

International Franchise Association  
50<sup>th</sup> Annual Legal Symposium  
May 8-9, 2017  
Washington, DC

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# **Greying of a Franchise System: How to Deal with an Aging Franchisee Population**

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### **EXHIBITS**

- A - Sample Notice of Change of Ownership Interests in Franchisee (Death or Disability)
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## **I. Introduction**

According to the International Franchise Association, more than 90% of all businesses in the United States are family owned and two-thirds of the country's Gross Domestic Product is produced by family-owned businesses. In the last 20 years, more than 80% of net new jobs created in the US were created by family owned businesses. However, the statistics demonstrate that almost 70% of these businesses, including family-owned franchises, will not survive to the second generation after the loss of the original owner, and of those that do, only 12% will succeed to the third generation.<sup>1</sup> The reasons for these statistics vary from a sudden illness or death of the original owner, the desire to retire and shut down the business, an inability to identify a successor, and lack of funds to develop a viable estate plan. Although many franchised business owners would like to see the business stay within their family after their retirement or death, the 70% rate indicates that succession planning is not taking place. It is clearly in the best interest of both the franchisor and the franchisee to develop a succession plan to ensure the continuation and future health of the franchised business and the overall franchise system. In this paper we evaluate various options for a franchisee's succession plan, as well as various transfer policies and procedures that franchisors should have in place for their franchise systems.

## **II. Exit Strategy / Succession Planning**

Franchisees and their owners spend a great deal of time and energy evaluating franchise opportunities and developing business plans for the franchised businesses that they purchase. Unfortunately, business planning often stops after they purchase the franchise, and their focus becomes fixed on growing and tending the business rather than on preparing to part with it. After all, what percentage of people eagerly rush to put a will in place? How many worry about an advanced care directive or life insurance? To postpone such considerations is a natural human tendency.

Among those franchised business owners who do think about exit planning, too many make the mistake of thinking that the time to develop an exit strategy or succession plan is when they are ready to sell the business, transfer their ownership interest, or retire. Unfortunately, once they reach these milestones, most of the value that could be generated by developing and implementing a productive succession plan has already been lost. These business owners wrongly assume that they can easily sell the franchised business to a third party, transfer their ownership interest to a family member or successor, or wind down the business at retirement without understanding the restrictions set forth in their franchise agreements.

Likewise, succession planning is of vital importance to franchisors who want to maintain their competitive edge, keep franchised businesses open at

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<sup>1</sup> International Franchise Association, *Succession Planning & Transfers Handbook*, p. 1 (2010).

their existing locations, and ensure that trained operators are available to properly implement system standards and operating procedures. The above statistic that 70% of franchised businesses will not succeed to the second generation following the retirement, death or disability of the original owner should cause every franchisor to take notice and implement succession planning guidelines for their franchised systems. Ultimately, succession and exit strategy planning requires input from the franchisees and their franchisor, and it must be designed in the way that takes into account the unique aspects of the franchised business model.

## **A. Choosing the Right Structure Prior to Death: The Value of Succession Trusts to Franchisors and Franchisees**

### **1. Probate**

An operator of a franchised business may die intestate (i.e., without a will) or with a will. In either case, in most states an individually-owned franchised business will end up in probate at the owner's death. Probate is the legal process of transferring title to assets following the death of the owner of the assets under either the owner's estate plan or the state's intestacy laws. Probate can be an incredibly time-consuming and costly process. Not only is this a burden on the franchised business owner's surviving family, but it can also be a drain on the franchisor's resources, as the franchisor is in effect partnered with the probate court during the process that can last several years.

Probate proceedings can interfere with the smooth operations of the franchisee's business. By placing decision-making authority in the hands of a probate court, these proceedings can potentially lead to decisions that are detrimental to the franchisor and the franchisee.

Another downside of probate is that it is public — anyone who is interested can find out what assets are owned and how they are being distributed after the owner's death. The public nature of probate can also draw unwanted attention from disgruntled family members who may challenge the disposition of the owner's assets, as well as from other unscrupulous parties. Probate is an invitation for such individuals to object, which then raises the level of court supervision and increases costs.

A great example of just how much turmoil probate proceedings can introduce to the running of a business is the legal battle that erupted following the 2006 death of Robert H. Brooks, owner of the Atlanta-based restaurant chain Hooters®. In his will, Brooks left 30% of his estate to each of his two children from his first marriage (one of whom, Coby Booker, became the new CEO). Brooks' second wife, Tami, was to have received \$1 million per year for 20 years; but she rejected the offer and went to court in search of a larger portion of her late husband's estate. She invoked South Carolina's "elective share" law, according to which widows and widowers can claim one-third of their dead

spouses' estates, instead of any bequest that they may have been left in the will. It took three years of legal wrangling and public acrimony for Booker and Tami to settle for an undisclosed sum. To raise it, Booker was forced to sell Hooters® to a private equity firm, and soon after he was let go.

## **B. Succession Trusts: Avoiding Probate and Protecting Assets**

The most effective tool for a franchisor and its franchisees to avoid probate and ensure the continuing success of the franchised business during the process of transition is a succession trust.

A trust is an estate planning tool created by an individual to manage his or her assets prior to death and to specify how the assets are to be distributed after death. The individual creating the trust, called a “trustor,” or “grantor,” transfers ownership of property and assets during their lifetime into the trust for the benefit of his heirs or other named beneficiaries.

There are two types of trusts, revocable and irrevocable:

**1. A revocable trust** agreement provides a mechanism for owning and managing assets both during the owner’s life and after death. By establishing a trust and transferring title of his or her assets to the trust, the business owner enables an appointed trustee to dispose of the assets at the owner’s death in the manner set forth in the trust document without a need for a probate proceeding. As the name implies, a revocable trust can be changed, amended, modified or revoked at the trustor’s discretion – so while it helps the business owner avoid probate, it still leaves the assets potentially available for creditor claims. A revocable trust also allows the grantor to provide for management succession of his assets in the event of incapacitation or disability. Because the trustor maintains control over all of the assets in a revocable living trust, such a trust does not avoid estate taxes, which become due when the assets are transferred to his heirs or beneficiaries after his death.

**2. An irrevocable trust** agreement generally cannot be changed, amended, modified or revoked even with a court order, thus offering coveted asset protection to the grantor. Since the assets in the irrevocable trust no longer belong to the grantor, they are generally protected from creditors or from other claimants (unlike the assets in the revocable trust). In addition, the assets are protected from Medicaid claims and divorcing spouses. The term “irrevocable” generally implies that the trust cannot be changed under any circumstances; an exception would be a special power of appointment in the trust document that may allow the grantor the freedom to modify the named beneficiaries at his discretion without affecting the benefits of the irrevocable trust. From a franchisor’s point of view, however, such changes in beneficiaries should be of little concern; the focus, instead, should be on appointing a reliable trustee.

### 3. Why Franchisors should Embrace Succession Trusts

Despite the advantages of a trust structure to both franchisees and franchisors, many franchise systems do not currently allow for trust ownership of franchised interests (or if they do allow for trust ownership, it comes at the cost of having to satisfy potentially onerous conditions). For franchise systems that have not yet considered the advantages of allowing trust-owned franchised interests, the following benefits should be considered:

- **Provides business continuity planning.** One of the most significant blows a franchised business can receive is when an owner/operator dies or becomes incapacitated unexpectedly. Such an event commonly leads to confusion and uncertainty over who will take the reins of the business. A business succession trust typically provides for this possibility and creates a management structure that can immediately run the business.
- **Addresses ownership transition issues.** If the business owner intends to transfer the business to a family member, an insider in the business, or even to a known third party, the business transition trust can implement this plan. Without such a plan, there often is chaos about when and how the business is transferred.
- **Minimizes royalty payment disruption.** Since the primary goal of a business succession trust is to ensure the orderly and efficient transition of the business, the odds of the business continuing to operate increase, which ensures that the business is able to continue making its royalty payments to the franchisor. Franchisors dealing with the death or incapacity of a franchisee who did not plan for the event understand the significant and immediate negative financial impact all too well.
- **Helps maintain system standards.** One of the obvious consequences of poor succession planning is the rapid deterioration of the franchised business operation in the event of the franchisee's death or disability. The financial stress put on a poorly prepared business quickly evinces itself in declining maintenance, capital expenditures, rapid turnover of senior management and missed remodeling deadlines. Encouraging franchisees to use business succession trusts can prevent this situation: a sound succession trust should clearly lay out the guidelines, benchmarks and metrics needed to maintain consistency in operations, employee continuity as well as the overall franchise system standards.
- **Minimizes liquidity problems.** Poor planning by franchisees generally results in unnecessary tax consequences at the owner's death. This can put the family in financial crisis and either require a fire sale or the withdrawal of funds that are necessary to the continued operation of the franchised business. The use of a business succession trust, coupled with

the appropriate estate plan, can provide much needed estate tax planning at death. Trust planning can also facilitate lifetime wealth transfers to the owner's family that can further minimize potential estate taxes. Federal and state estate tax rates vary but under current laws can exceed 50%.

