the facts necessary to understand the question presented, the question itself, the relief sought, the reasons why the appeal should be allowed (be it authorized by statute or rule), and it must attach a copy of the court’s decision on certification.

One important distinction between discretionary appeals under Fed. R. Civ. P. 23(f) and permissive appeals under 28 U.S.C. § 1292(b) is that an appeal under Rule 23(f) does not require that the district court certify the appeal. A Rule 23(f) appeal, unlike a Section 1292(b) appeal, also does not require that there be a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

The district court’s class certification decision is reviewed under a deferential standard. The trial court has broad discretion over certifying a class within the framework of Rule 23 and its decision is thus reviewed for abuse of discretion.

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131 Id. at 625.
132 Id.
133 Id. (citing to 28 U.S.C. App. advisory committee’s note).
135 Id.
138 Id.
139 28 U.S.C. § 1292(b).
140 In re Visa Check/MasterMoney Antitrust Litigation, 280 F.3d 124, 132 (2d Cir. 2001).
141 Id.; Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th Cir. 2001).
D. Individual Damages Hearings: Losing the Certification Battle One Hearing at a Time

The requirement that there be common questions of fact or law ordinarily does not apply to the determination of each class member’s damages under Fed. R. Civ. P. 23(b)(3). From a practical standpoint, the amount of damages afforded a class member can be (and often is) tried separately even where class members maintain varying amounts of damage under a common claim. Nevertheless, some courts have refused to certify a putative class action where the fact of injury involves too many individualized issues. For example in In re Google AdWords Litigation, the court denied class certification, in part, because of the fact-intensive, highly individualized analysis of each plaintiff’s injury. In that case, the plaintiffs alleged that Google engaged in deceptive advertising and unfair business practices regarding its “AdWords” service, which is designed to allow advertisers to create online advertisements and display them through multiple channels on the Internet. “Here, in many instances, individual proof would show that advertisers received significant revenues and other benefits from ads placed on parked domains and error pages—benefits that would need to be individually accounted for in any restitution calculation.” In short, the calculation of each class member’s damages would require an individualized determination. Judge Davila held that “[b]ased on the foregoing, the court finds that individualized issues of restitution permeate the class claims. In light of such, it concludes that the proposed class is not ‘sufficiently cohesive to warrant adjudication by representation.”

E. Local Rules on Class Action Practice

Attorneys seeking or defending against class certification should make a point of studying the local rules for the court where the action is filed. In many instances, the local rules may not have any specific provisions for class certification or class actions, but some districts maintain highly specific rules—both in terms of timing and notice.

For example, in both the District of Utah and the Central District of California, the proponent of a class action shall file a motion for certification that the action is maintainable as a class action within 90 days after service of the pleading purporting to commence a class action, including cross claims and counterclaims. Class counsel should legitimately question whether 90 days is sufficient time in which to conduct the type of discovery necessary for class certification—even if the court views its certification decision as not implicating an extensive review of the merits. Desires of the parties aside, the District of Utah and the Central District of California find 90 days presumptively sufficient. The key is to know of such deadlines and seek to change them by motion or stipulation if the particular case facts dictate doing so.


144 Id.

145 Id. at *15.

146 Id. at *16 (quoting Amchem, 521 U.S. at 623).

In contrast, in the Southern District of Illinois “[d]iscovery prior to class certification must be sufficient to permit the court to determine whether the requirements of Federal Rule of Civil Procedure 23 are satisfied, including a preliminary inquiry into the merits of the case to ensure appropriate management of the case as a class action. In order to ensure that a class certification decision is issued as soon as practicable, however, priority shall be given to discovery on class certification issues.” While not going so far as to require bifurcated discovery, the Southern District of Illinois emphasizes that the parties should organize discovery in order to focus on class certification matters first.

The Western District of Texas provides a comprehensive list of issues that must be addressed in motions for certification of a class. The District of Nebraska requires a unique addition to notices to class members, which requires that class members be informed that all documents sent to the court by any class member, including a member’s desire to opt out or objection to settlement, will be filed electronically by the clerk and therefore be available to the public.

While this is just a smattering of local rules from select jurisdictions, it emphasizes that many courts maintain special rules governing class action practice and counsel must become familiar with them.

F. Bifurcated Discovery in Advance of Certification Motion

As the Southern District of Illinois’s local rule indicates, there are two aspects of discovery in class action litigation. There is traditional discovery going toward the merits of the case and there is discovery regarding whether a class should be certified under Rule 23. The parties sometimes choose to engage in bifurcated discovery in which the discovery period is divided into two phases: certification discovery and merits discovery. However, the question remains whether they can do so. Justice Scalia’s decision in Wal-Mart suggests, at least in the context of analyzing commonality, that discovery may “overlap[]” with [a plaintiff’s] “merits contention.”

Bifurcation of discovery may be particularly attractive in courts that have a truncated time for certification such as the District of Utah or Central District of California. By bifurcating discovery, the parties can shorten the timeframe for responding to requests related to certification and thereby shorten the time needed before the certification issue can be resolved. After all, Fed. R. Civ. P. 23(c)(1)(A) requires that the court determine whether to certify the class “[a]n early practicable time after a person sues or is sued as a class representative.”

In suits where the plaintiff is unlikely to meet its burden of demonstrating that the case can proceed as a class action, bifurcating discovery serves to resolve the matter quickly. Bifurcating discovery is a cost-effective strategy because if the motion for certification is denied, the case often is dismissed because the cost of litigating may be prohibitive for the named
plaintiff on an individual basis. However, if the plaintiffs' motion for certification is granted, discovery on the merits could then begin in earnest.

From the defendant's prospective, the bifurcation of discovery serves another purpose. Focusing initial discovery solely on areas related class certification limits the amount of information that must be shared with the plaintiff before certification. Of course, as a practical matter merits discovery and certification discovery may overlap considerably.

G. The Potentially Far-Reaching Implications of Wal-Mart

In *Wal-Mart*, the United States Supreme Court took a deep dive into Fed. R. Civ. P. 23 and provided new direction, which greatly impacts how class action lawsuits will be litigated in the future. In addressing “one of the most expansive class actions ever,” the Supreme Court reversed the Ninth Circuit's affirmation of a district court's certification of approximately one and a half million plaintiffs in a sexual discrimination lawsuit brought under Title VII. Interpretations of Fed. R. Civ. P. 23(a)(2) (commonality) and (b)(2) (injunctive relief) were at the heart of the matter.

Betty Dukes was one of three named plaintiffs who brought suit against her employer, Wal-Mart, following repeated allegations of sexually discriminatory practices against women. In general, plaintiffs alleged that they were prevented from being promoted, paid less, and reprimanded more often and harsher because of their sex. This treatment, they alleged, was evidence of disparate impact and disparate treatment because their local managers' use of discretion in wages and promotions worked to disproportionately favor male employees. As such, the plaintiffs sought certification seeking injunctive and declaratory relief as well as damages and back pay solely under Fed. R. Civ. P. 23(b)(2).

In defining it as “the crux of [the] case,” Justice Scalia first noted that there tends to be a misunderstanding of the 'same injury, same resolution' concept of commonality under Rule 23(a)(2). The Court said that what is important is not so much that plaintiffs can raise an abundance of common questions, but that there is the existence of a *common answer* that will allow for class-wide resolution. Working with this framework, the Court turned to its test from *General Telephone Co. of Sw. v. Falcon* to determine how plaintiffs might link their individual claims of sexual harassment to those of the rest of the potential class. Concluding that

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153 *Wal-Mart*, 131 S. Ct. 2541.

154 *Id.* at 2547.

155 *Id.* at 2549. In *Wal-Mart*, class members consisted of both current and former employees from any time since December 26, 1998. *Id.* at 2562.

156 *Id.* at 2548.

157 *Id.*

158 *Id.* at 2550.

159 *Id.* at 2551 (emphasis added). (citing Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L.Rev. 97, 131-32 (2009)).


161 *Wal-mart*, 131 S. Ct. at 2553. The test from *Falcon* allowed either evidence of: (i) a biased testing procedure; or (ii) significant proof of a general policy of discrimination to suffice as a bridge between a plaintiff's claims for an injury on
plaintiffs needed to show that Wal-Mart operated under a general policy of discrimination to establish commonality, the Court held that plaintiffs had not met their burden.\textsuperscript{162}

Having made this distinction, the test for commonality appears to have been significantly tightened, as now plaintiffs must establish much more than common facts and a common injury. Rather, it now appears that plaintiffs must not only show that they have suffered the same injury, but also that the injury results in a common contention, which can be resolved by a common answer “in one stroke.”\textsuperscript{163} Furthermore, by reiterating that the trial court must conduct a “rigorous analysis”\textsuperscript{164} of the prerequisites of Rule 23(a), Justice Scalia opened the door for the court to begin an examination of the merits of the claim\textsuperscript{165} because “some overlap . . . cannot be helped.”\textsuperscript{166} While Justice Scalia took time to note that this explanation of commonality does not rise to that of predominance (found in Rule 23(b)(3)) because the court “[does not] consider dissimilarities,” it is clear that the burden under Rule 23(a)(2) has been heightened.\textsuperscript{167} Practitioners should be cognizant that while factual situations among class members may be similar, unless class-wide relief can be granted upon a common answer, commonality will no longer be satisfied.

The other major development falling from \textit{Wal-Mart} has to do with monetary claims that have traditionally been brought under Fed. R. Civ. P. 23(b)(2) as incidental to the injunctive relief primarily sought. Concluding that Fed. R. Civ. P. 23(b)(2) could not be used to award back pay for the conduct alleged to be discriminatory (and subject to the request for injunctive relief), Justice Scalia noted that the rule authorizes the use of \textit{one} injunction for all class members, not \textit{different} injunctions for each class member.\textsuperscript{168} Using that analogy, the Court determined that individualized monetary relief under this section is similarly not authorized.\textsuperscript{169} While the Court stopped short of determining whether monetary relief is barred altogether under Rule 23(b)(2), it did make strides to further define the features of class actions under Rule 23(b) and what is required or allowed.

To this end, Justice Scalia started by noting that the major difference between monetary class actions under Rule 23(b)(3) and an injunctive class action under Rule 23(b)(2) is that the the basis of discriminatory grounds and the existence of a class of persons with the same injury based off of a common contention that could be resolved by a common answer. \textit{Falcon}, 457 U.S. at 159 n.15.

\textsuperscript{162}\textit{Id.} at 2553-56. In so doing, the court rejected plaintiffs’ expert witness testimony because it failed to show “how regularly stereotypes play a meaningful role in employment decisions.” The court also reasoned that plaintiffs could not identify a “specific employment practice” that made the managers’ use of discretion discriminatory across the entirety of the company. \textit{Id.} at 2553.

\textsuperscript{163}\textit{Id.} at 2541.

\textsuperscript{164}\textit{Id.} at 2551 (quoting \textit{Falcon}, 457 U.S. at 161).

\textsuperscript{165} Traditionally, courts have taken the approach that the merits of the case should not be evaluated until after certification has been decided. \textit{See Joseph}, 109 F.R.D. at 641; 7A C. Wright & A. Miller, \textit{Federal Practice and Procedure} § 1778, at 55.

\textsuperscript{166}\textit{Wal-Mart}, 131 S. Ct. at 2552.

\textsuperscript{167}\textit{Id.} at 2556.

\textsuperscript{168}\textit{Id.} at 2557.

\textsuperscript{169}\textit{Id.}
latter is a mandatory class whereas the former affords greater procedural protections to its members.\textsuperscript{170} An injunctive class is mandatory because there is no way for members to opt out of certification and they need not be given notice—unlike monetary class actions under Rule 23(b)(3).\textsuperscript{171} The notice provision and the ability to opt out are not needed in Rule 23(b)(2) because predominance and superiority are said to be “self-evident” in that context. Under Fed. R. Civ. P. 23(b)(3), however, such requirements need to be established.\textsuperscript{172}

Monetary claims are traditionally afforded greater procedural protection because they tend to deal with equity among individual parties. In observing the possibility of parties being collaterally estopped from independently seeking damages following dismissal of a Rule 23(b)(2) action that attempts to insulate monetary claims so they are not predominant,\textsuperscript{173} the \textit{Wal-Mart} Court raised valid policy concerns and promoted allowing parties a chance to decide for themselves how to bring their monetary claims. Practitioners should be mindful of both the effects that \textit{Wal-Mart} will have on individualized damages as well as the overriding possibility that monetary damages are precluded from Rule 23(b)(2) altogether. Thus, when in doubt seek monetary relief under a Fed. R. Civ. P. 23(b)(3) and meet the tests of predominance and superiority.

IV. JOINDER OF CLAIMS AND PARTIES IN THE ABSENCE OF A CLASS ACTION

In the context of a multi-party action not involving a class proceeding, the rules governing joinder of claims and parties should be analyzed. Before we analyze those rules, practitioners are reminded that a well-written class action prohibition can also be used to prohibit multi-party actions. The goal of the prohibition is to force franchisees to proceed one at a time through litigation—a fact that gives the franchisor a strategic advantage. Of course, the Federal Rules of Civil Procedure are written to streamline the judicial process, a policy choice that a prohibition on multi-party suits undercuts. On the other hand, the prohibition protects against prejudice to the franchisor, which has to make significant expenditures to defend against mass actions by franchisees, and faces a much greater risk of loss.


Joining claims serves to streamline the judicial process and helps to limit the number of actual suits between the parties. “A party asserting a claim, counterclaim, cross-claim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.”\textsuperscript{174} A party may choose to join claims even if one is contingent on the disposition of another, but relief on the contingent claim cannot be granted unless and until the claim it relies on is resolved.\textsuperscript{175}

\begin{itemize}
  \item \textsuperscript{170} \textit{id}. at 2558.
  \item \textsuperscript{171} \textit{id}.
  \item \textsuperscript{172} \textit{id}.
  \item \textsuperscript{173} \textit{id}. at 2559.
  \item \textsuperscript{174} Fed. R. Civ. P. 18(a).
  \item \textsuperscript{175} Fed. R. Civ. P. 18(b).
\end{itemize}
The rule today is fairly straightforward. If Party A sues Party B in federal court under federal question jurisdiction, Fed. R. Civ. P. 18 allows Party A to bring as many claims as it has against Party B.\textsuperscript{176} At the same time, Rule 18 allows Party B to bring as many counterclaims against Party A as it desires. “The liberal policy regarding joinder of claims in the pleadings extends to cases with multiple parties.”\textsuperscript{177} Permitted joinder of claims is unaffected by the presence of multiple parties in an action.\textsuperscript{178}

B. **Fed. R. Civ. P. 20 – Permissive Joinder of Parties**

Rule 20 governs permissive joinder of parties, both for plaintiffs\textsuperscript{179} and defendants.\textsuperscript{180} It allows for nonessential party members to be joined to the litigation.\textsuperscript{181} No joinder is allowed for a person against whom the party asserts no claim and vice versa.\textsuperscript{182} If there is no viable allegation of a right to relief arising out of the same transaction, occurrence, or series of transactions or occurrences, the motion for joinder may be denied.\textsuperscript{183} The court may also issue orders to protect a party against embarrassment, delay, expense, or other prejudice that arises, including ordering a separate trial.\textsuperscript{184}

To join an action as a plaintiff, the party must do the following: “assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and any question of law or fact common to all plaintiffs will arise in the action.”\textsuperscript{185} Once the requirements of Rule 20 are met, there are a number of factors courts consider when determining if “the permissive joinder of a party will comport with the principles of fundamental fairness.”\textsuperscript{186} A court may deny permissive joinder if it would cause “prejudice, expense or delay.”\textsuperscript{187}

A person can be joined as a defendant if “any right to relief asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence,

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\textsuperscript{176} Fed. R. Civ. P. 18 advisory committee’s note – 1966 Amendment (“Rule 18(a) is now amended not only to overcome the [Federal Housing Admr. v. Christianson] decision and similar authority, but also to state clearly as a comprehensive proposition, that a party asserting a claim (an original claim, counterclaim, cross-claim, or third-party claim) may join as many claims as he has against an opposing party.”).

\textsuperscript{177} Fed. R. Civ. P. 18 advisory committee’s note – 1966 Amendment.

\textsuperscript{178} Id.

\textsuperscript{179} Fed. R. Civ. P. 20(a)(1).

\textsuperscript{180} Fed. R. Civ. P. 20(a)(2).


\textsuperscript{182} Fed. R. Civ. P. 20(b).

\textsuperscript{183} Fed. R. Civ. P. 20(a)(2).

\textsuperscript{184} Fed. R. Civ. P. 20(b).


\textsuperscript{186} Chavez v. Ill. State Police, 251 F.3d 612, 632 (7th Cir. 2001)(quoting Desert Empire Bank v. Ins. Co. of N. Am., 623 F.2d 1371 (9th Cir. 1980)).

\textsuperscript{187} Id.
or series of transactions or occurrences; and any question of law or fact common to all defendants will arise in the action.” 188 Rule 20 makes clear that the plaintiff joined need not have an interest in all claims, nor does the defendant joined need to be potentially liable for all causes of action. 189 It is sufficient that the party to be joined have some overlap with the claims asserted. 190

C. Fed. R. Civ. P. 21 - Misjoinder

Rule 21 governs misjoinder of parties. The rule states that misjoinder of parties, by itself, is insufficient to dismiss an entire action. 191 “On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.” 192 Noteworthy here is that misjoinder was grounds for dismissing an action in common law, but such a punishment is explicitly denied under the rules. 193 The purpose of Rule 21 now is to set out the more measured responses available to the court for misjoinder of claims or parties – which is to allow the court to add or drop a party and/or sever any claims. 194

V. WHAT TO ARGUE WHEN FRANCHISEES EMPLOY GROUP ACTIONS

When franchisees bring a group action, be it as a class action under Rule 23 or a multi-party action using the joinder rules, the obvious goal of the franchisor is to dispose of the claims as quickly and efficiently as possible. There are a number of ways to attack a group claim.

A. Fed. R. Civ. P. 12(b)(6)—Is There a Plausible Claim?

For fifty years, the courts had interpreted Fed. R. Civ. P. 8 as requiring only simple notice pleading. 195 The federal courts relied on the Supreme Court’s very liberal interpretation of pleading requirements in Conley v. Gibson to allow simple notice pleading of claims. 196 Allowing superficial pleadings to survive Rule 12(b)(6) scrutiny came under fire in Bell Atlantic Corp. v. Twombly. 197 In an opinion by Justice Souter, the Supreme Court altered what Rule 8 means in an antitrust conspiracy suit that arose out of New York: “We do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its
face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.\footnote{Id. at 570 (emphasis added).}

After Twombly, questions remained about whether it applied beyond antitrust cases. Two years later, the Supreme Court answered that question in Ashcroft v. Iqbal.\footnote{556 U.S. 662 (2009).} The question in Iqbal was whether the plaintiff pleaded factual matter that, if taken as true, stated a claim that the government deprived him of his constitutional rights.\footnote{Id. at 666.} Expanding its holding from Twombly beyond antitrust cases, the Supreme Court confirmed that “the pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation.”\footnote{Id. at 678 (citing Twombly at 555).} Thus, “[t]he plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.”\footnote{Id.} Practitioners should invoke Twombly and Iqbal to defeat a group action at the starting gate.

B. To Sever or Consolidate: That is the Question

Assume that a group action has been filed by franchisees against a franchisor, be it a class action under Rule 23 or a multi-party action involving a group of franchisees using the liberal joinder rules discussed above. Assuming the existence of a valid class action prohibition, the default reaction for most franchisors faced with a potential group action by franchisees is to attempt to sever the claims of the various franchisee plaintiffs using the misjoinder rule found at Fed. R. Civ. P. 21. Franchisors should consider this if the franchise agreement bars class or multi-party actions. The thought behind engaging in this strategy is that it prevents the plaintiffs from pooling resources and could make it difficult, if not wholly cost ineffective based on the value of individual claims, for franchisees to pursue their rights in court on a case-by-case basis.

There is another way to look at the issue, though. Clearly group actions tend to cost more than litigating any single individual franchisee’s grievance against the franchisor. However, the cost of defending a single group action for a franchisor can be far less expensive than the cost of defending multiple actions brought by individual franchisees across the country. The costs of associating in local counsel in each state where claims are raised, of having lead counsel potentially attend hearings and depositions out of state (in cases where forum selection clauses are unenforceable), as well as the logistical nightmare of defending hundreds of suits at once are all factors that a franchisor and its counsel should consider before seeking to sever a group action or attempting to defeat class certification under Fed. R. Civ. P. 23 or a multi-party action brought under Fed. R. Civ. P. 20.

Franchisors and their counsel might consider engaging in a “kill the king” strategy that comes with class certification or allowing for the joinder of multiple franchisees in a single action. By allowing class certification to occur and then defeating the complaint for failure to state a claim under Rule 12(b)(6), the franchisor can take out the entire class in one hearing.
Such a strategy has been used effectively outside the franchise context in cases like City of Pearland v. Reliant Energy Entex. In Reliant Energy, the City of Pearland and other similarly situated cities filed a class action against the defendant claiming that royalties the cities were owed on gross receipts of the defendant should have included not just sales, but also sales tax collected by the defendant, statutorily retained fees for collecting sales tax, and accrued interest on the sales tax that Reliant Energy was able to retain since it collected the taxes monthly but only paid out to the state quarterly. The Texas Court of Appeals ruled on summary judgment that Reliant Energy did not owe royalties on any of the funds that the class plaintiffs claimed were “gross receipts.” Reliant Energy could not prevent class certification by the various Texas cities, but that certification actually benefitted Reliant Energy when it was able to defeat all claims on summary judgment.

While there are definite risks for franchisors defending against claims of a large group of franchisees in a multi-party action or class action, the ability to knock out an entire group of franchisee claims in a single case would provide a quick and efficient end to potentially wide-ranging claims. The “kill the king” strategy, which has been effective in defending class actions outside the franchise context, could also prove effective in the franchise context.

C. Class and Mass Action Waivers

Because the primary policy behind class and multi-party actions is to promote recovery where it otherwise, on an individual basis, would be too costly to pursue, franchisors have increasingly begun to place prohibitions in their franchise agreements. The aforementioned discussion about class arbitration demonstrates the power of a class action prohibition because a properly worded arbitration clause in a franchise agreement all but eviscerates class arbitration under Stolt-Nielsen and Concepcion.

The question is whether contractual waivers prohibiting franchisees from pursuing class or multi-party actions relief are enforceable where there is no arbitration clause.

1. Theories Challenging Class Action Prohibitions and Franchisor Responses To Them

Franchisees typically rely on multiple theories in an attempt to invalidate class action prohibitions.

   a. Vindication of Statutory Rights Theory

When a class action prohibition provides a franchisor with immunity from mass liability while negating franchisee statutory rights, courts are reluctant to enforce the prohibition. In Kristian v. Comcast Corp., the First Circuit invalidated an arbitration clause containing a class prohibition because enforcement would have made it impossible for the plaintiff to vindicate its statutory rights under the antitrust laws. In this instance, plaintiff showed “uncontested”

204 Id.
205 Id. at 256-57.
206 See Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997).
207 446 F.3d 25 (1st Cir. 2006).
evidence that the outlay of funds needed to try the case (in excess of $300,000) far exceeded the individual damages sought (a few thousand dollars). Reasoning that the disparity between the expense and benefit of litigation would prevent individual plaintiffs from suing, the First Circuit held that the class action prohibition could not be enforced because plaintiffs needed a class mechanism to vindicate their statutory rights. While the theory of vindicating statutory rights is apparent in a number of decisions besides Kristian, the Supreme Court’s decision in Stolt-Nielsen assuredly emasculates the theory in the arbitration context.

b. State Law Unconscionability After Concepcion Theory

Prior to the Supreme Court’s decision in Concepcion, the defense of unconscionability under state law was readily used in an attempt to invalidate waivers of class-based relief in arbitration agreements. While decisions across jurisdictions differed, usually where plaintiffs had not had a “meaningful opportunity” to reject the contract term, a class action waiver would be held unconscionable. Following the decision in Concepcion, however, the theory of state law unconscionability as a bar to class action prohibitions (at least in arbitration) has been all but nullified.

c. Power Balancing Theory

Defining the relationship between franchisors and franchisees as a struggle over power in distributions channels, Professor Bert Rosenbloom has laid out a process by which

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208 Id. at 58.

209 Id. at 61.

210 130 S. Ct. 1758 (2010); but cf. 554 F.3d 300 (2d Cir. 2009), vacated and remanded sub nom., Am. Express Co. v. Italian Colors Rest., 130 S. Ct. 2401 (2010), aff’d reh’g In re Am. Express Merchs. Litig., 634 F.3d 187 (2d Cir. 2011).

211 See Thibodeau v. Comcast Corp., 912 A.2d 874 (Pa. Super. 2006) (holding that an adhesive contract that contains an agreement to arbitrate which waives the right to a class-based relief is per se unconscionable and unenforceable); Powertel, Inc. v. Bexley, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999) (invalidating a class-action waiver in an arbitration agreement because a unilateral change during the term of the agreement was procedurally unconscionable); Fonte v. AT&T Wireless Servs., Inc., 903 So. 2d 1019 (Fla. Dist. Ct. App. 2005) (upholding a class action waiver in an arbitration agreement because it was located in the original service agreement, which was freely accepted by plaintiff, and thus, not unconscionable); Jenkins v. First Am. Cash Adv. of Ga., 400 F.3d 868 (11th Cir. 2005) (upholding a class action waiver in an arbitration agreement because the Georgia RICO statute which authorized the recovery of attorney’s fees made adequate representation possible without class mechanisms, and thus, precluded the waiver from being unconscionable).

212 See Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 274 (Ill. 2006) (also stating that an arbitration agreement containing a class action waiver which was burdened by other features limiting the ability of plaintiff to obtain a remedy in a cost-effective manner was unconscionable); Fluke v. Cashcall, Inc. No. 08-5776, 2009 WL 1437593 at *7-8 (E.D. Pa., May 21, 2009); Honig v. Comcast of Ga. I, LLC, 537 F. Supp. 2d 1277, 1288-89 (N.D. Ga. 2008).

213 But cf. n.13 and 24, supra.


216 Professor Rosenbloom was the franchisees’ expert witness in Bonanno v. Quizno’s Franchise Company, LLC, No. 06-cv-02358-CMA-KLM, 2009 WL 1068744 (D. Colo. Apr. 20, 2009).
disputes between franchisors and franchisees can be settled. At the heart of his countervailing power analysis is the idea that when franchising is the means of distribution, the franchisor normally enjoys a significant advantage in power. Having leverage over franchisees, thus, allows franchisors to create more favorable contracts that place constraints on the actions and remedies of franchisees. Needless to say, these constraints work almost automatically to pit franchisors and franchisees against one another.

When disputes do arise, Professor Rosenbloom’s framework maps an inside-out approach with the manner of dispute resolution contingent upon both the difference in interests between the franchisor and franchisee and the adequacy of internal remedy made available to the franchisee (which is often dependent upon the amount of power exercised by the franchisor). The starting point in the exercise of countervailing power is the formal grievance procedure. When this option is available, as is the case in most franchises, franchisees are given a forum in which they can present their grievance(s) to the franchisor’s officers in the spirit of reaching a bona fide resolution. From there, the next option is another internal dispute-resolving method—the franchisee advisory council. This council hears grievances the same way in which a regular grievance procedure board would, but consists of representatives of both the franchisor as well as the franchisees. As Professor Rosenbloom notes, where franchisors provide such a council and take it seriously, communication throughout the franchise stands to be significantly enhanced which in turn reduces the number of disputes. After the foregoing internal methods of dispute resolution are exhausted, the final option prior to seeking a class action is that of an individual lawsuit. While this avenue ensures the most unbiased way to resolve a dispute, it is only worth pursuing if it is cost-effective. The basic premise is the smaller the amount of potential recovery the less likely an individual lawsuit is going to be an effective manner of countervailing power. It is then, when these three options all fail, that the class action becomes the remaining manner in which the imbalance of power can be remedied. When all other options have been exhausted, prohibitions on class actions in contractual agreements should not be upheld according to Professor Rosenbloom.

**d. Judicial Case Management Theory**

As set out below in our discussion on the efficacy of the class action prohibition used by Quiznos, class prohibitions, while useful tools to defeat group actions, are subject to the judicial concern that privately-negotiated class waivers might undermine the court’s ability to effectively manage its docket in conflict with its obligations under the Federal Rules of Civil Procedure.

**e. Low-Dollar Case Theory**

One of the main purposes of a class action is that it provides an avenue for claims to be brought that otherwise would not be because of the cost of individual litigation. As Judge Richard Posner has said, “[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.” Traditionally, when

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218 Id.

219 Id. at 279.

220 Carnegie v. Household Int’l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (emphasis in original) (quoted in Concepcion, 131 S. Ct. at 1761 (Breyer, J., dissenting)).
plaintiffs could prove that their payoff was so far outweighed by the cost of individual litigation, unconscionability or vindication of statutory rights could be invoked to strike down a class action waiver. While the advent of Concepcion certainly affects this approach where the parties have agreed to arbitrate, the amount of money at stake has customarily been one of the most important elements in the courts' analysis of class prohibitions.

Cases leading up to Concepcion establish that courts generally have a fairly low threshold for when they believe individual litigation is cost-justified. While a consensus low figure basis for cost-effective litigation has never been reached, it remains settled that it is the plaintiffs' burden to establish not only the likelihood of incurring such costs but why those costs would prevent it from pursuing individual litigation. One of the most instructive examples of this is in American Express Merchants Litig. where plaintiffs' expert witness showed that potential individual claims of approximately $40,000 did not justify the costs of individual litigation that were at a minimum several hundred thousand dollars. The Second Circuit agreed with the plaintiffs' expert and held the class action waiver in the arbitration agreement unconscionable.

Following Concepcion, it is anyone's guess how the lower courts will address this practical concern.

f. Knowing Waiver Theory

As a final attempt to get a court to invalidate a class action waiver, plaintiffs may attempt to argue that they did not knowingly waive their rights to such a remedy, and thus, enforcement of the waiver would be improper. Because courts generally assume that parties know and understand the agreements they enter into, this is not the easiest path to defeating a class action prohibition. However, general factors weighing in favor of one not knowingly waiving their right to a class action include plaintiff not being given an adequate amount of time to review and understand the agreement and the placement of the class action waiver in the agreement's fine print.

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222 Cases show a range between $75,000 down to $5,000 as a sufficient basis for cost-justified litigation. See supra n.220. Generally, it appears that five-figure claims can justify individual litigation.

223 554 F.3d 300 (2d Cir. 2009), vacated and remanded sub nom., Am. Express Co. v. Italian Colors Rest., 130 S. Ct. 2401 (2010), aff'd reh'g in re Am. Express Merchs.' Litig., 634 F.3d 187 (2d Cir. 2011).

224 In re Am. Express Merchs.' Litig., 634 F.3d 187, 198 (2d Cir. 2011).

225 Note that this decision was rendered one month prior to the Supreme Court's decision in Concepcion. In American Express, the Second Circuit worked to distinguish the case from Stolt-Nielsen (which caused the case's remand) stating that while the court cannot compel parties into class arbitration where they did not agree to it, there will still be instances where class action waivers render arbitration agreements unconscionable. Following Concepcion, this rationale is dubious.