- **Becomes franchisee recruiting tool.** Franchise systems that are proactive in not only allowing, but encouraging, franchisee succession and exit planning are viewed favorably by prospective franchisees. Franchisors who are able to offer these succession and exit planning tools within the system have an advantage over systems that do not. Franchisees are raising this issue today in the recruitment process and this issue will only become more prevalent in the future.
- **Responsive to franchisee concerns.** Succession and exit planning are hot topics on franchisee surveys in many franchise systems. Taking proactive steps to help address the franchisees' concerns shows not only that the franchisor is listening to these concerns, but that he/she is willing to do something about it.
- **Allows franchisor to control the process.** In systems that do not allow trust ownership, many franchisees are transferring their interests to trusts and not disclosing it to the franchisor. This prevents the franchisor from having any input on the types of trusts allowed or the overall transfer process. Allowing trust ownership provides the franchisor with the ability to dictate what types of trusts will be permitted and the process that franchisees need to follow to transfer interests to trusts.
- **Provides system efficiency.** By proactively defining the types of trusts that a franchisor will permit in the franchise system and the related transfer process, the franchisor can avoid having to review, comment, and negotiate each franchisee's situation independently. Having rules and standards in place significantly streamlines the trust compliance process and minimizes franchisor resources needed to deal with this issue.

Franchisors have not traditionally been receptive to trust ownership of franchisee businesses. Whether this is due to a lack of familiarity with estate planning issues or a fear of the unknown, franchisors are encouraged to review this policy and reconsider their position due to the overwhelming benefits for both franchisors and franchisees. What they may discover is that good planning for franchisees is also good planning for them and for the franchise system, and that being flexible and open to succession trusts will reap financial rewards in the future.

#### **4. Next Steps for Franchisors**

Franchisors may need to revise their existing franchisee recruitment and transfer policies to operate with trusts. Traditionally, franchisors have expressed

concern about their franchisees transferring assets to recipients who are beyond the franchisors' reach. If this is a concern, then choosing a revocable trust would provide an acceptable solution for managing this risk. In the case of an irrevocable trust, the franchisor should consider having the trust guarantee the franchise obligations and restrict distributions from the trust, while also taking care to appoint an independent-minded, reliable trustee. Since the trust would be managing the assets in accordance with the terms of the franchise agreement, the franchisor's right of first refusal and other rights would continue to be in effect.

Franchisors are discouraged from getting too involved in the selection of beneficiaries or in beneficiary changes. Once the provisions outlined above are in place, there is no need for additional restrictions, and the franchisor will not have to devote time to closely monitoring the trust's activities.

### **C. Exit Planning: A Franchisee's To-Do List**

A franchised business owner should begin the exit-planning process at least three years before the projected exit date. To ensure that the plan helps business owners achieve their long-range objectives, the process typically involves most, if not all, of the stages outlined below. We cannot emphasize enough that what follows are very general outlines, and the specific solutions will vary greatly in each individual succession plan, depending on the franchisee's specific circumstances.

#### **1. Establishing Owner Objectives**

The starting point is identifying the business owner's objectives. Determining his/her objectives regarding the exit from his/her business generally can be accomplished by answering these questions:

- How much cash do you need when you exit to support the lifestyle you desire? (Do you want to be cashed out when you leave the business or are you willing to receive the purchase price over time?)
- When do you want to leave the business? (Or, how much longer are you willing to remain active in the business?)
- To whom do you want to sell / transfer the business? (To a child? Which one? To a key employee? Co-owner? Or perhaps to an outside party who can pay top dollar?)

#### **2. Establishing Business Value**

While the previous phase establishes what the business owner wants or needs in order to leave their business on their terms, this phase determines what they have now. In other words, what is the business worth today? Determining the current value of the business tells us whether there is sufficient value in the



business to support the business owner's post-exit income needs. Most business values are discussed in terms of a multiple of EBITDA, and other factors impacting valuations may include the remaining term on agreements/leases, the condition of assets, trade-area prospects, etc. Sellers can work with brokers, valuation advisors or franchisors to determine the current value. If the current value falls short of this objective, part of the exit plan will be to increase the value of the business to a minimum acceptable level or, if that is not feasible, to recalibrate the owner's expectations. This valuation issue also must be viewed in context of the owner's likely successor for the business. If the exit plan involves transferring the business to family members or key employees, a lower business valuation may be preferable. On the other hand, a sale of the business to a third party may require the absolute highest possible valuation for the business.

### **3. Building Value and Cash Flow**

A critical part of an exit plan is working with the business owner's accounting, legal and tax advisors to develop and enhance the key value drivers for the business. These value drivers may include: an effective management team (particularly crucial in the event of the owner's sudden death or disability), efficient operating systems, an established and diverse customer base, a realistic growth strategy, effective financial controls, a stable and increasing cash flow, and a tax-efficient business structure. Working on these value drivers now will help ensure that the business is best positioned to fulfill the business owner's exit objectives.

### **4. Creating Ownership/Management Succession**

Having assembled his team of advisors, the franchisee "must identify those qualities that his successor must possess in order to successfully run and operate the franchise. Many franchisors require certain qualifications of a successor to the existing franchisee. Depending upon the type of franchise, these may include some specific and highly technical skills. Such qualities would be assessed by the franchisee, his advisors, and the franchisor as part of the succession plan."<sup>2</sup> Working closely with the franchisor throughout this process is crucial to reaching consent on the choice of the successor.

Once the successor has been picked, "the franchisee must train the successor by transferring his knowledge to the successor gradually over time. Depending upon the franchise, the owner will need a transition period of one to three years to adequately train his successor."<sup>3</sup>

"Initially the successor will shadow and just watch the owner. Gradually the owner will delegate more and more responsibilities to his successor so that he can effectively train the successor. Also, this transition period allows for not only the other employees of the franchise but also for the franchisee's customers,

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<sup>2</sup> International Franchise Association, *Succession Planning & Transfers Handbook*, p. 3 (2010).

<sup>3</sup> *Id.*, p. 4.

suppliers, and vendors to develop confidence in the successor as well. The end result is that all parties come to identify the franchise with the successor as opposed to the original owner.”<sup>4</sup>

## **5. Selling to a Third Party for Top Dollar**

This option involves two primary objectives. The first objective is to find a buyer willing to pay absolute top dollar for the business through a controlled auction, a negotiated sale or other method. The second is to ensure that the sale is structured to maximize the after-tax proceeds to the business owners. The first place to look for potential buyers is within the system: sellers should definitely consider existing franchisees but ensure that they are approved to grow.

Generally, owners are attracted to a third party sale (rather than a sale to insiders - family members, co-owners or employees) for one or more of the following reasons:

- When the market is favorable and strategic buyers are active in the marketplace, a sale to a third party can yield more cash.
- A sale to a third party usually is less risky than one to insiders.
- Sellers get their money faster than in a transfer to insiders.
- Insiders don't have what it takes (usually cash and sometimes desire) to buy the company.

Owners who opt to sell to a third party need to assemble a deal team by interviewing prospective advisors. Depending on the size of the business, a transaction intermediary may be an investment banker or a business broker. The team may also include an attorney skilled in transaction work and an accountant skilled in tax minimization techniques. The deal team members will use their expertise to help create a plan that:

- Minimizes the tax consequence of the deal;
- Takes into account the owner's willingness (or unwillingness) to remain active in the business once the deal closes;
- Determines whether the transaction will best be conducted as a controlled auction or negotiation;
- Specifies what kind of payment the owner will accept; and

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<sup>4</sup> *Id.*

- Last, but not least, includes a strategy that allows the owner to focus on the business's profitability while the transaction occurs.

**Tip:** Don't leave a bunch of "minor" deal points to the last minute, and make sure contracts are clear (What will be pro-rated? Who gets that rebate? Who will pay the transfer fees?).

#### **D. Transferring to Insiders: Family Members, Management or Employees**

If the business owner's objective is to sell or transfer the business to insiders, the exit plan will be structured very differently than a plan contemplating a sale to a third party. It is advisable to reveal this intention to the franchisor early on or simply to be prepared for the franchisor not to accept the proposed deal. In general, a sale to insiders does not end with a closing. It only ends when the business owner gets paid.

The potential benefits to this type of transfer include:

- Keeping the business in the family or extending the owner's legacy through a hand-picked management group;
- Motivating, retaining and rewarding key employees;
- Reaping more after-tax money than a third-party transfer;
- Retaining control until all, or most, of the purchase price is received;
- Remaining active in the business while gradually reducing day-to-day responsibilities;
- Gaining time to build up personal assets (via distributions of cash) before the exit.

There are, however, significant risks associated with this type of transfer, and they require careful mitigation:

**1. Insiders have no money.** What is needed is a transfer strategy that puts money in their pockets as they increase the value of the business. Years in advance of the transfer, the owner will have to work steadily and effectively to build cash flow (the source for all cash out) through the installation of value drivers and through careful planning to minimize taxation.