2. Class Prohibitions in the Quiznos Litigation – Same System; Same Class Action Prohibition; Different Results

In separate litigation regarding the exact same Quiznos franchise agreement *not involving an arbitration clause*, two district courts reached opposite decisions regarding the enforcement of the agreement’s class action prohibition. In both instances, franchisees brought suit, alleging claims for fraud, violations of the RICO statute, and breach of contract, among other things, and sought class certification despite the presence of the class prohibition. Quiznos contested the certification in both instances. With both decisions largely dependent upon how the court chose to define the issue, a Colorado district court upheld the prohibition in *Bonanno*\(^{227}\) and a Pennsylvania district court struck down the prohibition in *Martrano*.\(^{228}\) As no subsequent decisions involving similar fact patterns have been rendered since their resolution, both cases remain on point as good law.

a. Prohibition Upheld: *Bonanno* (Colorado)

In upholding the class action prohibition, *Bonanno* provides an illustration of how a court can reject several of the aforementioned theories against class action prohibitions in a non-arbitration context. In its decision, the *Bonanno* court both directly and indirectly rejected the franchisees’ assertion of state law unconscionability, low-dollar case, power balance, and knowing waiver theories.

In starting her analysis, Judge Arguello noted that class actions have historically been a procedural tool. She thus defined the issue as the right to a procedural mechanism, not an individual substantive right.\(^{229}\) From there, the court moved on to address the paramount question of unconscionability, noting that because a substantive right was not at issue less stringent review was necessary to determine if there was procedural unconscionability.\(^{230}\) Observing that franchisees had ample time to review the franchise agreement prior to signing it (under the operative franchise regulations) and that the placement of the class prohibition was not designed to mislead, the court rejected both the procedural unconscionability and knowing waiver theory arguments.\(^{231}\)

Next, the court turned to the franchisees’ argument that individual litigation was not cost-justified and would prevent it from obtaining legal redress. Distinguishing the case from *American Express*, the court determined that the lack of “expensive expert analysis or massive, widespread discovery” coupled with claims of “$60,000 to $75,000 plus attorneys’ fees” would not bar the franchisees from legal redress through individual litigation.\(^{232}\) Despite upholding the class prohibition for the aforementioned reasons, in closing, the *Bonanno* court raised the

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\(^{227}\) *Id.* at *16.


\(^{229}\) *Bonanno*, 2009 WL 1068744, at *11. In effect, the court chose to look at the class action prohibition as a bar rather than a waiver because it (and franchisees’ counsel) identified waivers with substantive rights, akin to a jury trial. *Id.* at *11-12.

\(^{230}\) *Id.* at *11.

\(^{231}\) *Id.* at *18-19.

\(^{232}\) *Id.* at *21.
concern of judicial case management and in effect opened the door for the *Martrano* court decision a few months later.


Picking up from where the *Bonanno* court left off, the court in *Martrano* ran with the theory of judicial case management and struck down the very same class action prohibition used in the Quiznos system in a putative class action involving the franchisees in Pennsylvania. Despite plaintiffs' contention that the class action prohibition was unconscionable, the *Martrano* court based its decision solely on its right to manage its docket.

The *Martrano* court defined the issue of whether to enforce a class action prohibition as a “threshold question” of federal law. To establish the basis of a federal law question, the court cited to Supreme Court precedent stating that “when a situation is covered by one of the Federal Rules . . . the court has been instructed to apply the Federal Rule.” From there, the court reasoned that because class-wide adjudication was governed by Federal Rules, it only needed to determine if giving effect to the class prohibition harmonized with the intent of those rules.

Identifying Federal Rules of Civil Procedure 23 and 42 (consolidation; separate trials) as directly applicable, the district court first noted that parties’ preferences are not encompassed factors within the rules. This finding allowed the court to discount the substantial weight traditionally given to parties in forming their own agreements while also bolstering the goals of “efficient judicial administration.” Noting that enforcement of the class action prohibition could produce an excess of identical cases in the judicial system, the court concluded that such a result would be inconsistent with “the just, speedy, and inexpensive determination of every action and proceeding” as called for in Fed. R. Civ. P. 1, and thus, struck down the prohibition.

The two competing decisions from the Quiznos litigation demonstrate courts looking at the same contractual waiver can approach the problem in polar opposite ways. Only time will tell which judge got it right.

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233 Id. at *23.
235 Id. at *19 n.50.
236 Id. at *20 (quoting *Hanna v. Plumer*, 380 U.S. 460, 471 (1965)).
237 Id.
238 Id. at *21.
239 Id.
240 Id. (quoting Fed. R. Civ. P. 1).
VI. ASSOCIATIONAL STANDING: PURSUITS BY FRANCHISEE ASSOCIATIONS

A. The Law of Associational Standing

An attack on a plaintiff’s standing “challenges the court’s power to hear the case.” 241 Where a party makes a Rule 12(b)(1) factual attack on standing and therefore an attack on the court’s subject matter jurisdiction, “[the] court has wide discretion to allow affidavits, documents, and even a limited evidentiary hearing to resolve disputed ‘jurisdictional facts.’” 242 Because a Rule 12(b)(1) motion challenges a court’s “power to hear the case,” the court must “weigh the conflicting evidence to arrive at the factual predicate that subject matter jurisdiction exists or does not exist.” 243 The plaintiff bears the burden of establishing the existence of subject matter jurisdiction. 244

Article III of the Constitution limits subject matter jurisdiction to “cases or controversies.” 245 Whether a party has constitutional standing is a question of law. 246 An association has standing to bring suit on behalf of its members only if it satisfies the three-prong test articulated by the United States Supreme Court in Hunt v. Washington State Apple Advertising Comm’n 247:

   a. Its members would otherwise have standing to sue in their own right;

   b. The interests it seeks to protect are germane to the organization’s purpose; and

   c. Neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. 248

In order to satisfy the first Hunt element (that its members would otherwise have standing in their own right), the association must prove that at least one of its members satisfies each of three elements of standing. The United States Supreme Court articulated the elements of standing in Lujan v. Defenders of Wildlife:


243 Id. at 325.

244 COB Clearinghouse Corp. v. Aetna U.S. Healthcare, Inc., 362 F.3d 877, 881 (6th Cir. 2004); and Moore, 533 F. Supp. 2d at 744 (citing RMI Titanium Co., 78 F.3d at 1134).


248 See also Nestle Ice Cream Co. v. NLRB, 46 F.3d 578, 586 (6th Cir. 1995) (applying Hunt to deny associational standing).
Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an “injury in fact” — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

A failure to identify any specific member of the association that has already suffered or will imminently suffer “injury in fact” is fatal to a claim of associational standing.

When only a handful of association members benefit from a lawsuit, and when the stated purpose of the association is to advance the common good of all members, the lawsuit does not then protect interests germane to the purpose of the association, implicating the second element of associational standing articulated in Hunt. The constitution and bylaws of the plaintiff association may preclude standing. The court in Michigan Road Builders Association, Inc. v. Blanchard stated that one of the association’s specific purposes was to “conduct only those activities which are for the common good and benefit alike for all members.” Because the executive director of the plaintiff association testified that “probably a half a dozen” members of the association would benefit from a successful lawsuit, the court concluded that the lawsuit could not, logically, be for the common good and benefit of all members and dismissed the case for lack of standing.

The third element of associational standing is, as described by Judge Posner, “a non-constitutional doctrine, entirely judge-made, of standing, to which the unilluminating term ‘prudential standing’ has been affixed.” It is nevertheless a critical element of standing under Supreme Court precedent. A plaintiff association must prove that “neither the claim asserted nor

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251 761 F. Supp. 1303.

252 Id. at 1312.

253 Id.

254 Mainstreet Org. of Realtors v. Calumet City, 505 F.3d 742, 745 (7th Cir. 2007).
the relief requested requires the participation in the lawsuit of each of the individual members.\textsuperscript{255}

Associational standing cases almost always arise as a challenge to a statute, regulation, or ordinance. A common characteristic of these claims is that courts may resolve the underlying issue (e.g., constitutionality of a statute) as a matter of law. Where, however, an association advances claims based on breach of contract, the courts routinely reject associational standing.\textsuperscript{256} That individualized proof may be easy to show is irrelevant; the mere existence of its necessity requires dismissal.\textsuperscript{257}

B. Franchisee Associational Standing Cases

Jon S. Swierzewski, in a 2007 Franchise Law Journal article, observed that franchisee associations claiming breach by a franchisor of their members’ franchise agreements “rarely, if ever, can satisfy the requirements” of Warth v. Seldin.\textsuperscript{258} As observed by William P. Steele III and A. Darby Dickerson some time ago:

In sum, contract-based or contract-related claims involving the rights of parties in a commercial context are not appropriate claims for an association to bring on behalf of its contracting members. Such claims are unlike a constitutional challenge to a statutory enactment, where the court is faced with a “pure question of law,” and no individualized proof regarding the enactment’s effect on the association’s members is required. By their very nature, contract-related claims require a court to inquire into the particular circumstances of the parties to the contract in order first to determine the existence of the contractual rights and then to determine both the fact and extent of any harm suffered as a result of any alleged breach of such rights. Because the franchisor-franchisee relationship is

\textsuperscript{255} Hunt, 432 U.S. at 343.

\textsuperscript{256} See Warth v. Seldin, 422 U.S. 490, 515 (1975) (dismissing suit by association because “whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof”); Dalworth Oil Co. v. Fina Oil & Chemical Co., 758 F. Supp. 410 (N.D. Tex. 1991) (holding that an association’s suit on behalf of wholesale motor fuel distributors against an oil company for violating the Petroleum Marketing Practices Act must be dismissed for lack of standing because individual participation by its members would be required to determine the contractual claims involved, even though the contracts of the various association members are similar); Rent Stabilization Ass’n v. Dinkins, 5 F.3d 591, 596-97 (2d Cir. 1993) (an association representing landlords lacked standing to claim that the application of the city’s rent control scheme violated constitutional principles because the court could not assess whether a member had a claim for relief without “delving into individual circumstances” to determine whether there had been a taking of property); Pennsylvania Chiropractic Ass’n v. Independence Blue Cross, No. 2705 CONTROL 080850, 2001 WL 1807984 (Pa. Com. Pl. Sept. 14, 2001) (association of chiropractors lacked standing to bring suit for injunctive relief based on defendants’ alleged policy of denying reimbursements for certain services because the court determined that individual participation by the members was required to resolve the suit); Friends for Am. Free Enter. Ass’n v. Wal-Mart Stores, Inc., 284 F.3d 575 (5th Cir. 2002) (distinguishing between prior associational standing decisions that focused on pure questions of law and claims that involve tortious interference and holding that there can be no associational standing in a contract interference case without participation of the individual members of the association).

\textsuperscript{257} Rockford Principals & Supervisors Ass’n v. Board of Educ. of Rockford School District No. 205, 721 F. Supp. 948 (N.D. Ill. 1989) (denial of associational standing to bring a breach of contract claim because individualized proof is necessary to prove existence of contractual obligations).

\textsuperscript{258} Standing in Franchise Disputes: Check the Invitations, Not Every Party Gets Inside, 26 Franchise L.J. 107, 111-12 (2007).
based on the parties’ agreement, a franchisee association suing a franchisor on behalf of its members will inevitably face the same difficulties of other associations that have been denied standing for failure to meet the third prong of Warth’s three-pronged test, namely, that neither the claim asserted nor the relief requested requires participation of the members of the association in the suit.259

Steele and Dickerson have been proven right, for the most part. The court in DDFA of South Florida, Inc. v. Dunkin’ Donuts, Inc.260, for example, denied standing to an association of Dunkin’ Donuts franchisees who brought suit against their franchisors for a declaratory judgment construing certain provisions of their franchise agreements. The court, applying Hunt, held that the association did not have standing to assert contract claims on behalf of its franchisees because determining compliance “requires individual determinations.”261 According to the court, “unlike most prior associational standing cases, this action does not challenge a statute, regulation or ordinance, but rather seeks a declaratory judgment with respect to ‘uniform’ franchise agreements between DDI and DDFA’s members.”262 Because the complaint asked whether the parties had complied with the provisions of the franchise agreement, the court held that the “Complaint does not raise a ‘pure question of law’ which can be considered without the individual participation of DDFA’s members.”263

The association in Dealer Store Owners’ Ass’n, Inc. v. Sears, Roebuck and Co.264 sought a declaratory judgment that Sears had breached its agreements with its dealers by selling Sears branded products in Kmart stores. In denying standing, the court held that “associational standing is not appropriate where a plaintiff seeks a declaration of rights on a group of contracts that are not uniform.”265 The court noted that an “individual inquiry into each Dealer’s Agreement needs to be undertaken to determine whether any breach or threatened breach has occurred. It is not sufficient to allege that ‘many’ or ‘most’ of the issues apply to the Dealers . . . .”266

The court in Michigan Dairy Queen Operator’s Ass’n v. International Dairy Queen, Inc.267 denied association standing to a plaintiff challenging the franchisor’s contractual right to require the modernization of stores. The court found that even a general declaration that the franchisor had to comply with its contractual obligations “would inevitably require the participation of the actual contracting parties,” including the franchisee.268 The court said that

260 No. 00-7455-CIV, 2002 WL 1187207 (S.D. Fla. May 2, 2002).
261 id. at *7.
262 id.
263 id.
265 id. at *5.
266 id. at *4.
268 id. at *1.
“fundamentally I don’t understand how a court can meaningfully construe a contract that involves a party not before the court.”

The court found that a franchise association had standing in *Nat’l Franchisee Ass’n v. Burger King Corp.* The National Franchise Association (“NFA”) sought a declaratory judgment that Burger King did not have the right to set the maximum price franchisees could charge for a product. Of particular concern to the NFA was the maximum price Burger King set for the double cheeseburger. The court ultimately concluded that Burger King had the right under the express language of the franchise agreement to set a maximum price, but also found that it could not grant a motion to dismiss because the one-dollar maximum price for the double cheeseburger might breach Burger King’s duty of good faith. But first the court had to address associational standing. Applying the first and third prongs of the *Hunt* test, the court concluded that the first prong was met because NFA alleged that at least one of its members would suffer injury from the setting of the maximum price. As to the third prong, “this Court concludes that the language of Section 5 [of the franchise agreement] is unambiguous and therefore its meaning may be determined as a matter of law without participation of each individual Franchise.” As to the good faith claim, the court said it was too early to determine whether this would require participation by the individual franchisee.

On June 27, 2012, the First Circuit Court of Appeals in *Fantastic Sams Franchise Corp. v. FSRO Association, Ltd.* affirmed a decision denying a franchisor’s petition to compel arbitration on an individual basis in an arbitration claim brought by a franchisee association on behalf of its members. The district court had compelled individual arbitration as to certain members of the association based on the language of their license agreements with the franchisor, but had denied it with respect to 10 other franchisees whose agreements contained different language regarding the duty to arbitrate and how. Rejecting the franchisor’s assertion that *Stolt-Nielsen* obligated the district court to compel individual arbitration as to all of the franchisees, the First Circuit concluded that whether the agreements allowed for an associational claim should be left to the arbitrators. The court expressly refused to adopt the franchisor’s assertion that there must be express contractual language evincing the parties’ intent to permit class or collective arbitration for it ever to be allowed.

**C. The Impact of the Franchisee’s Commitment to Arbitrate**

The existence of a commitment to arbitrate generally precludes associational standing. As a general rule, franchisees with a commitment to arbitrate do not, as a matter of law, have standing to file a lawsuit. Their exclusive remedy is arbitration. The court held in *In re Managed Care Litigation* that because some members of the plaintiff association had

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269 *Id.* at *2.

270 715 F. Supp. 2d 1232 (S.D. Fla. 2010).

271 *Id.* at 1240.

272 683. F3.d 18 (1st Cir. 2012)


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enforceable arbitration provisions in their HMO contracts, and some did not, the association did not have standing to bring its claims on behalf of the entire association. The court said that “an association that abandons some of its allegedly injured members no longer purports to be a ‘representative’ of its membership. Instead, it attempts to act as a de facto class aggregator of selected members and seek prospective injunctive relief that would benefit all of its membership.”  

The franchisor of the Subway system defeated associational standing in Doctor’s Assocs., Inc. v. Downey. The court denied standing on the theory allowing a franchisee association to bring a lawsuit would constitute an end run around its members’ duty to arbitrate.

The federal court reached the same conclusion in NIACCF v. Cold Stone Creamery, Inc. Cold Stone filed a motion to stay a lawsuit filed by an association representing an unknown number of its franchisees. NIACCF argued that a stay was unwarranted because it never agreed to arbitrate with Cold Stone. The court ruled that “[a]n organization consisting of franchisees should not be permitted to do that which the individuals themselves may not do.” The court granted the motion to stay.

The court in the Edible Arrangements case reached a different conclusion. It concluded that the franchisee association had standing based on a Third Circuit opinion that was not really on point.

One issue left open in the Downey case was whether the association itself might be a proper party to arbitration. In an order of dismissal, the court ruled that this issue was best left for resolution by the arbitrator. The Fourth Circuit rejected a similar claim in Davis Vision, Inc. v. Md. Optometric Ass’n. The First Circuit breathed new life into the theory in its Fantastic Sams opinion.

D. Lessons From Franchisee Associational Standing Cases

A key for avoiding franchisee associational standing continues to be arbitration. And the key to using an arbitration provision to preclude standing is in the language of the commitment.

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275 In re Managed Care at *10. See also Maryland Optometric Ass’n v. Davis Vision, Inc., Case No. WDO-04-02153, slip op. at 8 (D. Md. Dec. 21, 2004) (association could not seek relief on behalf of those association members who were not parties to agreements with arbitration provisions because the association “is not entitled to pick and choose the members that they represent”).

276 No. 3:06-CV-1170.

277 Id.


279 Id. at *2.

280 For a review of the Edible Arrangements decision, see Allan P. Hillman and Scott C. Kern, Inedible Arrangements: Can Arbitrator Clauses and Franchisee Associations Co-Exist, 15 Franchise Law.1 (2012).

281 187 F. Appx. 299 (4th Cir. 2006).

282 See n.28, supra.
The *Fantastic Sams* decision suggests that a broad promise to arbitrate all disputes may give an association standing to arbitrate disputes on behalf of its members, even if the agreement precludes multi-party and class arbitration. The moral for the franchisor is to disclaim specifically the right of an association to arbitrate disputes. Similarly, as noted earlier, the arbitration clause should preclude the arbitrator from consolidating claims and finding associational standing.\footnote{For a summary of the case and the district court’s analysis, see Edward W. Dunham and Erika L. Amarante, *DAI v. Downey: “Associational Standing and Arbitration,”* 27 Franchise L.J. 16 (2007).}

## VII. SETTLEMENT OF THE GROUP ACTION

Parties to lawsuits are typically free to settle litigation on their own volition without interference from the court. So, in a multi-party action involving multiple franchisees against a single franchisor, the parties will be in a position to settle the lawsuit on their own initiative. Class action settlements are far different.

### A. Court-Driven Process

In federal court, Fed. R. Civ. P. 23(e) governs class action settlements. Generally speaking, the “claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval.”\footnote{Fed. R. Civ. P. 23(e).} While the court’s role is critical in any class action settlement, it is limited to approving, disapproving, or imposing conditions on the settlement as the judge cannot rewrite the agreement.\footnote{Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998) (“The settlement must stand or fall in its entirety.”); *In re Auction Houses Antitrust Litig.*, No. 00 Civ 0648, 2001 WL 170792, at *18 (S.D.N.Y. Feb. 22, 2011) (approval of settlement conditioned on parties adopting changes specified by the district court).}

Practically speaking, if a court imposes conditions on approving a class action settlement, the parties likely will confer and attempt to achieve an agreement that meet’s the court’s demands. To be sure, courts are required to exercise greater diligence in their review of a proposed class action settlement when cases are certified solely for settlement purposes as compared to those cases where certification under Fed. R. Civ. P. 23(a) and (b) has resulted from the adversarial process.\footnote{Hanlon, 150 F.3d at 1026 (stating that a “higher standard of fairness” is required in cases where certification is proposed via settlement); see also Amchem, 521 U.S. at 620 (providing for “undiluted, even heightened, attention” to class certification requirements in a settlement class context).}

Common relief sought in a class action settlement include: (i) monetary payments; (ii) non-monetary relief (e.g. debt forgiveness, coupons, etc.); (iii) releases; (iv) injunctive relief; (v) attorneys’ fees and costs; and (vi) incentive awards to class representatives.\footnote{See Cohen and Lagarias, *supra* n.52, at 34.} Cynics will say that class actions (particularly the settlement of them) achieve little for the class and much for class counsel and the defendant who most often achieves a comprehensive release of claims. If the supervising court properly performs its role in the fairness hearing, such concerns can be regulated in meaningful ways.
Courts will be on the lookout for conduct that suggests collusion between class counsel, the representative plaintiffs, and the defendants that negatively and substantively affects the class as a whole. Some common scenarios include:

(i) Conducting a “reverse auction,” in which a defendant selects among attorneys for competing classes and negotiates an agreement with the attorneys who are willing to accept the lowest class recovery (typically in exchange for generous attorney fees).

(ii) Granting class members illusory nonmonetary benefits, such as discount coupons for more of defendants’ product, while granting substantial monetary attorney fee awards.

(iii) Filing or voluntarily dismissing class allegations for strategic purposes (for example, to facilitate shopping for a favorable forum or to obtain a settlement for the named plaintiffs and their attorneys that is disproportionate to the merits of their respective claims).

(iv) Imposing such strict eligibility conditions or cumbersome claims procedures that many members will be unlikely to claim benefits, particularly if the settlement provides that the unclaimed portions of the fund will revert to the defendants.

(v) Treating similarly situated class members differently (for example, by settling objectors’ claims at significantly higher rates than class members’ claims).

(vi) Releasing claims against parties who did not contribute to the class settlement.

(vii) Releasing claims of parties who received no compensation in the settlement.

(viii) Setting attorney fees based on a very high value ascribed to nonmonetary relief awarded to the class, such as medical monitoring injunctions or coupons, or calculating the fee based on the allocated settlement funds, rather than the funds actually claimed by and distributed to class members.

(ix) Assessing class members for attorney fees in excess of the amount of damages awarded to each individual.288

B. Motion for Preliminary Approval and Notice

Whether settlement is proposed before or after certification is formally adjudicated, a class action settlement must be presented to the court by motion seeking preliminary approval and thereafter defended with notice and an opportunity to be heard by all class members at a final fairness hearing.289


289 Uhl v. Thoroughbred Tech. and Telecomms., 309 F.3d 978 (7th Cir. 2002).
On preliminary approval, the parties (working jointly or unilaterally) will typically ask the court to: (i) grant preliminary approval of the settlement agreement; (ii) conditionally certify the settlement classes if the court has not already certified them pursuant to Fed. R. Civ. P. 23(a) and (b); (iii) appoint plaintiffs as class representatives and their attorneys as class counsel; (iv) approve and authorize the dissemination and mailing of the class notice and all documents related to the participation of class members in the settlement (e.g., claim forms, opt out forms, appeal forms, etc.); (v) appoint (where appropriate) a class action administrator to assist in the administration of the settlement; and (vi) set a date for a final fairness hearing where the court will be asked to issue final approval of the settlement after finding that it is "fair, reasonable, and adequate" to the class.\(^{290}\) At the preliminary-approval stage of this two-step process, the court determines only "whether the proposed settlement is 'within the range of possible approval.'"\(^{291}\) The judge should make a preliminary determination that the proposed class satisfies the criteria set forth in Fed. R. Civ. P. 23(a) and at least one of the provisions of Fed. R. Civ. P. 23(b).\(^{292}\) A full assessment of the settlement awaits the final fairness hearing where the court will have before it, among other things, the reaction of class members to the proposal.\(^{293}\)

Notice of a class action settlement is necessary to satisfy due process concerns stemming from the absence of the class members because the settlement can and likely will have preclusive effect on each class member bound by it.\(^{294}\) The rule directs the court to provide "notice in a reasonable manner to all class members who would be bound by the proposal."\(^{295}\) According to the Supreme Court, this means that the notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."\(^{296}\) In practical terms, class counsel drafts the notice with input (often significant) from defendant's counsel. Often the court will direct that the notice of the fairness hearing required by Fed. R. Civ. P. 23(e) be combined with the notice under Fed. R. Civ. P. 23(c)(2) directing notice at the specific classes affected by the settlement.\(^{297}\) The notice should be neutral in tone and advise all class members about the details of the litigation, the settlement, how to obtain a copy of the settlement agreement, and provide ample time to allow recipients to review the proposed settlement, to file claims, to opt out, or to object.\(^{298}\) A sample notice used in a franchise class action is attached to this paper as Exhibit A.

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\(^{290}\) Fed. R. Civ. P. 23(e)(2).


\(^{293}\) *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 308 (7th Cir. 1985); *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1014 (N.D. Ill. 2000).


\(^{295}\) Fed. R. Civ. P. 23(e)(1).


\(^{298}\) Id.
C. Class Administration

In addition to approving the settlement through the processes described above, the court retains jurisdiction to ensure that the class action settlement is administered properly. This starts at the preliminary approval stage where the court is typically asked to appoint an administrator to assist in that process. The administrator’s duties may include such things as taking custody of settlement funds, processing the claims within the meaning of the agreement and notice requirements, implementing the distribution procedures for settlement payments, reporting to the court on the status of its efforts, and overseeing the implementation of an injunction.\textsuperscript{299} Often the parties recommend a private company (of which there are many) to assist the court in its administration of the settlement. More often than not, defendant incurs the administration costs as part of the settlement. After final approval, the court will retain jurisdiction to oversee compliance with its final judgment approving the settlement.

D. The Effect of Class Members When They Opt-In or Opt-Out: Preclusion Doctrines

As discussed above, Fed. R. Civ. P. 23 requires all class members of a certified class to be given notice of a settlement, the opportunity to be heard in relation to it, and the choice to opt out of the settlement. If a class member does not opt out, they will be bound by the terms of the settlement agreement, including any and all releases provided in it.\textsuperscript{300} Thus, a party who fails to opt out will confront claim and issue preclusion defenses if they later attempt to litigate against the defendant.\textsuperscript{301} In some contexts, there are “opt-in” classes where class members must affirmatively state that they intend to be bound by the class settlement in order for the settlement to have effect. This is the rule, for example, in wage claims under the Fair Labor Standards Act.\textsuperscript{302}

Of course, there are exceptions to the preclusive effect of a class action judgment. First, practitioners should be mindful of the judgment requirement set forth in Fed. R. Civ. P. 23(c)(3):

\begin{enumerate}
\item[(3)] \textit{ Judgment}. Whether or not favorable to the class, the judgment in a class action must:
\begin{enumerate}
\item[(A)] for any class certified under Rule 23(b)(1) or (b)(2) include and describe those whom the court finds to be class members; and
\item[(B)] for any class certified under Rule 23(b)(3) include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.\textsuperscript{303}
\end{enumerate}
\end{enumerate}

\textsuperscript{299} \textit{Id.} at § 21.661.


\textsuperscript{301} \textit{Id}.

\textsuperscript{302} \textit{See} 29 U.S.C. § 216(b).

\textsuperscript{303} Fed. R. Civ. P. 23(c)(3).
The failure of the court to include language in its judgment consistent with this requirement may give a class member a cognizable basis to attack the judgment later.

Second, the notice of the proceedings after certification must follow the requirements of Fed. R. Civ. P. 23(d), which provides for different standards of notice depending on whether the class is one brought under Fed. R. Civ P. 23(b)(1) or (2) (in which case the notice is permissive at that point) or one brought under Fed. R. Civ. P. 23(b)(3) (in which case the notice is mandatory). If the notice is corrupt, an absent class member could easily impeach a judgment using these provisions.

Finally, the courts have recognized certain instances where preclusion doctrines should not be applied where the adequacy of counsel in the class action is collaterally challenged in a later proceeding. In 2008, the United States Supreme Court laid down a test to determine the preclusive effect of a judgment on non-parties. In *Taylor v. Sturgell*, the Court found that “[a] party’s representation of a nonparty is ‘adequate’ for preclusion purposes only if, at a minimum: (1) the interests of the nonparty and her representative are aligned . . . and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty.”

While not a class action, the principle enunciated in *Taylor* reaches deep. Thus, in *Shook v. Board of County Commissioners of El Paso*, the Tenth Circuit determined that the failure of a particular putative class to be certified could not have preclusive effect on “different plaintiffs in a future suit seeking certification of a different class or seeking different relief.” Compare this result to the Seventh Circuit’s determination from *In re Bridgestone/Firestone, Tires Prods. Liab. Litig.*, where the court determined that an order denying class certification might have preclusive effect on unnamed class members so long as the class representatives and class counsel adequately represented them.

The safest course for any class member is to vigilantly protect their rights. Read the notice. Analyze the claims. Determine if the case as adjudicated meets your individual needs. If not, opt out and ensure for yourself that there are no preclusive effects of the class action. While there are ways to attack a class action judgment, it is far better to be ahead of the judgment and protect one’s rights.