**2. Cash flow can be taxed twice.** Poorly planned insider sales can result in excess income taxes. Through effective tax planning, however, much of this tax burden can be legally avoided. The owner and advisors (including a certified business appraiser) should use a modest, but defensible

valuation for the business. Because a lower value is used for the purchase price, the size of the tax bite is correspondingly reduced. The difference between what the owner will receive from the sale of the business, at a lower price, and what the owner wants to be paid after leaving the business is “made good” through a number of different techniques to extract cash from the company after the owner’s exit.

**3. Successor’s management/ownership skills are untested.**

This risk calls for a written plan to systematically transition management and ownership responsibilities to the successor--beginning today. The transition period, during which the owner tests both his assumptions and his successors’ skills, usually takes several years to complete.

**4. The owner loses control before being cashed out.** This is only true if the owner (and his advisors) fails to implement a transfer strategy designed to accomplish the opposite: to be cashed out *before* losing control. In such a plan, the owner keeps control, in part through a well-designed and incremental sale of the company over time, based upon improving company cash flow over time.

Employee Stock Ownership Plans, which involve transferring ownership of the company both to family members and to employees, cannot be used on their own to transfer ownership wholly to family members, but they can be used in combination with other methods of transfer - such as gifting or recapitalization - to keep majority ownership in a family.

One method for keeping good employees interested in growing the business is “key man” insurance. This is a policy in the name of the employee, where the company pays the premium and the employee accrues the cash value of the policy.

**5. Wealth preservation planning.** A comprehensive exit plan must contain the proactive design and implementation of wealth preservation strategies before ownership of the business is transferred. An effective wealth preservation plan will protect the value of the business currently, as well as in the event of the owner’s unexpected death or permanent disability. Wealth preservation also encompasses the owner’s plan for transferring wealth (either in the form of the business itself or exit proceeds) to future generations.

### **III. The Franchisor's Role in the Transfer of a Franchise**

#### **A. Franchise Agreement Provisions**

##### **1. A Franchisor's Right to Approve Transfers**

Franchisors go great lengths to review franchise applications for the sale of new franchises to "prospective franchisees".<sup>5</sup> Background checks, search of the Office of Foreign Asset Control terrorist watch lists, personality tests, financial statements and operational criteria are routinely evaluated in the application process as franchisors try to verify whether the applicant will be a good fit for the brand. Likewise, transfer applicants are screened with this same attention to detail to ensure that the transferee can step into the transferor's business operations without harming the customer experience and the brand.

Transfers come in many shapes and sizes as existing franchisees bring in new investors, release former owners, form new business entities, and engage in succession planning. A franchise agreement, therefore, must be drafted to broadly address each potential transfer. Typically, the franchise agreement will first demonstrate the franchisor's interest in selecting a particular franchisee and then will contain a broad definition of transactions that will qualify as transfers that will trigger a need to obtain the consent of the franchisor. For example:

You understand and acknowledge that the rights and duties set forth in this Agreement are personal to you and that we have entered into this Agreement in reliance on your and your owners' business skill, financial capacity, personal character, experience and demonstrated or purported ability to develop and operate high quality business operations. Accordingly, neither you, your owners, nor any immediate or remote successor to any part of your interest in this Agreement shall sell, divide, assign, transfer, convey, give away, pledge, mortgage, transfer in trust, divorce or operation of law or by other means, or otherwise encumber or dispose of any interest in you, this Agreement, the Franchise, substantially all the assets of the Franchised Business, the Premises or any other assets pertaining to your operations under this Agreement (collectively "Transfer") without obtaining our prior written consent.

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<sup>5</sup> A "prospective franchisee" means any person (including any agent, representative, or employee) who approaches or is approached by a franchise seller to discuss the possible establishment of a franchise relationship. 16 C.F.R. 436.1(r) (2007).

Franchise agreements typically condition third party transfers on a number of factors such as the following:

- The franchisor will typically need to waive its contractual right of first refusal;
- The franchisee must be in full compliance with the terms of the franchise agreement and any other agreements with the franchisor or its affiliates;
- All monetary obligations of the franchisee to the franchisor and its affiliates as well as all bills from suppliers, any taxes, and outstanding judgments, or liens must be satisfied;
- The proposed transferee must meet the franchisor's then-current operational and financial criteria for new franchise owners;
- The proposed transferee and its managers must attend and successfully complete any required training programs;
- The franchisee and its owners must sign a general release of all claims against the franchisor and its affiliates;
- The debt service taken on by the transferee must not be so high as to jeopardize the ability of the proposed transferee to operate and maintain the Franchised Business;
- If the franchisee finances any part of the sales price, all obligations of the proposed transferee to the franchisee must be subordinate to their obligations to the franchisor and its affiliates;
- The proposed transferee must agree to remodel the franchised business premises to bring the business up to the franchisor's then-current standards;
- The franchisee and its owners must sign a non-compete agreement for the post-term period required by the franchise agreement;
- If the premises are leased, the landlord must provide its consent to the transfer;
- The proposed transferee must sign a new franchise agreement, typically for the remaining term of the existing franchise agreement;
- The proposed transferee's owners must sign a personal guaranty of the transferee's obligations under the new franchise agreement; and

- The franchisee must pay a transfer fee.

Recognizing a franchisee's interest in transferring shares of its company to minority investors or family members, some franchisors will permit transfers of minority ownership interests without invoking the franchisor's right of first refusal, requiring a new franchise agreement, remodel, or the payment of a transfer fee. These "permitted transfers" are typically conditioned on the franchisee providing advance written notice of the intent to transfer and the new owners passing a background check.

If a franchisee plans to make a private placement or public offering of shares of their companies, a franchisor will want to reserve the right to consent to these transfers and review any of the offering documents before any such offering is made available to potential investors.

## **B. State Regulation of Transfers**

Courts typically will uphold a franchisor's refusal to consent to a transfer request if the franchise agreement provides for the sole discretion of the franchisor to accept or reject a transfer.<sup>6</sup> If the agreement states that the franchisor shall not unreasonably withhold its consent to a transfer, the franchisor's decision to reject a transfer will be upheld if the franchisor can demonstrate a legitimate business justification for its decision.<sup>7</sup> However, if the franchise agreement is silent, the courts are split on whether to impose a reasonable business justification standard or to permit an arbitrary standard.<sup>8</sup> In addition, state relationship laws come into play and these laws will supersede any stated transfer provisions in the franchise agreement and regulate the situations in which a franchisor may refuse to approve a proposed transfer. Some states explicitly require the franchisor to act reasonably or in good faith, while others require good cause or a legitimate business justification to reject a proposed transfer. Therefore, in reviewing transfer applications, franchisors should be cognizant of the potential need to demonstrate a legitimate business justification to reject a transfer. It is also a good practice for the franchise agreement to set forth the general areas that must meet its satisfaction, i.e., operational, financial, legal -- to ensure that refusals to approve a transfer are on consistent grounds system-wide, and avoid charges of arbitrary or discriminatory decision-making.

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<sup>6</sup> *Perez v. McDonald's Corp.*, 60 F. Supp. 2d 1030, 1035 (E.D. Cal. 1998).

<sup>7</sup> See, e.g., *Burger King Corp. v. H&H Restaurants LLC*, 2001 WL 1850888 at 5 (S.D. Fla. 2013), *Walner v. Baskin Robbins Ice Cream Co.*, 514 F. Supp. 1028, 1029 (N.D. Tex. 1981).

<sup>8</sup> Joel D. Siegel & Glenn J. Plattner, *Saying No: Franchisor Exposure for Franchisee Transfer Restrictions*, 16 Franchise L.J. 131, 133 (1997); Terrence M. Dunn, *Franchisor's Control Over the Transfer of a Franchise*, 27 Franchise L.J. 233, 236 (2008).

## 1. Arkansas

Under the Arkansas Franchise Practices Act, franchisees are statutorily required to notify franchisors of their intent to transfer a franchise, or any interest in a franchise, to another person by first providing written notice of their intention, along with the prospective transferee's name, address, statement of financial qualification, and business experience during the previous five year period.<sup>9</sup> Within 60 days following the receipt of this information, the franchisor must notify the franchisee of its approval or disapproval of the transfer application. If the proposed transferee is unacceptable to the franchisor, the notice must identify a "material reason relating to the character, financial ability, or business experience of the proposed transferee."<sup>10</sup> Importantly, if the franchisor fails to respond in this 60-day period, the transfer is deemed approved.<sup>11</sup> After approving a transfer, the transfer is not valid unless the transferee agrees to comply with the franchise agreements' transfer requirements.<sup>12</sup>

The Act further prohibits a franchisor from restricting the sale of securities or shares of stock to employees of the franchisee or heirs of the principal owner of the franchisee "as long as basic financial requirements of the franchisor are complied with, if the sale, transfer, or issuance does not have the effect of accomplishing a sale of the franchise."<sup>13</sup>

## 2. California

Under the California Franchise Relations Act, it is unlawful to prevent the transfer of a franchise if the transferee is qualified under "the franchisor's then-existing standards for the approval of new or renewing franchisees, these standards to be made available to the franchisee . . . and to be consistently applied to similarly situated franchisees operating within the franchise brand, and the franchisee and the buyer, transferee, or assignee comply with the transfer conditions specified in the franchise agreement."<sup>14</sup>

A franchisee must submit written notice of any intention to sell, assign, or transfer "a franchise, all or substantially all of the assets of a franchise business, or a controlling or non-controlling interest in the franchise business" to another person. The term "franchise business" includes "a legal entity that is a party to a franchise agreement."<sup>15</sup> The transfer notice must contain:

- (1) The proposed transferee's name and address.