**E. Attorneys’ Fees and Costs**

The application for attorneys’ fee awards typically come at the final fairness hearing as part of a settlement or after conclusion of the litigation of class proceedings. The request may be based on a percentage of a common fund that the class action has produced for the class or

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304 Fed. R. Civ. P. 23(c)(2).
307 543 F.3d 597, 611 (10th Cir. 2008).
based on a statutory fee award.\textsuperscript{309} The statutory approach is generally calculated using the lodestar method whereby the court multiplies the number of hours spent by the reasonable hourly rate and then enhances the number by a multiplier.\textsuperscript{310}

The Seventh Circuit has found reversible error for a district court to deny a risk multiplier/lodestar to successful class counsel “in a case in which the lawyers had no sure source of compensation for their services.”\textsuperscript{311} Lodestars vary by circuit and district court, but a multiplier of between 1.5 and 2.5 is not uncommon.\textsuperscript{312} In common fund cases, the courts will often use the lodestar method as a crosscheck to ensure that the percentage approach does not result in excessive fee.\textsuperscript{313} While not a required practice, it is prudent (and, in the opinion of the authors, ethical) for the parties to separately negotiate the payment of fees and costs—after an agreement has been reached on the settlement terms for the class. This avoids an actual or perceived conflict, which the court will be vigilant in monitoring.\textsuperscript{314}

As with all things involving class proceedings, class members should be given notice of the fee request and an opportunity to be heard or otherwise object to the proposal. Critically, only the party being asked to pay the fee (i.e., the defendant) or class members can object to it.\textsuperscript{315} Class counsel bears the burden of proving their entitlement to the fee and shall submit sufficient information to the court to allow it to make a determination of its reasonableness.\textsuperscript{316} Courts can grant discovery rights to objectors if they believe the attorneys’ fee application is incomplete or otherwise the result of collusion or a conflict.\textsuperscript{317}

F. Incentive Awards

Incentive awards are payments to the class representatives and are meant to compensate them for work done on behalf of the class and the risk associated with bringing the action.\textsuperscript{318} The Seventh Circuit has established this criteria for evaluating an incentive award: “[T]he actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation.”\textsuperscript{319} In \textit{Cook v. Niedert}, it affirmed the incentive award because, “[m]ost

\begin{footnotesize}
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  \item[309] MANUAL FOR COMPLEX LITIGATION § 21.7 (4th ed. 2004).
  \item[310] Id.
  \item[311] \textit{In re Continental Ill. Sec. Litig.}, 962 F.2d 566, 569 (7th Cir. 1992).
  \item[313] Id.
  \item[314] MANUAL FOR COMPLEX LITIGATION § 21.7 (4th ed. 2004).
  \item[315] Id. at § 21.72.
  \item[316] Id.
  \item[317] Id.
  \item[319] \textit{Cook v. Niedert}, 142 F.3d 1004, 1016 (7th Cir. 1998).
\end{itemize}
\end{footnotesize}
significantly, the special master found that, in filing the suit, [the representative plaintiff] reasonably feared workplace retaliation."320

While not unusual in class action cases, courts will be vigilant in ensuring they are not disproportionate to the realities of the result or that they otherwise create a conflict, real or perceived, among class members.321 For this reason, the Ninth Circuit refused to approve a settlement where the court found that the incentive awards demonstrated that the class representatives were "more concerned with maximizing [their own] incentives than with judging the adequacy of the settlement as it applies to class members at large."322 In an even more egregious outing of such concerns, the Ninth Circuit refused to approve incentive awards where class counsel and the representative plaintiffs had entered into a sliding scale approach to the amount that would be paid to the representative plaintiffs.323 Approval of incentive awards truly depends on the facts and circumstances of the case. While many awards are less than $20,000, cases from around the country show a range of awards with some values between $50,000 and $303,000.324

G. Final Fairness Hearing and Objectors

At the final fairness hearing, the parties seeking approval must establish that the proposed settlement is "fair, reasonable, and adequate."325 The court should be vigilant in analyzing any class settlement to ensure this standard is met. While the requirements for what a district court must look at by circuit, some common factors used by courts in reviewing the fairness of a class action settlement include: (i) likelihood of success at trial; (ii) likelihood of class certification; (iii) status of competing and overlapping actions; (iv) value of the claims; (v) total present value of monetary and non-monetary terms; (vi) attorneys' fees; (vii) costs of litigation; and (viii) defendant's ability to pay.326

Objectors play an essential role in the process because they can assist the court in its evaluation of the fairness, adequacy, and reasonableness of the proposed settlement.327 Any class member who does not opt out may object to a settlement, voluntary dismissal, or compromise.328 Parties to the settlement itself can also object.329 Objections can be individually

320 Id.
321 See Cohen and Lagarias, supra n.52, at 38.
322 Staton v. Boeing Co., 327 F.3d 938, 977 (9th Cir. 2003).
323 Rodriguez v. West Publ'g Corp., 563 F.3d 948, 957 (9th Cir. 2009).
327 Id. at § 21.643.
328 Id.
based where the objector has a private challenge to the proposed settlement or be based on a class concern as a whole.330

Regrettably, there are professional objectors who use the right of objection to forestall a settlement for a private advantage (i.e., typically a payoff for getting in the way). The job of the court is to separate out legitimate objections from those designed to hold a class action settlement hostage, overruling the latter to allow for the settlement to proceed and relying on the former to force the parties to address the settlement deficiencies. In Siemer, the district court overruled an objection at the fairness hearing where a sole objector challenged the class settlement involving approximately 8,600 current and former franchisees of the Quiznos franchise system.331 There the objector, a former franchisee in the system, objected to a provision in the settlement agreement that provided debt forgiveness to certain class members.332 The objector, who paid all of its outstanding obligations to the franchisor before closing their store, asserted that the settlement was unfair to those, like the objector, who had paid all such past debts.333 Granting the objector’s motion to intervene but denying a request for discovery and overruling the objection, the district court found that a “not-insignificant percentage of those franchisees who received class notices opted out of the settlement[]” and that the objectors “were free to do so, as well, and to bring their own individual action against Quiznos or to negotiate independently for a better deal.”334 The district court reminded the objector that it is not incumbent upon the parties to have struck the “best possible deal” but rather one that complied with Fed. R. Civ. P. 23(e)(2)’s requirement that the settlement be “fair, reasonable, and adequate.”335

Often objectors leverage their power by insisting on the right to discovery to establish the basis for their objection and to test the collusiveness of the bargain struck by class counsel, the representative plaintiffs, and the defendant. Yet, such discovery is appropriate “only where the party seeking it lays a foundation by adducing from other sources evidence indicating that the settlement may be collusive . . . .”336 The court must sort out the legitimate from the illegitimate—those truly meritorious and those brought for improper purposes.337 Because objectors can appeal decisions overruling their objections, they hold significant power stemming from the inherent requirements behind the review process because of the ability of the objector to hold up a class settlement affecting thousands and worth millions.338 Courts will be vigilant in

329 Id.
330 Id.
332 Id.
333 Id.
334 Id. at *1.
335 Id. at *2.
337 In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297 (N.D. Ga. 1993); In re Lorazepam & Clorazepate Antitrust Litig., 205 F.R.D. 24, 26 (D.D.C. 2001) (holding that “[c]lass members who object to a class action settlement do not have an absolute right to discovery; the Court may in its discretion allow discovery if it will help the Court determine whether the settlement is fair, reasonable, and adequate” and allowing limited discovery).
spotting non-meritorious objections and will not hesitate to throw out those that are brought improperly or without a factual basis.339

VIII. PRACTICAL CONSIDERATIONS

A. Who to Retain

Not every group action complaint is equal. But it would be imprudent to give short shrift to a franchisee assertion of a systemic problem and the need for class or mass action relief. While a large franchise system may be well-suited to defend a multi-party action involving 20 franchisees not employing Rule 23, a small system may find such a case troubling—particularly if the group who has joined together constitutes the bulk of the franchisees. In this same vein, a class action in a larger system can have equally devastating effects—no matter the legal outcome—on the business and public relations operations of the franchisor. Using the procedural tools to initiate group actions, franchisee lawyers can rightfully and legally call a franchisor’s conduct into account where the franchisor loses even if it wins. One needs to look no further than class litigation examples in such systems as Meineke, Quiznos, Chicken Delight, and 7-Eleven to appreciate how a collective action against the system can pose huge legal, business, and public relations obstacles for extended periods of time.340

The seriousness of such cases dictates careful consideration of who to retain to represent the franchise system in any group litigation. As one set of commentators see it, the outside counsel retained to defend a franchise system against a “bet the company” attack by its franchisees plays a multi-faceted role, including that of psychiatrist, diplomat, field general, and movie director.341 Their job is to navigate choppy waters brought forth by a perfect storm of management directives and franchisee unrest that typically start as smaller problems and escalate over time in a way perhaps initially never imagined.342

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339 See Scardelletti v. Debar, 265 F.3d 195, 204 n.10 (4th Cir. 2001) (reversed and remanded on other grounds, 536 U.S. 1 (2002)) (affirming denial of motion to intervene and stating “while [the court] should extend to any objector to the settlement leave to be heard, to examine witnesses and to submit evidence on the fairness of the settlement, it is entirely in order for the trial court to limit its proceedings to whatever is necessary to aid it in reaching an informed, just and reasoned decision” (quoting Flinn v. FMC Corp., 528 F.2d 1169, 1173 (4th Cir. 1975)); Lazy Oil Co. v. Wilco Corp., 166 F.3d 581, 591 (3d Cir. 1999) (affirming order approving settlement of class action and denying lead plaintiff’s objections and motions for certification of subclass and disqualification of class counsel); Maywalt v. Parker & Parsley Petroleum Co., 864 F. Supp. 1422, 1429-30 (S.D.N.Y. 1994) (settlement fair, adequate and reasonable despite objections from certain class members and class representatives).


342 The same can be said for locating an attorney willing to pursue group claims in a franchise system on behalf of the franchisees. Having sufficient economic resources is often a problem prohibiting group litigation by the franchisees. Contingency fee agreements may be required; class counsel may need to fund expenses. Most critically, it is incumbent upon the franchisees, if pursuing a class action, to ensure that counsel has sufficient experience in class proceedings and in the substantive area of the law, to meet the adequacy requirements of Fed. R. Civ. P. 23(a)(4).
B. Litigation Holds

In the day and age of electronic discovery, the litigation hold has become more critical than ever before. In a group action with many claimants, it is imperative that in-house counsel—at the first sign of trouble—even before suit is filed if able—initiate a written litigation hold that is directed at all potential custodians of information and all relevant data held by them. Blanket holds are not uncommon and thought should be given to obtaining written acknowledgements from the recipients of the hold to ensure receipt and compliance. An example of comprehensive litigation hold requiring such an acknowledgment is attached as Exhibit B. Such an approach will serve you well later if there is ever a question about the destruction of relevant evidence because you will be able to provide the court with ample evidence of your good faith.

Of course, it does not end there. In-house attorneys must work diligently with IT personnel to coordinate the cessation of any document destruction policies until further notice. Indeed, a litigation hold requires a party to suspend its routine document retention and destruction policies to ensure the preservation of relevant information. This includes intervening in any routine operations of an information system that provides for the automatic deletion or destruction of email. You should further ensure an early conversation with the IT staff to ensure an understanding of the location of all electronic evidence, how the company’s computer servers work and are integrated, the other (non-server solutions) being used by company employees, and the associated burdens of retrieving such information.

Why do all this? Simply put, the duty to preserve evidence does not begin upon receipt of a preservation request from plaintiff’s counsel or the filing of a lawsuit. The case law is nearly uniform that a hold must be put in place as soon as the party reasonably anticipates litigation. The standard is an objective one assessing whether “a reasonable person in the defendant’s position should have foreseen that the evidence was material to a potential civil action.” In some states, a charge of document destruction is measured by “whether [the party] knew or should have known at the time it caused the destruction . . . that litigation . . . was a distinct possibility.”

What triggers this standard is perhaps subject to some debate, but prudent counsel dictates that it is far better to place the litigation hold early rather than too late. A pre-filing letter from plaintiff’s counsel outlining racial profiling in defendant’s company was enough to trigger the need to hold all relevant evidence in Major Tours, Inc. v. Colorel. Similarly in the landmark case of Zubulake v. UBS Warburg LLC, the Southern District of New York found that the duty arose when the EEOC filed charges months before the commencement of a civil

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343 sanofi-aventis Deutschland GmbH v. Glenmark Pharms, Inc., No. 07-CV-5855, 2010 WL 2652412, at *3 (D. N.J. July 1, 2010);


347 In re Estate of Neumann, 2001 WI App 61, ¶ 84, 242 Wis.2d 205 (quoting Garfoot v. Fireman’s Fund Ins. Co., 228 Wis.2d 707, 724 (Wis. Ct. App. 1999)).

lawsuit by the plaintiffs. Failure to issue an appropriate and timely litigation hold will result in sanctions even if the failure is not intentional and only grossly negligent. More often than not, it will result in the court requiring an adverse inference instruction be given to the jury. Intentional destruction, of course, can result in far more severe sanctions for parties and their lawyers.

C. Electronic Discovery

Perhaps one of the greatest challenges in litigation today is electronic discovery. As the developing case law shows, failure to learn the rules governing electronic discovery will serve an extreme prejudice on clients and could lead to sanctions or a claim of malpractice if you do not.

The best approach on electronic discovery is to work cooperatively from the outset with the opposing counsel. Courts do not look favorably on the failure of one party to engage in the process and negotiation of the issues related to electronic discovery (e.g., location, retention, costs, burdens, search terms to be used, number of custodians, format of production, etc.) It is prudent for much of the e-Discovery negotiation to occur as part of any pretrial planning, including as part of any Fed. R. Civ. P. 26(f) or similar report ordered by the court. By building these agreements into a scheduling order, parties avoid coming up short later in establishing the existence of an agreement; judges will be far more likely to impose sanctions when their orders are violated than they will with private agreements. Many courts are adopting model orders governing ESI use. For example, the Federal Circuit Advisory Council recently promulgated an “E-Discovery Model Order” for voluntary use in patent cases. The Seventh Circuit has initiated an “Electronic Discovery Pilot Program” that contemplates the integration of various principles for ESI production in any litigation as well as a proposed order for use in any scheduling order.

There are a host of companies today consulting in the ESI field. In a case where the damages are high and the issues real, immediate thought should be given to the retention of such a company. Retention can be cost prohibitive in certain instances, but prudence must rule the day. In Zubulake, the district court found five plaintiffs grossly negligent in their failure to

350 See e.g, Rimkus Consulting Group, Inc. v. Cammarata, 688 F. Supp. 2d 598 (S.D. Tex. 2010); Zubulake, 220 F.R.D. at 212.
351 Barsoum v. NYC Hous. Auth., 202 F.R.D. 396, 400 (S.D.N.Y. 2001)(“The level of intentionality goes directly to the degree of severity of any sanction that may be warranted.”); Computer Assoc. Int’l, Inc. v. American Fundware, Inc., 133 F.R.D. 166, 168-69 (D. Colo. 1990) (Plaintiff claimed defendant improperly copied computer code and told defendant that in October and December 1986 before filing suit December 23, 1986. The defendant had a practice of saving only the most recent code that the court found legitimate under normal circumstances, but that it had a duty to stop doing it once it was on notice of potential litigation in October. The court said it was “inconceivable” that the defendant would not know the software codes would be sought in discovery beginning in October 1986. The court granted default judgment to the plaintiff.); Dillon v. Nissan Motor Co., 986 F.2d 263, 268 (8th Cir. 1993) (Affirmed district court decision to exclude expert testimony, photographs, and exhibits as sanctions for the destruction of evidence the expert studied to reach his conclusion).
identify the key players and ensure that their electronic and paper records were preserved.\textsuperscript{354} The best path is to coordinate with in-house counsel, IT personnel, management, and those in leadership positions on the relevant issues in the case to assess the relevant custodians and issues so as to ensure a full and complete collection. Self-collection, which is likely fine in a small matter with a single custodian, poses risks in other environments.\textsuperscript{355} By allowing for employees to self-collect, counsel invites room for error that could have drastic consequences. In a class action, where a system is under attack, you are far better served by the early retention of an ESI vendor and a thorough and complete collection by that vendor before discovery gets underway.

\textbf{D. Insurance Coverage}

While a topic on insurance coverage for class action lawsuits goes far beyond the scope of this paper, suffice it to say that any franchisor sued en masse should look to any and all insurance coverage. The availability of coverage obviously depends on what is available and the allegations asserted in the complaint. There may be advertising injury coverage, director and officer policies, and errors and omissions provisions that require defense and indemnification in certain circumstances. Denial of coverage may itself lead to satellite litigation between a franchisor and its carrier as to what obligation the insurer has to contribute to the defense. Franchisors are well suited to provide notice of a group action and ask the insurer to defend it. In some states, such as Wisconsin, a failure to defend may by itself lead to a claim against the insurer for breach of the duty to defend and a resulting waiver by the insurer of its coverage defenses.\textsuperscript{356} This is independent of an assertion of bad faith which itself may serve as a powerful tool for franchisors denied coverage by their insurers when defending group actions.

\textbf{E. Regulatory Pressures}

It is a common practice of civil plaintiffs in large cases to attempt to associate with governmental agencies charged with regulating a particular industry or practice and “get the government on their side.” In franchising, the FTC, various state agencies, and the attorney general of each state have a stake in that regulatory pattern. Franchisee counsel should use the leverage it provides; franchisor attorneys should be prepared to independently defend its client’s alleged conduct with regulators. Finally, when settling a class action, the defendant is obligated under CAFA to notify the regulators within 10 days of the filing of the settlement.\textsuperscript{357} Those regulators then have 90 days to object before the court can enter any order approving the settlement.

\textbf{IX. CONCLUSION}

Multi-party litigation is stressful in any litigation, but its impact on a franchise system is unique. This is because there are many stakeholders in a franchise system – the franchisor, the franchisee, suppliers to the system, and the end-user of the product or service. Franchise

\textsuperscript{354} \textit{Zubulake}, 220 F.R.D. at 218.