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<sup>9</sup> Arkansas Code § 4-72-205 (a).

<sup>10</sup> *Id.* at § 4-72-205 (b)(1).

<sup>11</sup> *Id.* at § 4-72-205 (b)(2).

<sup>12</sup> *Id.* at § 4-72-205 (c).

<sup>13</sup> *Id.* at § 4-72-206 (4).

<sup>14</sup> Cal. Bus. & Prof. Code § 20028(a).

<sup>15</sup> Cal. Bus. & Prof. Code § 20029(a).



(2) A copy of all agreements related to the sale, assignment, or transfer of the franchise, the assets of the franchise business, or the interest in the franchise business.

(3) The proposed transferee's application for approval to become the successor franchisee. The application shall include all forms, financial disclosures, and related information generally utilized by the franchisor in reviewing prospective new franchisees, if those forms are readily made available to the existing franchisee. If the forms are not readily available, the franchisee shall request and the franchisor shall deliver the forms to the franchisee by business courier or receipted mail within 15 calendar days. As soon as practicable after the receipt of the proposed transferee's application, the franchisor shall notify, in writing, the franchisee and the proposed transferee of any additional information or documentation necessary to complete the transfer application. If the franchisor's then-existing standards for the approval of new or renewing franchisees are not readily available to the franchisee when the franchisee notifies the franchisor of the franchisee's intent to sell, transfer, or assign the franchise, the assets of the franchise business, or the controlling or noncontrolling interest in the franchise business, the franchisor shall communicate the standards to the franchisee within 15 calendar days.<sup>16</sup>

After the franchisor has received all required information, it has 60 days (unless a different time period is specified in the franchise agreement) to notify the franchisee in writing **by business courier or receipted mail** of its approval or disapproval of the proposed transfer. If the franchisor does not follow this procedure, the transfer shall be deemed to be approved. If the franchisor disapproves the transfer application, the notice must include the reasons for the disapproval.<sup>17</sup>

The California Franchise Relations Act prohibits a franchisor from denying a “surviving spouse, heirs, or estate of a deceased franchisee or the majority shareholder of the franchisee the opportunity to participate in the ownership of the franchise under a valid franchise agreement for a reasonable time after the

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<sup>16</sup> *Id.* at § 20029 (a)(1) – (3).

<sup>17</sup> *Id.* at § 20029 (b)(1).

death of the franchisee or majority shareholder of the franchisee.”<sup>18</sup> During this time period, the surviving parties can either demonstrate that they meet the franchisor’s requirements to own a franchise or arrange for the transfer of the franchise to a person who meets those standards.<sup>19</sup> A franchisor, however, can still exercise a right of first refusal to purchase the franchise interest being transferred.<sup>20</sup>

### 3. Hawaii

Hawaii has enacted a franchise relationship statute which requires the parties to deal with each other in good faith.<sup>21</sup> The statute further prohibits a franchisor from refusing to approve a transfer without good cause. “Good cause” under the statute includes the following:

- (i) The failure of a proposed transferee to meet any of the franchisor's or subfranchisor's reasonable qualifications or standards then in effect for a franchisee or subfranchisor;
- (ii) The fact that the proposed transferee or any affiliated person of the proposed transferee is a competitor of the franchisor or subfranchisor;
- (iii) The inability or unwillingness of the proposed transferee to agree in writing to comply with and be bound by all lawful obligations imposed by the franchise, including without limitation all instruction and training obligations, and to sign the current form of franchise agreement used by the franchisor or subfranchisor; and
- (iv) The failure of the franchisee or proposed transferee to pay any sums owing to the franchisor and to cure any default in the franchise agreement or other agreements with the franchisor existing at the time of the proposed transfer.<sup>22</sup>

A franchisor has 30 days after receipt of a written request for transfer to approve or disapprove a transfer. If the franchisor disapproves of the transfer, the franchisor must specify the reasons for the disapproval. If the franchisor fails to

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<sup>18</sup> *Id.* at § 20027(a).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at § 20027(b).

<sup>21</sup> Haw. Rev. Stat. 482E-6(1).

<sup>22</sup> *Id.* at 482E-6(2)(l).

approve or disapprove the transfer within this 30-day period, the transfer will be deemed approved by the franchisor.<sup>23</sup>

#### **4. Indiana**

Similar to California, in Indiana, franchisors may not refuse to permit a surviving spouse, heirs or the estate of a deceased franchisee from participating in the operation of the franchised business under a franchise agreement for a reasonable period of time after the death of the franchisee, provided that they can meet the franchisor's standards.<sup>24</sup>

#### **5. Iowa**

Iowa has enacted a comprehensive statute setting forth detailed requirements for franchise transfers. The statute permits a franchisee to transfer their franchise if the transferee "satisfies the reasonable current qualifications of the franchisor for new franchisees," which includes "a qualification based upon a legitimate business reason."<sup>25</sup> The franchisee must provide a franchisor 60 days to review their transfer application which shall include the ownership percentages of all proposed owners after the transfer.<sup>26</sup> A franchisor must provide notice prior to the expiration of the 60-day period or the transfer will be deemed to be approved.<sup>27</sup> A franchisor may not discriminate against a proposed transferee on the basis of race, color, national origin, religion, sex, or disability but can disapprove a transfer if the disapproval is not arbitrary or capricious.<sup>28</sup>

A franchisor may condition a transfer on any of the following:

- a. That the transferee successfully complete a reasonable training program.
- b. That a reasonable transfer fee be paid to reimburse the franchisor for the franchisor's reasonable and actual expenses directly attributable to the transfer.
- c. That the franchisee pay or make provision reasonably acceptable to the franchisor to pay any amount due the franchisor or the franchisor's affiliate.

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<sup>23</sup> *Id.*

<sup>24</sup> Ind. Code §23-2-2.7-2(3).

<sup>25</sup> Iowa Code 523.H.5(1).

<sup>26</sup> *Id.at* 523.H.5(5).

<sup>27</sup> *Id.at* 523.H.5(7).

<sup>28</sup> *Id.at* 523.H.5(8).

d. That the financial terms of the transfer comply at the time of the transfer with the franchisor's current financial requirements for franchisees.<sup>29</sup>

Most franchisors condition the transfer of the franchise upon the requirement that the franchisee sign the franchisor's then-current form of franchise agreement. This activity is prohibited in Iowa where a franchisee is entitled to transfer a franchise for the remaining term of their existing franchise agreement.<sup>30</sup> In addition, a franchisor may not condition the approval of the transfer on the franchisee taking action or relinquishing any rights unrelated to the franchise and cannot require the franchisee to sign a release broader than the release to be provided by the franchisor to the franchisee.<sup>31</sup>

Iowa's statute further identifies certain transfers that may proceed without the consent of the franchisor and for which a franchisor may not exercise a right of first refusal. These include:

- (1) the succession of ownership following the death or disability of the franchisee or its owner to a surviving spouse, heir, or partner active in the management of the franchise unless the successor fails to meet the franchisor's reasonable qualification for a franchisee within one year;
- (2) the formation of a corporation by a proprietorship franchisee;
- (3) a transfer of ownership interests amongst the owners of a franchise, a transfer of less than a controlling interest in the franchise to the franchisee's spouse or child, a transfer of less than a controlling interest in the franchise to an employee stock ownership plan or employee incentive plan so long as more than 50% of the franchise is held by persons who meet the franchisor's standards for franchisees; and
- (4) the grant of a security interest in the franchised business or its assets, or an ownership interest in the franchisee, so long as the security agreement gives the franchisor simultaneous notice of any foreclosure action and a reasonable opportunity to pay the

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<sup>29</sup> *Id.* at 523.H.5(3).

<sup>30</sup> *Id.* at 523.H.5(4).

<sup>31</sup> *Id.* at 523.H.5(10).

secured obligation and redeem the interests of the secured party.<sup>32</sup>

## **6. Michigan**

The Michigan Franchise Investment Law prohibits a franchisor from rejecting a transfer request without good cause, which includes, but is not limited to:

(i) The failure of the proposed transferee to meet the franchisor's then current reasonable qualifications or standards.

(ii) The fact that the proposed transferee is a competitor of the franchisor or subfranchisor.