\textsuperscript{356} \textit{Maxwell v. Hartford Union High Sch. Dist.}, 2012 WI 58, 341 Wis.2d 238, 814 N.W.2d 484.

\textsuperscript{357} 28 U.S.C. § 1715.
systems are successful where the stakeholders are bound together in a positive relationship. Lawsuits generally pit franchisor against franchisee in ways that tend to break down, not build up, relationships. The risk of poisoning the franchisor-franchisee relationship is particularly high when the class consists of current franchisees.

We franchise lawyers play a unique role in all of this. We understand the importance of relationships in franchising and understand how no-holds-barred litigation can damage permanently the franchise system upon which our clients are dependent for their success. We franchisor and franchisee lawyers represent our clients at our best when we act as consummate professionals in conducting multi-party litigation.
BIOGRAPHIES OF AUTHORS

JOSEPH S. GOODE

Joe is a shareholder at Kravit, Hovel & Krawczyk S.C., in Milwaukee, Wisconsin. He focuses his practice on business litigation with a particular emphasis in franchise and dealership law, intellectual property litigation, shareholder and fiduciary disputes and non-competition and trade secret litigation. Throughout his career, Joe has represented clients in complex commercial and business litigation proceedings for 18 years. He has significant jury and bench trial experience in state and federal court. Joe also has successfully argued before the Wisconsin Supreme Court and the United States Court of Appeals for the Seventh Circuit on issues involving claim preclusion, zoning, federal court abstention, constitutional due process and equal protection. Along with his colleague Mark M. Leitner, Joe served as class counsel for the franchisees of the Quiznos franchise system in a nationwide class action settled in 2010 at a value of $206 million. Joe is a graduate of the University of Wisconsin-Madison and Syracuse University College of Law. He also holds a master’s degree in public administration from the Maxwell School of Citizenship and Public Affairs at Syracuse University. Joe is a member of the Milwaukee Bar Association, the State Bar of Wisconsin, the Seventh Circuit Bar Association, the American Bar Association, the ABA’s Forum on Franchising, and the International Franchise Association. He is active in his community and sits on the board of directors of the Dane County Humane Society, one of the nation’s oldest private animal shelters. Each year since 2006, Joe has been named as a Wisconsin Super Lawyer or Rising Star; in 2012, he was named a “Best Lawyer in America” for commercial litigation.

WILLIAM L. KILLION

Bill is a partner in the Minneapolis office of Faegre Baker Daniels. He provides counseling and dispute-resolution services to franchisors. Bill has been recognized for his work in franchising by The Best Lawyers in America, Franchise Times Magazine, Minnesota Super Lawyers, and Who’s Who of Franchise Lawyers. Minnesota Law & Politics, in 2008 and again in 2012, identified Bill as one of the top 100 “Super Lawyers” in Minnesota in all areas of practice. Bill has authored many articles related to franchising. His article, “The Modern Myth of the Vulnerable Franchisee: The Case for a More Balanced View of the Franchisor-Franchisee Relationship,” published in the Franchise Law Journal, received the Burton Award in 2009. Bill was the Editor-in-Chief of the Franchise Law Journal from 2003 to 2006. Bill is certified as a Civil Trial Specialist by the Minnesota State Bar Association and board certified in Civil Trial Advocacy by the National Board of Trial Advocacy. He is admitted to the bar in both Minnesota and Utah. Bill received his undergraduate degree from the University of Nebraska (Phi Beta Kappa) in 1970 and graduated from the University of Nebraska Law School, with distinction, in 1973. He was also a member of the Order of the Coif and was Editor-in-Chief of the Nebraska Law Review.
EXHIBIT A
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 07-CV-2170
ILENE SIEMER, et al.

vs.

THE QUIZNO'S FRANCHISE COMPANY LLC, et al.

NOTICE OF PENDENCY AND PROPOSED SETTLEMENT OF CLASS ACTION

DO NOT WRITE OR CALL THE COURT OR THE COURT CLERK'S OFFICE TO INQUIRE ABOUT THE SETTLEMENT

A class action settlement has been reached under which your rights may be affected. You may be entitled to receive benefits under this settlement.

This Notice of Pendency and Proposed Settlement of Class Action (the "Notice") is directed to (i) all Quiznos Franchisees who paid an Initial Franchise Fee or who were not charged an initial Franchise Fee on or before July 2, 2009 to purchase a Quiznos Restaurant to be located in the United States, the District of Columbia or the United States Territory of Puerto Rico which did not open for operation on or before that date and those Persons who have been specifically identified in paragraph 2.59 of the October 27, 2009 Class Action Settlement Agreement and Release (the "Agreement"); and (ii) all Quiznos Franchisees (including all Current Operators as defined in paragraph 2.11 of the Agreement) in the United States, the District of Columbia and the United States Territory of Puerto Rico who, at any time prior to the Preliminary Approval Date, have operated a Quiznos Restaurant pursuant to a Franchise Agreement. The Notice is not directed to those Persons excluded from the definition of the SNO Settlement Class in paragraph 2.59 of the Agreement and/or those Persons excluded from the definition of the Franchise Operator Settlement Class in paragraph 2.26 of the Agreement.

This Notice incorporates by reference the definitions set forth in Section II of the Agreement.

By an order dated (the "Preliminary Approval Date"), the United States District Court for the Northern District of Illinois (Eastern Division) (the "Court") preliminarily approved and certified the settlement of a class action lawsuit against The Quizno’s Franchise Company LLC f/k/a, The Quizno’s Corporation, Quizno’s Franchising LLC, Quizno’s Franchising II LLC, QFA Royalties LLC, The Quizno’s Master LLC, QZ Finance LLC, QIP Holder LLC, TQSC II LLC f/k/a TQSC LLC, QCE Holding LLC, QCE Incentive LLC, QCE Finance LLC, QCE LLC, American Food Distributors LLC, Source One Distribution LLC f/k/a National Restaurant Supply Distribution LLC, S&S Equipment Company LLC, Ba-Bing! LLC f/k/a Source One Systems LLC, Chain Management

QUESTIONS? CALL TOLL-FREE 800-495-7419 OR VISIT WWW.ONATIONALSETTLEMENT.COM

You are being sent this Notice because you have been identified as being a member of the SNO Settlement Class, the Franchise Operator Settlement Class, and, in certain instances, both classes, and you may be eligible to receive benefits under this Settlement.

This Notice is not intended to, nor should it be construed as, an expression of any opinion by the Court with respect to the truth of the allegations in the various lawsuits or of the merits of the claims or defenses asserted. This Notice is simply to advise you of the terms of the Agreement and your rights in connection with the Agreement. This is not a lawsuit against you.

A full copy of the Agreement may be obtained by contacting the Third Party Class Action Administrator, Class Counsel or Defendants’ Counsel at the addresses listed below. A copy of the Agreement is also available at the Settlement Website www.Onationalsettlement.com. This Notice contains only a summary of the Agreement as preliminarily approved by the Court.

What is this Lawsuit About?

**Franchise Operator Class Action Litigation**

The Franchise Operator Representative Plaintiffs (defined and identified in paragraph 2.25 of the Agreement), individually and on behalf of all others similarly situated, have asserted claims against the Defendants relating to the Quiznos Sub brand (“Quiznos”) based on alleged violations of the Racketeer Influenced and Corrupt Organization Act (“RICO”), the Colorado Consumer Protection Act (“CCPA”), and other laws in connection with the sale of Franchise Agreements and the alleged sale of food, supplies and equipment to Quiznos Franchisees located in the United States, the District of Columbia and the United States Territory of Puerto Rico. The Franchise Operator Representative Plaintiffs also assert claims for fraud in connection with the sale of Franchise Agreements and the preparation of franchise disclosure documents. Further, the Franchise Operator Representative Plaintiffs assert claims for breach of contract and violations of the implied covenant of good faith and fair dealing arising out of and relating to Franchise Agreements. Plaintiffs also allege that Quiznos breached its Franchise Agreement in connection with its management of an advertising fund that is partially funded by Quiznos Franchisees. All of the Franchise Operator Representative Plaintiffs’ claims concern Franchise Agreements sold in the United States, the District of Columbia and the United States Territory of Puerto Rico that relate to Quiznos Restaurants that were at one time or are now currently operational. The Franchise Operator Class Representatives make no claims concerning the purchase of a Franchise Agreement for a Quiznos Restaurant that never became operational (i.e. the “SNOs”).

The Franchise Operator Representative Plaintiffs’ claims were initially raised in three separate lawsuits: (i) Brunet, et al. v. The Quizno’s Franchise Company LLC, et al., Case No. 07-CV-01717-PAB-KMT (United States District Court for the District of Colorado); (ii) Westerfield, et al. v. The Quizno’s Franchise Company LLC, et al., Case No. 06-C-1210 (United States District Court for the Eastern District of Wisconsin (Green Bay Division)); and (iii) Siemer, et al. v. The Quizno’s Franchise Company LLC, et al., Case No. 07-C-2170 (United States District Court for the Northern District of Illinois (Eastern Division)) (collectively the “Franchise Operator Class Action Litigation”), which cases will all be resolved in accordance with the Agreement. Quiznos sought to dismiss all of the claims.

QUESTIONS? CALL TOLL-FREE 800-495-7419 OR VISIT WWW.ONATIONALSETTLEMENT.COM
presently asserted against it in each case filed by the Franchise Operator Representative Plaintiffs, asserting that the claims alleged are insufficient as a matter of law and that Quiznos complied with all applicable laws. All of the motions to dismiss remained pending as of the date of the Agreement. Quiznos denies any liability, has been vigorously defending the allegations and has raised numerous defenses to the Franchise Operator Representative Plaintiffs' claims.

Neither this Court, nor those presiding over the other cases comprising the Franchise Operator Class Action Litigation, decided the merits of the Franchise Operator Representative Plaintiffs' claims as asserted in their amended pleadings or the defenses thereto raised by Quiznos. The Franchise Operator Representative Plaintiffs and Quiznos concluded that it would be in their respective best interests to enter into the Agreement in order to avoid the uncertainties of litigation and the potential lengthy appeals, particularly in complex litigation such as these cases. The Agreement provides that it will not be deemed or construed as an admission of any liability or wrongdoing by Quiznos or the Franchise Owner Representative Plaintiffs, any evidence of a breach of contract, or any violation of any statute or law.

**SNO Class Action**

The SNO Representative Plaintiffs (defined and identified in paragraph 2.58 of the Agreement), individually and on behalf of all others similarly situated, have asserted claims based on alleged violations of the CCPA and other laws in connection with the sale of Quiznos Restaurants to be operated in the United States, the District of Columbia, and the United States Territory of Puerto Rico. The SNO Representative Plaintiffs also assert claims for fraud in connection with the sale of Franchise Agreements and the preparation of franchise disclosure documents. Further, the SNO Representative Plaintiffs assert claims for breach of contract and violations of the implied covenant of good faith and fair dealing arising out of and relating to Franchise Agreements. Among other things, the SNO Representative Plaintiffs allege that as a result of the Defendants' conduct, they were unable to obtain sites for their Quiznos Restaurants. All of the SNO Representative Plaintiffs' claims concern Franchise Agreements sold for restaurants in the United States, the District of Columbia and the United States Territory of Puerto Rico that did not open; the SNO Representative Plaintiffs make no claims concerning the operation of any Quiznos Restaurants. The SNO Representative Plaintiffs claimed in the SNO Class Action that they should receive a refund of Franchise Fees paid and be awarded other damages. Certain Defendants filed a counterclaim against the SNO Representative Plaintiffs for breach of their Franchise Agreements, claiming entitlement to damages for, among other things, 15 years of lost future royalties due to the failure of the SNO Representative Plaintiffs to open a Quiznos Restaurant. Defendants and the SNO Representative Plaintiffs deny any liability as to the respective claims asserted them, have been vigorously defending the allegations asserted against each other and have raised numerous defenses to each other's claims.

The claims of the SNO Representative Plaintiffs were previously pending in the matter of *Bonanno, et al. v. The Quiznos Franchise Company, et al.*, Case No. 06-CV-02358 (United States District Court for the District of Colorado) (the "SNO Class Action"), the Honorable Christine M. Arguello presiding. In the SNO Class Action, the court did not decide the merits of the SNO Representative Plaintiffs' claims or the defenses raised thereto by Quiznos or Quiznos' counterclaims and the SNO Representative Plaintiffs' defenses to them. However, on April 20, 2009, Judge Arguello denied the SNO Representative Plaintiffs' motion for class certification in the *Bonanno* case, ruling that the class action bar in the Quiznos Franchise Agreement is enforceable. The SNO Representative Plaintiffs and Defendants concluded that it would be in their respective best interests to enter into the Agreement in order to avoid the uncertainties of litigation and the potential lengthy appeals, particularly
in complex litigation such as this. The Agreement provides that it will not be deemed or construed as an admission of any liability or wrongdoing by Defendants or the SNO Representative Plaintiffs, any evidence of a breach of contract, or any violation of any statute or law.

Class Definitions

Franchise Operator Settlement Class

The Franchise Operator Settlement Class, as preliminarily certified by the Court in its order dated ________________ (the “Preliminary Approval Order”), is defined as:

All Quiznos Franchisees (including all Current Operators as defined in paragraph 2.11 of the Agreement) in the United States, the District of Columbia and the United States Territory of Puerto Rico who, at any time prior to the Preliminary Approval Date, have operated a Quiznos Restaurant pursuant to a Franchise Agreement. The Franchise Operator Settlement Class specifically EXCLUDES:

(a) All Quiznos Franchisees who would otherwise be Franchise Operator Settlement Class Members but who have previously asserted a claim against QCE, the QCE-Related Parties or QCE’s Affiliates (or any of their predecessors, successors, or parents) and were represented by counsel which resulted in a signed settlement agreement, judgment or arbitration award;

(b) All Quiznos Franchisees who timely and validly request exclusion from the Franchise Operator Settlement Class pursuant to the opt out provisions described in paragraph 12.2 of the Agreement;

(c) All Quiznos Franchisees who operated a Non-Traditional Quiznos Restaurant (defined in paragraph 2.35 of the Agreement), except non-institutional owners (i.e. Quiznos Franchisees who have executed 2 or fewer Franchise Agreements) of Non-Traditional Quiznos Restaurants located in convenience stores and gas stations;

(d) All Persons who are employees of QCE, the QCE-Related Parties, and the Defendants (but not excluding area directors, market captains or regional managers of QFA, QCE and/or one of the QCE-Related Parties who otherwise are members of the SNO Settlement Class and/or the Franchise Operator Settlement Class); and

(e) All Quiznos Franchisees not represented by counsel against whom a default judgment was entered in favor of any of the Defendants named in the Franchise Operator Class Action Litigation.

In establishing the identity of the members of the Franchise Operator Settlement Class, the Parties will primarily rely on the records of QCE.
SNO Settlement Class

The SNO Settlement Class, as preliminarily certified by the Court in its Preliminary Approval Order, is defined as:

All Quiznos Franchisees who paid an Initial Franchise Fee or who were not charged an Initial Franchise Fee on or before July 2, 2009 to purchase a Quiznos Restaurant to be located in the United States, the District of Columbia or the United States Territory of Puerto Rico which did not open for operation on or before that date. The SNO Settlement Class also specifically includes (i) Barton Klatt; (ii) Megan Makki; (iii) Joe Chia; (iv) Moe Mastani; (v) Amir Milani; (vi) Negin Milani; and (vii) Sima Savarini (together with their owners, guarantors, officers, directors, predecessors, successors, representatives, heirs, executors, administrators, successors and assigns). Except as otherwise provided in this paragraph, the SNO Settlement Class specifically EXCLUDES:

(a) The Elhilu Settlement Class (as defined in paragraph 2.15 of the Agreement);

(b) All Quiznos Franchisees who would otherwise be SNO Class Members but who have previously asserted a claim against QCE, the QCE-Related Parties or QCE's Affiliates (or any of their predecessors, successors, or parents) and were represented by counsel which resulted in a signed settlement agreement, judgment or arbitration award;

(c) All Quiznos Franchisees who timely and validly request exclusion from the SNO Settlement Class pursuant to the opt out provisions described in paragraph 12.2 of the Agreement;

(d) All Quiznos Franchisees who purchased a Non-Traditional Quiznos Restaurant;

(e) All Persons who are employees of QCE, the QCE-Related Parties, and the Defendants (but not excluding area directors, market captains or regional managers of QFA, QCE, and/or one of the QCE-Related Parties who otherwise are members of the SNO Settlement Class and/or the Franchise Operator Settlement Class);

(f) All Quiznos Franchisees not represented by counsel against whom a default judgment was entered in favor of any of the Defendants named in the SNO Operator Class Action; and

(g) All Quiznos Franchisees who received a full refund of the Initial Franchise Fee paid for a Quiznos Restaurant to be located in the United States, the District of Columbia and the United States.
Territory of Puerto Rico which did not open for operation on or before July 2, 2009.

In establishing the identity of the members of the SNO Settlement Class, the Parties will primarily rely on the records of QCE.

**Settlement Terms (Franchise Operator Settlement Class)**

**A. Franchise Operator Class Members**

The Agreement is not an admission of liability on the part of the Parties or of the existence of any state of facts related to the claims of the Franchise Operator Class Members. By the terms of the Agreement, a member of the Franchise Operator Settlement Class is entitled to obtain a Settlement Payment which, along with the other consideration provided under the Agreement, will have the effect of resolving all past differences between the Franchise Operator Class Member and Quiznos relating to their ownership and operation of a Quiznos Restaurant in the United States, the District of Columbia or the United States Territory of Puerto Rico.

For purposes of the Settlement, the Franchise Operator Class Members are divided into three subclasses:

(a) Current Operators (either defined in paragraph 2.11 of the Agreement or identified in paragraph 2.20 of the Agreement) who as of the Preliminary Approval Date are operating one or more Quiznos Restaurant(s) (“Franchise Operator Class I Members”);

(b) Former Operators (Transfer) who as of the Preliminary Approval Date have sold their Quiznos Restaurant(s) to another Quiznos Franchisee (“Franchise Operator Class II Members”); and

(c) Former Operators (Closed) who as of the Preliminary Approval Date have ceased operating their Quiznos Restaurant(s) (“Franchise Operator Class III Members”).

A Franchise Operator Class Member may also be a SNO Class Member (discussed below); however, a Quiznos Franchisee cannot be a SNO Class Member and Franchise Operator Class Member under the same Franchise Agreement. For purposes of determining the subclass of the Franchise Operator Class Members, the Parties shall primarily rely on the records of QCE.

Any Franchise Operator Class Member may opt out of the Franchise Operator Settlement Class, and will not be bound by it in any way, nor receive any benefits as a Franchise Operator Class Member under the Settlement. No releases will be issued to those Franchise Operator Class Members who opt out. This is addressed further below.

**B. Consideration to Franchise Operator Class Members**

Pursuant to and subject to the terms and conditions of the Agreement, Franchise Operator Class Members are eligible to receive the following benefits under the Agreement:
i. **Franchise Operator Class I Members** (who do not opt out of the Franchise Operator Settlement Class) shall receive $3,150.00 (three thousand one hundred fifty dollars) (the “Franchise Operator Class I Member Settlement Payment”). The Franchise Operator Class I Member Settlement Payment shall be made in the form of credits applied to food purchases of Franchise Operator Class I Member from QFA or QCE-Related Parties in twelve (12) equal quarterly installments over a period of three (3) years. QFA shall apply the first credit no later than thirty (30) days after the Funding Date and apply the remaining eleven (11) credits on a quarterly basis thereafter; provided, however, that QFA shall be entitled to apply the first credit on or after October 1, 2009 (prior to Preliminary or Final Approval of the Settlement) and, further, QFA shall be allowed to offset compensation to Franchise Operator Class I Members with past due Royalties, Marketing and Promotion Fees and other amounts owed by the Franchise Operator Class I Member to QFA, QCE, the QCE-Related Parties or the National and Regional Advertising Trusts which accrued on or after May 1, 2009. A Franchise Operator Class I Member who exits the Quiznos System within three (3) years of the Funding Date immediately forfeits the right to any unapplied credits. Moreover, it is expressly agreed and understood that in lieu of credits applied to food purchases of Franchise Operator Class I Member, at QFA’s sole discretion, the installment amount of the Franchise Operator Class I Member Settlement Payment may be made in the form of cash payments, rent credits and/or Royalty credits to the Franchise Operator Class I Member. QCE acknowledges that the credits afforded Franchise Operator Class I Members under the Agreement shall be in addition to any and all other rebate programs existing in the Quiznos System, if any, from time to time and that the Franchise Operator Class I Member’s right to the Settlement Payment shall not exclude the right to any other rebates offered by QFA, QCE or any QCE-Related Party and vice versa. Nothing in the Agreement shall obligate QFA, QCE or any QCE-Related Party to offer any rebate or similar program or to continue any such program that exists as of the Funding Date.

ii. **Franchise Operator Class II Members** (who do not opt out of the Franchise Operator Settlement Class) shall receive $475.00 (four hundred seventy-five dollars) (the “Franchise Operator Class II Member Settlement Payment”). The Third Party Class Action Administrator shall mail a check for the Franchise Operator Class II Member Settlement Payment to each Franchise Operator Class II Member, which shall be mailed with a Form 1099 no later than thirty (30) days after the Funding Date.

iii. **Franchise Operator Class III Members** (who do not opt out of the Franchise Operator Settlement Class) shall receive $1,700.00 (one thousand seven hundred dollars) (the “Franchise Operator Class III Member Settlement Payment”). The Third Party Class Action Administrator shall mail a check for the Franchise Operator Class III Member Settlement Payment to each Franchise Operator Class III Member, which shall be mailed with a Form 1099 no later than thirty (30) days after the Funding Date.

**Settlement Terms (SNO Settlement Class)**

**A. SNO Class Members**

The Agreement is not an admission of liability on the part of the Parties or of the existence of any state of facts related to the claims of the SNO Class Members. By the terms of the Agreement, a member of the SNO Settlement Class is entitled to obtain a Settlement Payment which, along with the other consideration provided under the Agreement, will have the effect of resolving all past differences.
between the SNO Class Member and Quiznos relating to their ownership and operation of a Quiznos Restaurant in the United States, the District of Columbia or the United States Territory of Puerto Rico.

For purposes of the Settlement, a Quiznos Franchisee who is otherwise a SNO Class Member but who has a Quiznos Site (defined in paragraph 2.50 of the Agreement) as of the Preliminary Approval Date shall be considered a Current Operator and a Franchise Operator Class I Member, not a SNO Class Member. For purposes of determining the subclasses of the SNO Class Members, the Parties will primarily rely on the records of QCE.

For purposes of the Settlement, the SNO Class Members are divided into five subclasses:

(a) SNO Class Members whose Franchise Agreement Effective Date is between February 17, 2006 and July 2, 2009 ("SNO Class I Members");

(b) SNO Class Members whose Franchise Agreement Effective Date is between February 17, 2003 and February 16, 2006 ("SNO Class II Members");

(c) SNO Class Members whose Franchise Agreement Effective Date is before February 17, 2003 ("SNO Class III Members");

(d) Notwithstanding the Franchise Agreement Effective Date, SNO Class Members who signed any release in favor of any of the Quiznos Released Parties prior to the Preliminary Approval Date that did not receive economic or other consideration for the release ("SNO Class IV(a) Members"); and

(e) Notwithstanding the Franchise Agreement Effective Date, SNO Class Members who signed any release in favor of any of the Quiznos Released Parties prior to the Preliminary Approval Date that received economic or other consideration for the release ("SNO Class IV(b) Members") (SNO Class IV(a) Members and SNO Class IV(b) Members shall at times collectively be referred to in the Agreement as "SNO Class IV Members"). "Other consideration" as used in this paragraph does not include a release of claims by QCE, QCE-Related Parties or Defendants for lost future royalties. SNO Class I Members, SNO Class II Members, and SNO Class III Members cannot be SNO Class IV Members. A SNO Class Member may also be a member of the Franchise Operator Settlement Class; however, a Quiznos Franchisee cannot be a SNO Class Member and Franchise Operator Class Member under the same Franchise Agreement.

Any SNO Class Member may opt out of the SNO Settlement Class, and will not be bound by it in any way, nor receive any benefits as a SNO Class Member. No releases will be issued to SNO Class Members who opt out. This is addressed further below.

B. Consideration to SNO Class Members

i. SNO Class I Members who elect to leave the Quiznos System and not execute an Election to Proceed as Franchisee shall be entitled to a Settlement Payment of ten percent (10%) of their Initial Franchise Fee for each executed Franchise Agreement that did not result in the SNO Class I Member commencing operations of a Quiznos Restaurant (the "SNO
Class I Member Settlement Payment”). The Third Party Class Action Administrator shall mail a check for the SNO Class I Member Settlement Payment to each SNO Class I Member, which shall be mailed with a Form 1099 no later than thirty (30) days after the Funding Date.

ii. **SNO Class II Members** who elect to leave the Quiznos System and not execute an Election to Proceed as Franchisee shall be entitled to a Settlement Payment of thirty-two and seven-tenths (32.7%) of their Initial Franchise Fee for each executed Franchise Agreement that did not result in the SNO Class II Member commencing operations of a Quiznos Restaurant (the “SNO Class II Member Settlement Payment”). The Third Party Class Action Administrator shall mail a check for the SNO Class II Member Settlement Payment to each SNO Class II Member, which shall be mailed with a Form 1099 no later than thirty (30) days after the Funding Date.

iii. **SNO Class III Members** who elect to leave the Quiznos System and not execute an Election to Proceed as Franchisee shall be entitled to a Settlement Payment of five percent (5%) of their Initial Franchise Fee for each executed Franchise Agreement that did not result in the SNO Class III Member commencing operations of a Quiznos Restaurant (the “SNO Class III Member Settlement Payment”). The Third Party Class Action Administrator shall mail a check for the SNO Class III Member Settlement Payment to each SNO Class III Member, which shall be mailed with a Form 1099 no later than thirty (30) days after the Funding Date.

iv. **SNO Class IV(a) Members** shall be entitled to a settlement payment of $500 (Five Hundred Dollars) (the “SNO Class IV(a) Member Settlement Payment”) and **SNO Class IV(b) Members** shall be entitled to a settlement payment of $250 (Two Hundred and Fifty Dollars) (the “SNO Class IV(b) Member Settlement Payment”). The Third Party Class Action Administrator shall mail a check for the SNO Class IV(a) Member Settlement Payment and the SNO Class IV(b) Member Settlement Payment to each SNO Class IV Member, which shall be mailed with a Form 1099 no later than thirty (30) days after the Funding Date.

v. **SNO Class I Members, SNO Class II Members, and SNO Class III Members** (but not SNO Class IV Members) may elect to forego the Settlement Payment to which they are entitled pursuant to the foregoing and remain a Quiznos Franchisee. Each SNO Class Member who invokes the Election to Proceed as Franchisee shall NOT receive the SNO Class Member Settlement Payments to which they otherwise would be entitled under this Agreement, but instead shall remain a Quiznos Franchisee and receive the GFP and the associated GFP Credit Certificate which is a certificate providing the SNO Class Member invoking the Election to Proceed as a Franchisee with a credit equal to the amount of their Initial Franchise Fee for certain equipment and supplies needed to become operational. In addition to the entitlements set forth in paragraph 4.2 of which they will be able to take advantage, SNO Class I Members, SNO
Class II Members, and SNO Class III Members (but not SNO Class IV Members) who complete the Election to Proceed as a Franchisee shall be provided two additional forms of consideration as part of the Settlement: (a) an additional 12 months from the Funding Date to locate and secure a Quiznos Site to open and operate a Quiznos Restaurant; and (b) the GFP and associated GFP Credit Certificate. QFA shall send a GFP Credit Certificate to each SNO Class Member who invokes the Election to Proceed as Franchisee no later than thirty (30) days after the Funding Date. The certificate shall neither be valid nor redeemed until after the Funding Date. The rights and obligations of each SNO Class I Member, SNO Class II Member and SNO Class III Member who invokes the Election to Proceed as Franchisee are, and shall continue to be, governed by their Franchise Agreement; provided, however, that Section 6 or any equivalent section of the Franchise Agreement entitled “Schedule,” relating to QFA's right to terminate the Franchise Agreement, shall be amended (as of the Funding Date) to read as follows:

QFA shall be entitled to terminate the Franchise Agreement if the SNO Class Member who has invoked the Election to Proceed as Franchisee has not obtained a Quiznos Site or opened a Quiznos Restaurant within one calendar year after the Funding Date of the Settlement; provided, however, that QFA may agree in writing to extend the time beyond one (1) calendar year after the Funding Date of the Settlement for a SNO Class Member who invokes the Election to Proceed as Franchisee to open a Quiznos Restaurant so long as the SNO Class Member is, in the opinion of QFA, diligently using best efforts to look for a site.

Additional Benefits to Franchise Operator Class Members and SNO Class Members

A. Enhancements and Modifications to Quiznos Franchise System

Quiznos agrees to make modifications to its franchise model and business practices that are intended to (i) enhance the profitability of each Quiznos Restaurant; (ii) strengthen the franchisor-franchisee relationship; and (iii) enhance franchisee prospects for success in developing a Quiznos Site and opening a Quiznos Restaurant. These enhancements and modifications include: (1) Creation of an “Advertising Advisory Council”; (2) Modifications to Quiznos’ “Franchise Disclosure Document” regarding the manner in which Quiznos distributes food and other restaurant products or supplies to Quiznos Franchisees; (3) Retention of an independent agency on an annual basis to review costs of food, paper and supplies being sold to Quiznos Franchisees and to share the results of that review with Quiznos Franchisees; (4) Creation of a Quiznos-sanctioned independent franchisee association (the Independent Association of Franchisees (the “IAOF”)) that would maintain its own corporate status as a not-for-profit entity with the costs of incorporation, other startup costs, and a certain portion of annual operational costs to be paid for by Quiznos; (5) Creation of a “Dispute Resolution Program,” the purpose of which will be to address and resolve day-to-day operational concerns of Quiznos Franchisees; (6) Creation of a “Store Transfer Assistance Program”; (7) Development of new alternative supplier request protocols to create a formal process for alternative supplier review; (8) To the extent
Quiznos Franchisees are obligated to create a delivery program in their store, provisioning of the programmatic materials (including the “Delivery Kit”) at a reduced cost; (9) Good faith consideration of all written waivers requested by Quiznos Franchisees in the “Dispute Resolution Program” with respect to any policies or procedures that mandate the maximum retail price that they may charge consumers; (10) Establishment of a “Retraining Program” available to any Quiznos Franchisee currently operating a restaurant so as to ensure that Quiznos Franchisees understand all operational guidelines and procedures; (11) The creation, update and/or maintenance of Quiznos internal monitoring systems of the SNO Pipeline; and (12) An agreement to provide each SNO Class Member who invokes the Election to Proceed as Franchisee with the name and contact information of an employee or agent who has responsibilities for site development, including finding Quiznos Sites for Quiznos Franchisees and other assistance. Each of the enhancements and modifications are more fully detailed in the Agreement at paragraph 4.2.