(iii) The unwillingness of the proposed transferee to agree in writing to comply with all lawful obligations.

(iv) The failure of the franchisee or proposed transferee to pay any sums owing to the franchisor or to cure any default in the franchise agreement existing at the time of the proposed transfer.<sup>33</sup>

A franchisor may still exercise its right of first refusal to purchase the interest that is subject to the transfer.<sup>34</sup>

## **7. Minnesota**

In Minnesota, a franchisor's withholding of consent to a transfer is unfair and inequitable if the proposed transferee meets the franchisor's current standards for its franchisees.<sup>35</sup>

## **8. Nebraska and New Jersey**

Nebraska and New Jersey require franchisees to notify the franchisor of any intent to transfer their franchise by written notice (certified mail in Nebraska) including the name, address, financial qualifications and five-year business history of the prospective franchisee. After receipt, the franchisor has 60 days to approve or disapprove the transfer application. If the transfer is disapproved, the franchisor must identify the material reasons therefore. If the franchisor does not reply within the 60-day period, the transfer is deemed to be approved. The

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<sup>32</sup> *Id.* at 523.H.5(12).

<sup>33</sup> Mich. Comp. Laws. § 445.1527(g).

<sup>34</sup> *Id.*

<sup>35</sup> Minn. Stat. § 80C.14 (Subd. 5).

transfer is not valid unless the transferee agrees in writing to comply with all franchise requirements.<sup>36</sup>

## **9. Washington**

Washington requires the parties to deal with each other in good faith and prohibits a franchisor from imposing a standard of conduct on a franchisee unless it is “reasonable and necessary”.<sup>37</sup> The Director of the Securities Division of the Washington Department of Financial Institutions has issued two interpretative statements on transfers. With respect to voluntary (partial or complete) transfers, in order to meet the good faith standards and fair practices standards in the statute, a franchisor may not “unreasonably withhold its consent to a transfer or otherwise unreasonably restrict transfer”. In particular, the Director notes that it would be unreasonable for a franchisor to refuse to permit a transfer where the prospective transferee meets the franchisor’s current requirements for the sale of a new franchise. In addition, franchisors may not charge “exorbitant transfer fees” (instead, transfer fees must be tied to the franchisor’s expenses “directly incurred as the result of transfer”) or require the transferor to sign a release of claims under the Washington Franchise Investment Protection Act.<sup>38</sup>

With respect to involuntary transfers on death, a franchisor cannot terminate a franchise upon the death of the franchisee unless the franchisor has good cause or can demonstrate that the franchise is reliant upon the unique talents of the franchisee.<sup>39</sup>

## **IV. The Transfer Process**

### **A. Transfer Policies and Guidelines**

As identified above, it is in the best interest of every franchisor to encourage their franchise community and their franchisee associations to adopt formal succession and exit plans broadly. Having a good exit plan has never been cited as a negative! Annual conventions or regional meetings can serve as convenient and effective settings for educating franchisees about the importance of protecting their investment (time and money) through thoughtful planning. In addition, franchisors should be willing to engage in constructive, discreet dialogues directly with specific franchisees if there is a concern about the absence of a plan for the future, with the goal being the development of a well-informed stay/go decision on the part of the franchisee.

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<sup>36</sup> Neb. Rev. Stat. § 87-405 and N.J. Rev. Stat. § 56:10-6; see also *V.W. Credit, Inc. v. Coast Automotive Group, Ltd.*, 346 N.J. Super. 326, 340 (App. Div. 2002) (holding a franchisor unreasonably withheld its consent to a transfer where its decision was not “supported by substantial evidence showing that the proposed franchisee is materially deficient.”).

<sup>37</sup> Wash. Rev. Code 19.100.180(1) and (2)(h).

<sup>38</sup> Bus. Franchise Guide (CCH) ¶ 5470.76.

<sup>39</sup> Bus. Franchise Guide (CCH) ¶ 5470.77.

Although a franchise agreement typically will outline the legal requirements that a franchisee must meet in order to transfer their interest in a franchise, franchisors are also encouraged to outline the transfer procedures with step by step instructions and checklists for obtaining the franchisor's consent and effectuate the transfer of the business. This will enable the franchisee to create a succession plan that is in line with the franchisor's requirements. Throughout the transfer process, the franchisor and the franchisee should remain in close contact regarding progress.

Franchisors typically require that any prospective transferee meets its then-current criteria for new franchisees in terms of their financial wellbeing and operational experience and abilities. Naturally, a franchisor's assessment of its system's needs in terms of the profile of franchisees changes over time. What should remain reasonably constant is the franchisor's approach to reviewing a proposed transfer, the implications of the transfer to the franchise system, and the judgment that the franchisor uses in translating this into the filters used in assessing the proposed transferee. Examples of factors that will in turn influence these filters include but are not limited to the number of locations involved, the size of the buyer relative to the target acquisition, the condition of the assets, and the relative penetration of the brand in the relevant geographic market.

## **B. Internal Steps to Review Transfer Applications**

**1. Transfer Request.** The first step in the transfer process arises when the franchisee initiates a request to transfer the franchise, or an interest in the franchise, to another owner, a third party, or a trust or other estate planning vehicle. Typically, a franchisee must send the request to the franchisor thirty to ninety days prior to the proposed transfer date. If applicable, the franchisor may collect the transfer fee simultaneously with the request to transfer or may not require payment until the transfer is approved and closes. Depending on the type of transfer, the notice from the franchisee can take on several formats. For example, in the case of the death of a franchise owner, prior notice is not possible and the franchise agreement typically provides a post-death time frame in which the decedent's interests must be transferred. A sample transfer request arising out of the death of an owner of the franchisee entity is attached as Exhibit A. If a franchisee is engaging in corporate or estate planning and the underlying ownership structure of the franchisee in terms of percentages of ownership interests will not be altered, the request may be framed as a request to transfer ownership interests in the franchisee. A sample Notice of Change of Ownership Interests in Franchisee is attached as Exhibit B.

**2. Due Diligence.** Upon receipt of the transfer request, the franchisor will initiate its due diligence process for the transfer, which will include not only an evaluation of the prospective transferee but also the existing franchisee and its current franchised business operations. If the franchise agreement grants the franchisor a right of first refusal, any review of the transfer request must also contain an evaluation of whether the franchisor plans to

exercise the right of first refusal. A sample letter to the franchisee regarding the initiation of the transfer process and a request for additional information that is needed before the franchisor can fully evaluate its right of first refusal is included as Exhibit C. Typically, a franchisee and its proposed transferee will need to gather and present at least the following to the franchisor:

- The franchise application of the transferee;
- The proposed purchase price and purchase agreements;
- Financial statements of the franchised business;
- Financial statements of the proposed transferee;
- Entity documents for the transferee;
- A list of ownership interests in the transferee;
- A franchise disclosure document receipt; and
- Evidence of the transferee's right to control the premises of the franchised business by deed or lease, and, if by lease, the landlord's consent to the transfer.

Upon receipt of the requested information, the franchisor should have its legal, finance, operations, and development teams review the transfer request and evaluate its right of first refusal. The language of the franchise agreement will dictate the scope of the right of first refusal, how it is triggered and the steps that must be taken to exercise or reject the right. Oftentimes the franchisor's election to exercise the right of first refusal may meet with resistance by the selling franchisee that has already engaged in protracted discussions with a potential purchaser. Therefore, it is a good policy for a franchisor to include a reference to the right of first refusal in any transfer checklists that are shared with the system. The selling party and proposed buyer should limit their out of pocket expenses by delaying their due diligence efforts until the franchisor has had an opportunity to evaluate the proposed sale and its right of first refusal.

If the franchisor passes on the right of first refusal, the franchisor will need to review the prospective transferee's franchise application and evaluate the candidate in line with its current requirements including all background checks and operational assessments. Since most transfers are conditioned on bringing the franchised business up to the franchisor's standards, a scope of work is typically attached to resulting transfer approval and eventually to the transfer agreement.

Upon review of the transfer application, the franchisor should outline its approval or rejection of the transfer request relying on the transfer conditions



outlined in the franchise agreement. If approved, the franchisor's notice should provide clear guidance on the steps and timing required to consummate the transfer. If rejected, the franchisor should verify that it has employed criteria in line with its transfer policies in an objective manner to reduce the risk of claims arising out of the refusal to approve the transfer.<sup>40</sup>

### **3. Transfers for Convenience of Ownership**

In the context of succession planning, individuals who own the franchise may request a transfer of the franchise agreement to an entity formed by the individuals. They can then operate under a corporate structure with hired officers and directors to manage the company upon an owner's retirement, death or disability. Many franchisors chose to treat this "transfer for convenience of ownership" as a permitted transfer so long as the entity is newly formed for the sole purpose of operating the franchise and the underlying ownership interests in the franchise don't change. If the franchise is already held by an entity, the individual owners may want to transfer their ownership interests to a corporation or limited liability company that they control to protect their equity interests. This transfer can be accomplished by an assignment agreement that results in the transfer of stock, membership or partnership interests in the underlying entity. Here, a franchisor's consent will likely be conditioned again on the underlying ownership interests remaining the same as when the franchisee entered the franchise system. If new owners are introduced under either of these scenarios, a full transfer will be triggered and the franchisee and transferee must comply with any conditions of transfer set forth in the franchise agreement. A sample Transfer Agreement for Transfers made for Convenience of Ownership is attached as Exhibit D.

### **4. Transfers of Individual Ownership Interests to Entities and Trusts**

The owners of a franchise entity may desire to transfer their individual ownership interests to limited liability companies or corporate entities for tax planning or estate planning purposes. In evaluating these transfer requests, franchisors will want to evaluate the organizational documents for each entity to verify the structure of the new entities and to confirm that the original owner controls the entity. Depending on the structure of the franchise agreement, these transfers may be permitted transfers that will not invoke the franchisor's right of first refusal.

When evaluating a request to transfer an ownership interest in a franchise to a trust, a franchisor should request that the trust agreement: (1) permit the franchisor to approve any successor trustee or additional beneficiary; (2) permit the franchisor to approve modifications of the trust agreement, including the

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<sup>40</sup> See Frederic A. Cohen & Nicole L. Micklich, *Transfers of Franchisees: Disputes Arising From Assignments* (Workshop 13 at the American Bar Association Annual Forum on Franchising, 2013).

provisions relating to the trustee's powers and duties; (3) include a representation that the trust was properly formed under applicable law and that it is in full force and effect; (4) provide that any subsequent transfer by the trust (including, the "transfer" to a beneficiary upon the occurrence of a triggering event or the "transfer" back to grantors of the trust) is subject to the transfer provisions in the franchise agreement; and (5) provide that the trustee shall not take any actions that are contrary to the franchise agreement or the franchisor's rights with respect to the franchise agreement, the franchise system, other franchised system restaurants or the goodwill associated therewith. The franchisor may request that the trust, and individual owners who are transferring their ownership interests provide current financial statements. Depending upon the financial condition of the trust and its grantors, the franchisor may require additional personal guarantees from the trust, the trustee, the grantors, beneficiaries or other related individuals. A sample Consent to Transfer of Ownership Interests to a Trust is attached as Exhibit E.

## **5. Transfers on Divorce**

Transfers that arise as the result of a divorce are challenging for a number of reasons; the foremost of which is that the transfers resulting in a division of the franchise are frequently conducted as part of a settlement without notifying or obtaining the franchisor's consent. Therefore, it is important to specifically require franchisor approval of any transfer as a result of divorce. If both spouses were involved in the operation of the business, the franchisor may provide an expedited review only to ensure that the remaining owner has the operational and financial ability to continue to operate the business. However, if the remaining owner was not previously involved in the operation of the business, most franchisors will treat the request to transfer in the same manner that they would treat a third-party transfer request including the requirement for the remaining owner to attend and successfully complete the training program.

## **6. Transfers on Death, Incapacity or Bankruptcy of an Owner**

The death, incapacity or bankruptcy of a key owner of a franchisee can damage the integrity of the operation of the franchised business if a substitute operator or owner is not identified quickly. Typically, the death, incapacity or bankruptcy of a minority owner of a franchise will be addressed through the standard transfer provisions addressed above. However, franchise agreements should directly address situations arising upon the death, incapacity or bankruptcy of the key owner of the franchise. The agreement should specifically identify the time frame in which the transfer take place and should provide for an interim operator if necessary. A sample provision follows:

*Death, Incapacity or Bankruptcy.* If your Operating Principal (which is defined as the key owner of the franchisee entity that is responsible for supervising

the franchised business operations) or any owner holding more than a 10% interest in you dies, becomes incapacitated, or enters bankruptcy proceedings, that person's executor, administrator, personal representative, or trustee must promptly notify us of the circumstances, and apply to us in writing within three months after the event (death, declaration of incapacity, or filing of a bankruptcy petition) for consent to transfer the person's interest. The transfer will be subject to the provisions of this Section XX, as applicable; however, we will not impose a transfer fee for such a transfer, so long as you reimburse us for any out-of-pocket expenses that we incur in reviewing and/or documenting a transfer under this Section XX. In addition, if the deceased or incapacitated person is the Operating Principal, we will have the right (but not the obligation) to take over operation of the Franchised Business until the transfer is completed and to charge a reasonable management fee for our services.

For purposes of this Section XX, "incapacity" means any physical or mental infirmity that will prevent the person from performing his or her obligations under this Agreement: (1) for a period of thirty or more consecutive days; or (2) for sixty or more total days during a calendar year. In the case of transfer by bequest or by intestate succession, if the heirs or beneficiaries are unable to meet the transfer conditions of Section XX above, the executor may transfer the decedent's interest to another successor that we have approved, subject to all of the terms and conditions for transfers contained in this Agreement.

If an interest is not disposed of under this Section XX within six months after the date of death or appointment of a personal representative or trustee, we may terminate this Agreement under Section XX below.

A franchise agreement might also distinguish between a temporary incapacity of a key owner and a permanent disability. With respect to a situation involving a temporary incapacity, an interim operator, which may be the franchisor, can be approved to step in and operate the franchised business for a finite period of time; whereas a permanent disability would trigger the clause above and the need for a transfer to transpire within a defined period of time.

### **C. Challenges in the Transfer Process**

In a perfect world, a franchisor and franchisee will have their interests aligned throughout the transfer process. However, oftentimes their interests diverge and disagreements can arise that the parties will have to work through during the process.

A primary frustration for franchisors is the discovery that a transfer of ownership interests in the franchisee entity took place months or even years prior to the franchisor's discovery. These unauthorized transfers may be grounds for termination of the franchise agreement, however, that would leave the franchisor with the loss of a unit unless a new transferee is identified quickly. More frequently, the franchisor will place the franchisee in default of the franchise agreement while the franchisee goes through the formal transfer approval process to recognize the new owners. However, franchisees should not assume that the transfer will be approved, and thus they may in fact face a true termination.

Issues may arise when a franchisee presents a transfer candidate that does not meet the franchisor's then-current qualifications for a franchise owner. The situation may be further exacerbated if a franchisee and its transferee are already headed to the closing table without awaiting the franchisor's approval of the transfer request. The franchisee may feel that the franchisor is unfairly limiting the buyer pool by rejecting too many candidates. Franchisors should encourage potential sellers to screen their prospective buyers with the franchisor before spending time and money on the underlying deal. This is another reason why clearly articulated transfer policies and procedures are recommended.

A common sore-point for a franchisee interested in engaging in a transfer is the franchisor's right to require a remodel or refresh of the franchised business upon approval of the transfer. These capital expenditures may impact the ultimate purchase price that the franchisee would be able to generate from the sale. However, the franchisor's interest in ensuring that the new owner has the financial ability and business vision to maintain the premises of the franchised business to the franchisor's then-current standards is critical to the future well-being of the franchise system. In addition, in business segments with customer-facing physical infrastructure, buyer candidates who do not believe that image improvement is critical in order to compete are unlikely to be deemed qualified to buy.

### **V. Conclusion**

Given the investment of human and financial capital in a franchise business, adequate succession planning helps to ensure a return on that investment for the investors and/or their heirs. Likewise, this planning enables franchisors to maintain continuity of operations at sites and in territories where

the franchise owner has helped to build the goodwill of the brand. Careful and coordinated planning by both the franchisor and the franchisee should take place on an ongoing basis. Whether through the creation and review of annual business plans or through a formal succession planning process, both parties will realize benefits from this process.

**EXHIBIT A: SAMPLE**

**Notice of Change of Ownership Interests in Franchisee  
(Death or Disability)**

TO: FRANCHISOR NAME

1. Pursuant to a Franchise Agreement dated as of \_\_\_\_\_ (“Franchise Agreement”), [Franchisor Name] (“Franchisor”) granted \_\_\_\_\_ (“Franchisee”) the right to operate a [Franchise System Name] (“Franchised Business”) located at [Business Address].

2. When Franchisee signed the Franchise Agreement, the ownership interests in Franchisee were held as follows:

| Owner | % of Ownership Interest Held by Owner |
|-------|---------------------------------------|
|       |                                       |
|       |                                       |

3. As evidenced by the enclosed copy of the death certificate attached as Exhibit 1, [Name of Deceased] passed away on [Date of Death]. As permitted by Section XXX of the Franchise Agreement, this letter serves as notice to Franchisor that [Name of Deceased]’s ownership interests in Franchisee were transferred to [Name of transferee] (“Transferee”). After the transfer, the ownership interests in Franchisee are held as follows:

| Owner | % of Ownership Interest Held by Owner |
|-------|---------------------------------------|
|       |                                       |
|       |                                       |

4. This letter serves as notice to Franchisor of the change in ownership in Franchisee, which is a permitted transfer under the terms of the Franchise Agreement.