B. Contributions to Advertising Trusts, Debt Forgiveness and Covenants Regarding Claims for Future Lost Royalties

As part of the Settlement, Quiznos has agreed to fund the National Marketing Fund Trust and the Regional Advertising Program Trust with an additional $19,400,000 which it is otherwise not obligated to pay. Of this amount, $10,000,000 will be dedicated to Local Advertising (as defined in the paragraph 4.5 of the Agreement) during the period January 1, 2010 through December 31, 2012, with the balance to be applied to advertising initiatives set by Quiznos for the period 2009-2012. The use of these funds will be governed by Quiznos with input from the “Advertising Advisory Council” identified above.

Quiznos has also agreed to forgive certain debts owed to them by Franchise Operator Class I Members, Franchise Operator Class II Members and Franchise Operator Class III Members (who do not opt out of the Franchise Operator Settlement Class). In addition, Quiznos has agreed to release and otherwise forego prosecuting claims for future lost royalties against SNO Settlement Class Members (who do not submit an Election to Proceed as Franchisee) as well as Franchise Operator Class II Members and Franchise Operator Class III Members who do not opt out of the SNO Settlement Class or the Franchise Operator Settlement Class.

Dismissal, Discharge and Release of All Claims

The Agreement provides for the dismissal, with prejudice, of the four class action lawsuits identified in this Notice against Quiznos. Pursuant to paragraph 6.1(b), the Agreement provides for a broad general release of all claims of the SNO Class Members and the Franchise Operator Class Members whether or not such class members submit a claim (except those members of the SNO Settlement Class and the Franchise Operator Settlement Class who timely and properly opt out in accordance with paragraph 12.2 of the Agreement) and all claims of the Incentive Award Releasees against the Quiznos-Released Parties (defined in paragraph 2.48 of the Agreement). Specifically, in connection with the Agreement, Franchise Operator Class Members and SNO Class Members are providing a general release of all claims from the beginning of time until the date of the Final Judgment and Order against the Quiznos Released Parties. The Agreement provides for a limited Release of claims of the Quiznos Released Parties against the SNO Class Members, Franchise Operator Class Members and the Incentive Award Releasees as specifically set forth in paragraph 6.1(c) of the Agreement.
Right to Object

Any SNO Class Member or Franchise Operator Class Member who objects to the Settlement may appear at the hearing on the final approval of the Settlement and present any evidence or argument that may be proper. To do so, all such class members must file a Notice of Objection with the Clerk in Courtroom 2119 of the United States District Court for the Northern District of Illinois (Eastern Division), 219 South Dearborn Street, Chicago, IL 60604 no later than ____________________ (the "Objection Deadline") and include in their filing the following information: (i) The objector's full legal or business name, address and telephone number and the name, address and telephone number, and other contact information for his, her or its attorney, if any; (ii) A statement of the objection to the Settlement, including its legal and factual basis; (iii) Documentation supporting the objection; and (iv) A summary by the attorney for the objector of their experience with the "Class Action Fairness Act" and class action practice generally. The objected class member must also, on or before the Objection Deadline, deliver by hand or send by U.S. First Class Mail (postage prepaid) or overnight delivery, a copy of all papers filed with the Clerk to the Third Party Class Action Administrator at the following address:

Q National Settlement
C/o The Garden City Group, Inc.
Post Office Box 9554
Dublin, OH 43017-4854
Toll-Free Number: 800-495-7419
Fax Number: 206-876-5295
Email: Qnationalsettlement@gardencitygroup.com
Settlement Website: www.Qnationalsettlement.com

Copies of all papers filed in relation to an objection shall further be delivered to Class Counsel and Defendants' Counsel at the addresses set forth below.

Final Approval Hearing

A final approval hearing concerning the fairness of the Settlement of the Lawsuit is scheduled for beginning at __________ a.m./p.m. in Courtroom 2119 of the United States District Court for the Northern District of Illinois (Eastern Division), 219 South Dearborn Street, Chicago, IL 60604. You have the right to appear at and participate in the hearing on final approval of the Settlement. The Court, the Honorable Rebecca R. Pallmeyer presiding, has reserved the right to adjourn or reset the hearing on the final approval of the Settlement, approve the Settlement with or without modifications, enter a final judgment dismissing the Lawsuit, with prejudice, and order the payment of counsel fees and expenses, without further notice of any kind.

Incentive Awards

At the time of the final approval hearing, or such other time as the matter may be heard, Class Counsel will apply for approval of an additional $50,000 Incentive Award for each of the forty-five (45) Franchise Operator Representative Plaintiffs and a $12,500 Incentive Award for each Franchise Agreement signed by the SNO Representative Plaintiffs (a total of 13 agreements). These payments are in addition to any sums the SNO Representative Plaintiffs and Franchise Operator Representative Plaintiffs would otherwise be entitled to under the Agreement as members of the SNO Settlement Class and/or Franchise Operator Settlement Class. Class Counsel will also request an Incentive Award for each Quiznos Franchisee listed on Exhibit L to the Agreement based on monetary assistance in allowing

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QUESTIONS? CALL TOLL-FREE 800-495-7419 OR VISIT WWW.QNATIONALSETTLEMENT.COM
the SNO Class Action and Franchise Operator Class Action Litigation to be pursued. The total award sought is $500,000 and shall serve to partially reimburse those identified on Exhibit L for their monetary contributions to the litigation. The final amount of all Incentive Awards sought by Class Council will be determined by the Court as required by law.

Fees and Expenses of Class Counsel

At the time of the final approval hearing, or such other time as the matter may be heard, Class Counsel will apply for approval of their fees and expenses of litigation. The Parties to the Agreement have agreed that Quiznos will not oppose a request for approval of fees and expenses of litigation in an amount of $11,000,000, with $10,000,000 being allocated to attorneys’ fees and up to $1,000,000 being allocated to actual and documented litigation costs and expenses. Class Counsel has agreed not to seek an award of attorneys’ fees and costs in excess of these amounts.

Any award of attorneys’ fees and expenses or Incentive Awards to the SNO Representative Plaintiffs and Franchise Operator Representative Plaintiffs will not reduce the value of benefits provided to the SNO Settlement Class and Franchise Settlement Class under the Agreement, and will be paid separately by Quiznos. Under no circumstances will you be required to pay any attorneys’ fee or costs as a consequence of your decision to participate in the Settlement.

Participation in the Settlement

If you wish to participate in the Settlement, you will have to complete a “Settlement Payment and Election Claim Form” (the “Claim Form”) electronically via the Settlement Website (www.Onationalsettlement.com) or by mail, email or fax it to the Third Party Class Action Administrator at the address identified above on or before ________________ (the “Claim Deadline”). A Claim Form is included in this package. To obtain a copy of the Agreement and any documents related to the administration of this Settlement, you may visit the Settlement Website or contact the Third Party Class Action Administrator at the address listed above.

In order to be eligible to receive the benefits under the Class Action Settlement Agreement and Release (the “Agreement”), a timely and properly completed valid Claim Form and IRS Form W-9 (or, for Puerto Rican entities, a W-8BEN) executed under penalty of perjury MUST be submitted to the Third Party Class Action Administrator on or before the Claim Deadline.

Within sixty (60) days of the Claim Deadline, the Third Party Class Action Administrator will send each Claimant who timely and properly submitted a Claim Form a SNO Classification Notice and/or Franchise Operator Classification Notice. The SNO Classification Notice and/or Franchise Operator Classification Notice will advise each Claimant of the Settlement Payment that he, she or it will receive under the Agreement. If Claimant disputes his, her or its classification on the SNO Classification Notice and/or Franchise Operator Classification Notice, the SNO Class Member and/or Franchise Operator Class Member must submit his, her or its challenge on or before the SNO Challenge Deadline and the Franchise Operator Challenge Deadline. If Claimant disputes the rejection of his, her or its Claim Form, the Claimant must submit an Appeal Form. The Appeal Form will be provided to you with the Notice of Rejection of the Claim Form.

If Claimant does not dispute his, her or its classification on the SNO Classification Notice and/or the Franchise Operator Classification Notice, the Claimant need not take any further action and the Settlement Payment will be made to you in accordance with the terms of the Agreement and sent to the

QUESTIONS? CALL TOLL-FREE 800-495-7419 OR VISIT WWW.ONATIONALSETLEMENT.COM
address listed above on this Claim Form once the Settlement is deemed Final. However, for any SNO Class I Member, SNO Class II Member or SNO Class III Member who submits an Election to Proceed as Franchisee on this Claim Form, the Claimant must confirm his, her or its Election to Proceed as Franchisee on the Settlement Website (in accordance with the instructions provided on the SNO Classification Notice which will be provided within sixty (60) days of the Claim Deadline).

If you wish to opt out of the SNO Settlement Class or Franchise Operator Settlement Class (discussed more fully below) and forego any rights as a SNO Class Member and/or Franchise Operator Class Member (including the right to obtain a Settlement Payment), you should NOT complete a Claim Form. You should instead complete only the Opt Out Form sent along with this Claim Form.

A Claimant may be entitled to a Settlement Payment under the Settlement as a member of the SNO Settlement Class, the Franchise Operator Settlement Class, or both classes.

If the Third Party Class Action Administrator determines that your Claim Form is valid, you will receive the applicable Settlement Payment (or, in the case of SNO Class Members who select the Election to Proceed as Franchisee, a GFP Credit Certificate) in accordance with the terms of the Agreement. In the event the Third Party Class Action Administrator determines that your Claim Form is rejected, you will be advised, provided with an Appeal Form and given the opportunity to appeal the rejection of your claim.

**Claim Forms received after** are VOID and will not be honored.

**Opting Out of the Settlement**

You will be bound by the terms of the Settlement unless you opt out. If you do not opt out, you will not in the future be able to bring or maintain any other claim or legal proceeding against the Quiznos Released Parties, including QCE, QFA, the QCE-Related Parties or the Defendants, including those which are, or could be based on, arise from or relate in any way to your operation of a Quiznos Restaurant in the United States, the District of Columbia, or the United States Territory of Puerto Rico or a Franchise Agreement for a Quiznos Restaurant which did not commence operations.

An “Opt Out Form” is included in this package. If you do not wish to participate as a member of the SNO Settlement Class and/or Franchise Operator Settlement Class you are entitled to opt out by mailing the “Opt Out Form” or a letter stating that you wish to opt out. Any request to opt out shall contain the following language:

QUESTIONS? CALL TOLL-FREE 800-495-7419 OR VISIT
WWW.ONATIONALSETTLEMENT.COM
REQUEST TO OPT OUT

I understand that I am requesting to be excluded from the [SNO Settlement Class][Franchise Operator Settlement Class] and that by opting out, I will receive no monetary benefit as a member of the [SNO Settlement Class][Franchise Operator Settlement Class] under the Settlement. I further understand that if I am excluded from the Settlement, I may bring a separate legal action, on my own behalf, but I may receive nothing or less than what I would have received if I had filed a claim for benefits under the Settlement of this case. I also understand that to the extent I would be released under this Settlement, if I opt out, QCE LLC, the QCE-Related Parties, the Defendants in the litigation, and any or all of their Affiliates have the right to file a claim against me for such matters that may be alleged by them to be due and owing by me to either or all of them.

If you opt out, you will not be eligible for any benefits of the Agreement as a SNO Class Member and/or Franchise Operator Class Member, including any Settlement Payment owed to you, but you may instead rely upon any existing rights you may have to initiate any action you deem appropriate.

In order to opt out of the Settlement, your “Opt Out Form” must be completed and received by the Third Party Class Action Administrator by mail, email or fax on or before [Date].

Inquiries by Class Members

This Notice is intended to be a summary of the terms of the Settlement. You may contact Class Counsel or Defendants’ Counsel as indicated below if you have any questions. The pleadings and other papers filed in the lawsuit are also available for inspection and/or copying at the Court. PLEASE DO NOT WRITE OR CALL THE COURT OR THE COURT CLERK'S OFFICE TO INQUIRE ABOUT THE SETTLEMENT.

Please visit the Settlement Website at www.Onationalsettlement.com for additional information.

If there is a conflict between this Notice, the Agreement, or the Final Judgment and Order for Dismissal, the terms of the Agreement and the Final Judgment and Order and Order for Dismissal will prevail.

CLASS COUNSEL

GERALD A. MARKS
JUSTIN M. KLEIN
MARKS & KLEIN, LLP
63 Riverside Avenue
Red Bank, New Jersey 07701
Phone: (732) 747-7100
Fax: (732) 219-0625

QUESTIONS? CALL TOLL-FREE 800-495-7419 OR VISIT
WWW.ONATIONALSETTLEMENT.COM
Dated: October ____, 2009

By Order of The Honorable Rebecca M. Pallmeyer
United States District Court Judge
EXHIBIT B
To: All [Redacted] Personnel

From: [Redacted]
General Counsel

Date: October 3, 2012

RE: Document Retention

URGENT NOTICE REGARDING PENDING LITIGATION

1. On July 31, 2012, [Redacted] brought suit against [Redacted] in federal court in Los Angeles, California alleging that these companies [Redacted] that these companies [Redacted] in [Redacted].

2. On September 30, 2012, [Redacted] amended its claims to add allegations [Redacted], including [Redacted].

3. [Redacted] (collectively the “Company”) believe that all of [Redacted] claims, as originally alleged and as alleged presently, lack merit and the Company intends to vigorously defend against them. As required by law, however, we must continue to ensure that potentially relevant documents and information are not lost or destroyed.

4. Accordingly, you are hereby notified of your obligation to preserve documents (or to continue to preserve documents) that might be potentially relevant to this litigation as
described below. Managers should take immediate action to ensure that all direct reports receive this memorandum, review it, and acknowledge its contents by having each direct report sign where indicated below and returning to the undersigned.

**SPECIFIC DOCUMENT PRESERVATION REQUIREMENTS**

5. Until further notice, all employees of the Company must suspend any activities undertaken pursuant to any document retention policy that might result in the elimination or destruction of any documents or other information relating to the subjects described below. It is critical that all such documents be preserved.

6. By “documents,” we mean: (a) paper documents, including, without limitation, handwritten notes, communications, files, printed e-mail messages, calendars, memoranda, drawings, photographs, videos, voice recordings, and daily diaries; and (b) electronically-stored information, including, without limitation, e-mail messages and attachments, word processing documents, PowerPoint presentations, spreadsheets, databases, and data entries. Please note that the obligation to preserve these documents and things extends to all versions and drafts of paper documents and any prior versions or drafts of any electronically-stored information, including backups of such electronically stored information.

7. The time period at issue begins [redacted], and is ongoing, although this date may change as the litigation proceeds.

8. Until further notice, all employees must preserve and may not destroy, obscure or modify documents dated and/or created after [redacted] that refer or relate in any manner to:

- [redacted]
9. You should take immediate steps to continue to secure all possible storage places of electronic documents, including your Company-issued computers and laptops, handheld devices, or other hardware, removable storage devices such as USB "thumb" drives and removable hard drives; network shared drives and individual user drives; and your home or personal computers and/or home or personal e-mail accounts used in any manner for Company business.

10. The Company’s IT staff will assist counsel in locating documents related to the case.

   However, you should not rely on the IT staff to preserve documents that are within your control.

11. Please be advised that communications relating to the lawsuit are subject to the attorney-client and other related privileges. You should not discuss this lawsuit or this notice outside the presence of the Company’s in-house or outside counsel. You should also treat your discussions with counsel as confidential.

12. If you any questions about the documents that must be preserved, or regarding any provision of this notice, do not hesitate to contact me at [Redacted] or via e-mail at [Redacted].
Please review this notice thoroughly and then sign as indicated below and return to me by October 12, 2012 as your acknowledgement that you understand and agree to abide by its requirements.

Print Name: __________________________
Sign Name: __________________________
Date: ________________________________
Email Address: ________________________

Thank you in advance for your cooperation.