5. Franchisee acknowledges that it must satisfy the conditions of Sections XXX of the Franchise Agreement before Franchisor will execute the attached consent to the transfer including the following:

**A.** Franchisee and its owners must not be in default of the Franchise Agreement or any other agreement with Franchisor or its affiliates or any other creditor or supplier of the Franchised Business.

**B.** Franchisee has submitted to Franchisor entity documentation to evidence the change of ownership noted under Paragraph 3 of this Notice of

Change of Ownership including the following: an amendment to the articles of organization; modified shareholders agreement or bylaws showing the updated owner list; updated stock certificates; a certificate of good standing; and a resolution identifying the officer who has authority to execute this Notice of Change of Ownership.

**C.** Franchisee has completed Replacement Exhibit A to the Franchise Agreement, which is attached to this letter as Exhibit 2.

**D.** Franchisee and its owners will submit any other information requested by Franchisor to determine whether to consent to the change in ownership.

**6.** Franchisee and its owners agree that Franchisor's consent to the change in ownership shall not constitute a waiver of any claims Franchisor may have against Franchisee and any owner, nor shall that consent be deemed a waiver of Franchisor's right to demand exact compliance with any term of the Franchise Agreement, nor shall the consent be deemed a waiver of Franchisor's continuing right to give or withhold consent to any future transfers.

**7.** In order to induce Franchisor to consent to the change in ownership interests, Franchisee (on behalf of itself and its affiliates and their respective past and present members, officers, directors, shareholders, agents, and employees, in their corporate and individual capacities) and [Transferee] (on behalf of himself/herself and his/her heirs, representatives, successors and assigns) (collectively "Releasers") freely and without any influence forever release and covenant not to sue Franchisor, its affiliates, and their respective past and present officers, directors, shareholders, agents and employees, in their corporate and individual capacities, with respect to any and all claims, demands, liabilities and causes of action of whatever kind or nature, known or unknown, vested or contingent, suspected or unsuspected (collectively, "claims") which any Releaser now owns or holds or may at any time have owned or held, including, without limitation, claims arising under federal, state and local laws, rules and ordinances, claims for contribution, indemnity and/or subrogation and claims arising out of, or relating to, any agreement between any Releaser and Franchisor or its affiliates, the sale of franchises to any Releaser, the development and operation of all businesses operated by any Releaser that are franchised by Franchisor or its affiliates and the performance by Franchisor or its affiliates of its obligations under any agreement between Franchisor or its affiliates and any Releaser. Franchisee and Transferee (on behalf of the Releasers) agree that fair consideration has been given by Franchisor for this release and they each fully understand that this is a negotiated, complete and final release of all of their claims.

8. Franchisee, Transferee and Franchisee's owners have duly executed and delivered this notice to Franchisor and agrees to be bound by the foregoing provisions.

**FRANCHISEE**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

**TRANSFEREE**

By: \_\_\_\_\_  
Date: \_\_\_\_\_

**OWNER**

By: \_\_\_\_\_  
Date: \_\_\_\_\_

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**CONSENT TO CHANGE IN OWNERSHIP INTERESTS**

Based upon the representations made by Franchisee in the foregoing Notice of Change of Ownership Interests in Franchisee, [Franchisor] hereby consents to the request to modify the ownership interests in Franchisee.

**Franchisor:**

By: \_\_\_\_\_

Dated: \_\_\_\_\_

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**EXHIBIT 1 :COPY OF DEATH CERTIFICATE**

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**EXHIBIT 2: REPLACEMENT PAGE TO OWNERSHIP INTEREST TABLE IN  
FRANCHISE AGREEMENT**



**EXHIBIT B**

**SAMPLE NOTICE OF CHANGE OF OWNERSHIP INTERESTS IN FRANCHISEE**

TO: [Franchisor]

1. Pursuant to the following Franchise Agreements (collectively the “Agreements”), [Franchisor Name] (“Franchisor”) granted [Franchisee Name] (“Franchisee”) the right to develop and operate [Franchised System] businesses at the following locations:

| <b>Agreement</b> | <b>Effective Date</b> | <b>Location</b> |
|------------------|-----------------------|-----------------|
|                  |                       |                 |
|                  |                       |                 |
|                  |                       |                 |
|                  |                       |                 |

2. When Franchisee signed the Agreements, the ownership interests in Franchisee were held as follows:

| <b>Individual Owners</b> | <b>% of Ownership Interest Held by Individual Owner</b> |
|--------------------------|---|
|                          |   |
|                          |   |

3. As of [effective date of transfer], Franchisee plans to modify its ownership interests as follows:

| <b>Entity Owners</b> | <b>% of Ownership Interest Held by Entity Owner</b> |
|----------------------|---|
|                      |   |
|                      |   |

4. This letter serves as notice to Franchisor of the change in ownership in Franchisee, which is a transfer under the terms of the Agreements.

5. Franchisee must satisfy the following conditions before Franchisor will execute the attached consent to the transfer:

**A.** Franchisee has submitted to Franchisor entity documentation to evidence the change of ownership noted under Paragraph 3 of this Notice of Change of Ownership including [identify necessary documents].

**B.** Franchisee shall complete [identify ownership interests exhibit] to the Franchise Agreement, which is attached to this letter as Exhibit 1, to reflect Franchisee's current ownership interests.

**C.** [Identify entity owners] shall execute the Corporate Guaranty of each Franchise Agreement as attached to this letter as Exhibit 2.

**D.** Franchisor will not require Franchisee to pay a transfer fee under any of the Agreements in connection with this Notice of Change of Ownership.

**6.** Franchisee and its owners agree that Franchisor's consent to the change in ownership shall not constitute a waiver of any claims Franchisor may have against Franchisee and any owner, nor shall that consent be deemed a waiver of Franchisor's right to demand exact compliance with any term of the Agreements, nor shall the consent be deemed a waiver of Franchisor's continuing right to give or withhold consent to any future transfers.

**7.** In order to induce Franchisor to consent to the change in ownership interests, Franchisee (on behalf of itself and its affiliates and their respective past and present members, officers, directors, shareholders, agents, and employees, in their corporate and individual capacities) and [list owners] (each on behalf of himself/herself and his/her heirs, representatives, successors and assigns) (collectively "Releasors") freely and without any influence forever release and covenant not to sue Franchisor, its affiliates, and their respective past and present officers, directors, shareholders, agents and employees, in their corporate and individual capacities, with respect to any and all claims, demands, liabilities and causes of action of whatever kind or nature, known or unknown, vested or contingent, suspected or unsuspected (collectively, "claims") which any Releasor now owns or holds or may at any time have owned or held, including, without limitation, claims arising under federal, state and local laws, rules and ordinances, claims for contribution, indemnity and/or subrogation and claims arising out of, or relating to, any agreement between any Releasor and Franchisor or its affiliates, the sale of franchises to any Releasor, the development and operation of all businesses operated by any Releasor that are franchised by Franchisor or its affiliates and the performance by Franchisor or its affiliates of its obligations under any agreement between Franchisor or its affiliates and any Releasor. Franchisee (on behalf of the Releasors) agree that fair consideration has been given by Franchisor for this release and they each fully understand that this is a negotiated, complete and final release of all of their claims.

**8.** Franchisee and its owners have duly executed, sealed and delivered this notice to Franchisor and agrees to be bound by the foregoing provisions.

**FRANCHISEE**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

**OWNER**

By: \_\_\_\_\_  
Date: \_\_\_\_\_

**OWNER**

By: \_\_\_\_\_  
Date: \_\_\_\_\_

**CONSENT TO TRANSFER BY [Franchisor entity]**

Based upon the representations made by Franchisee in the foregoing Notice of Change of Ownership Interests in Franchisee, [Franchisor Name] hereby consents to the request to modify the ownership interests in Franchisee. **[Note: If there are any other conditions that you will require, then these should be listed here.]**

**ATTEST:**

***[FRANCHISOR ENTITY NAME]***

By: \_\_\_\_\_

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**EXHIBIT 1**  
**REPLACEMENT EXHIBIT XX TO FRANCHISE AGREEMENTS**  
**OWNERSHIP INTERESTS**

**EXHIBIT 2**  
**CORPORATE GUARANTY**

## EXHIBIT C

### SAMPLE LETTER RE TRANSFER REQUEST

**Re: Proposed Transfer of [No.] Franchised [Franchise System Name] Businesses Identified in Attachment A (collectively, the “Businesses”)**

Dear \_\_\_\_\_:

It is my understanding that you are discussing the potential transfer of \_\_\_\_\_ Franchised \_\_\_\_\_ Businesses from the current franchisee entity (“Assignor”) to \_\_\_\_\_ (“Assignee”). The contemplated transaction is a “transfer” under the existing franchise agreements (collectively, the “Franchise Agreements”) between Assignor and [Franchisor Name] (“Franchisor”). Accordingly, Franchisor has certain rights and Assignor and Assignee have certain obligations in connection with the transaction, which are outlined, in part, in this letter. You should carefully review the transfer sections of the Franchise Agreements for additional information on the transfer process.

As an initial matter, Franchisor has a right of first refusal with regard to the proposed transaction. To determine if Franchisor will exercise that right, you must submit to Franchisor:

- (1) a copy of the signed letter of intent, sales agreement and any other agreements relating to the proposed transaction;
- (2) XXXX, XXXX, and XXXX year end P&Ls by unit and consolidated;
- (3) copies of the real property leases (if any) for the Businesses along with a summary of terms of the leases (i.e., rent, any other amounts due, expiration dates); and
- (4) any other documentation provided by Assignor to Assignee.

Franchisor may request additional information from Assignor regarding the proposed transaction and the operation of the Business. The period in which Franchisor must determine whether or not it will exercise its right of first refusal will not commence until Franchisor receives, at a minimum, the executed letter of intent or sales agreement and the other documents noted. Within XX days after Franchisor’s receipt of the documents above (and any other requested documents or information), Franchisor will advise if it intends to waive or exercise its right of first refusal. If Franchisor elects to exercise the right of first refusal, Franchisor will proceed under the terms of the Franchise Agreements.

If Franchisor waives its right of first refusal, the formal waiver will be reflected in an attachment to the assignment agreement. If Assignor subsequently proposes to sell the assets at a lower price or on more favorable

terms, Assignor must again extend a right of first refusal to Franchisor. A waiver of this right by Franchisor does not constitute consent to the transfer of the Franchise Agreements to Assignee or approval of the Assignee as the franchisee of record for the Restaurants.

In the event that Franchisor waives its right of first refusal, the closing for this transaction cannot take place unless the parties have complied with the conditions set out by Franchisor, which include (but are not limited to) the following:

**1. Obligations for Assignor:**

**A. Continued Operation of Businesses.** Until the date of closing for the transaction, Assignor must continue to operate the Businesses in accordance with the existing Franchise Agreements and Franchisor's standards of operation.

**B. Payment Obligations.** Until the closing, Assignor is responsible for all continuing fees and other amounts due to Franchisor and its affiliates through and including the closing date. With regard to these continuing fees, Assignor must continue to timely pay those amounts as they come due and shall not fall behind on those payments. Any amounts due as of closing must be paid from the closing proceeds.

**C. Payment of Transfer Fee.** By no later than the date that the assignment agreement is executed, the transfer fee of \$X,XXX must be paid to Franchisor.

**D. Information from Assignor.** Assignor understands that Franchisor may provide any information Franchisor has regarding Assignor or Assignor's operation of the Businesses to Assignee.

**2. Execution of Assignment Agreement.** Assignor (and its owners and guarantors) and Assignee (and its owners) must execute and comply with the terms of an Assignment Agreement that will be provided by Franchisor. The terms will include mutual general releases by Assignor (and its respective owners) and Franchisor.

**3. Obligations of Assignee.**

**A. Approvals.** Franchisor must approve the transfer of the Businesses to Assignee and must approve Assignee to operate the Businesses, which will involve financial and operational approvals by Franchisor. Please work with \_\_\_\_\_ at \_\_\_\_\_ to provide Franchisor all information necessary for the approvals. You must submit to Franchisor an application, a management plan, and personal financials for the owners of the franchisee of record for the Businesses after the transfer. Upon review, Franchisor may request additional information.

**B. Entity Information.** Please provide to Franchisor the name of the entity formed to act as the Assignee for the Businesses. That entity will need to submit a copy of the final signed version of all governing documents including:

- Articles of formation/incorporation,
- Certificate of Formation/Incorporation,
- Operating Agreement/Bylaws/Management Agreement (This document must provide that: the activities of Assignee are limited exclusively to the development and operation of [Franchise System] businesses and any other businesses that are franchised by Franchisor and its affiliates; and any Transfer (as defined in the Franchise Agreement) is subject to the restrictions in the Franchise Agreements with Franchisor),
- If the following information is not otherwise provided in the entity documents, a summary of the individuals or entities who will have an ownership interest in the entity, including the following information for each owner: name, respective ownership interest, home address, home telephone number and, if applicable, the office held. If any ownership interest is owned by an entity, please also provide a summary of the ownership interests in that entity and entity documents for that entity,
- Any agreements between the members/shareholders (including any buy/sell agreements),
- Any other governing documents,
- Any amendments to the governing agreements,
- A resolution of the Board of Directors and shareholders/members authorizing entry into and performance of the Franchise Agreements and noting who has authority to sign all franchise documents,
- If the entity was formed more than 6 months prior to the proposed closing date, a certificate of good standing from the state of formation and the state where the entity will operate,
- Assignee must also submit a copy of all stock/membership certificates (if any), which include the stop-transfer restrictions set forth in the Franchise Agreements, as follows: "Any assignment or transfer of this interest is subject to the restrictions imposed on assignment by the Franchise Agreement(s) to which the entity is a party,"
- A copy of the stock ledger or membership list, and
- Identify an Operating Principal for the Businesses who satisfies the criteria in the Franchise Agreements.

**C. Execution of New Franchise Agreements.** If permitted by the Franchise Agreements, Assignee must execute Franchisor then-current form of franchise agreement for each Business (along with any addenda

required by Franchisor). Certain owners, officers and directors of, and other individuals and entities associated with Assignee will be required to execute a personal guarantee of the obligations under each new franchise agreement. The term of each new franchise agreement will be the remainder of Assignor's current term. The expiration dates for the existing franchise agreements are set forth in Attachment A. After the transfer is finalized, Assignee must pay the continuing fees established in the new franchise agreements.

**D. Real Estate.** For each Business provide proof that Assignee has site control either via fee simple interest evidenced by a deed or leasehold interest evidenced by a new lease or assignment of the existing lease.

**E. Proof of Insurance.** By no later than \_\_\_ days after the closing, Assignee must submit proof of the minimum insurance for the Businesses as required by the franchise agreements.

**F. Training.** Franchisor may require any new owners or operating principal to attend any training required by Franchisor.

**G. Renovation, Remodel, Upgrade.** Perform any renovation, remodeling or upgrading as require by Franchisor at the Businesses.

\* \* \* \*

The transfer process takes some time to complete. To keep the transfer process moving along, please send me the requested information as soon as possible. Documents should be sent to: \_\_\_\_\_. Please do not hesitate to call me if you have any questions regarding this letter or the transfer process.

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**Attachment A: List of Businesses**

## EXHIBIT D

### SAMPLE ASSIGNMENT AGREEMENT FOR CONVENIENCE OF OWNERSHIP (ASSIGNMENT FROM INDIVIDUALS TO LLC OR INC.)

**THIS ASSIGNMENT AGREEMENT** is made as of \_\_\_\_\_, by and among \_\_\_\_\_ and \_\_\_\_\_ (collectively, "Assignors"), on the one hand, and \_\_\_\_\_ ("Assignee"), on the other hand. [Note: If there is only one Assignor, then you can change the reference to singular Assignor in this Agreement.]

#### RECITALS

Pursuant to a \_\_\_\_\_ Franchise Agreement dated as of \_\_\_\_\_, 20\_\_ ("Franchise Agreement"), [franchisor entity name] ("Franchisor") granted Assignors the right to develop and operate a franchised \_\_\_\_\_ business as described in the Franchise Agreement (the "Franchised Business").

Assignors desire to assign all of their rights in the Franchise Agreement to Assignee, and Assignee desires to take an assignment of all of Assignors' rights in the Franchise Agreement ("Assignment").

[Each] Assignor owns a direct or indirect interest in Assignee (as further set forth in attached Appendix A).

The Franchise Agreement permits the Assignment as long as certain conditions are met.

Assignors and Assignee are executing this Assignment Agreement in order to comply with the conditions contained in the Franchise Agreement and to obtain Franchisor's consent to the Assignment.

**NOW, THEREFORE**, in consideration of the mutual covenants, agreements and obligations set forth below, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties, intending to be legally bound, agree as follows:

**1. Assignment of the Franchise Agreement.** Assignors hereby assign to Assignee all of Assignors' right, title and interest in the Franchise Agreement, and Assignee hereby assumes and agrees to perform all duties of Assignors under the Franchise Agreement, including payment of all monies owed, or that become owed, to Franchisor from and after the Effective Date (as defined in Section 2).



**2. Effective Date.** The Assignment will be effective on the date that Franchisor signs the attached Consent (“Effective Date”). Assignors and Assignee acknowledge and agree that, if Assignors or Assignee fail to comply with any term, condition or provision set forth in the Assignment Agreement, Franchisor, at its election, may: (A) declare the Assignment and this Assignment Agreement to be null and void; (B) declare the parties to be in default of this Assignment Agreement; or (C) take any other legal or equitable remedy available to Franchisor.

**3. Continuing Liability of Assignors.** Notwithstanding the Assignment, each Assignor will remain personally bound by, and personally and primarily liable for, each and every obligation in the Franchise Agreement that arose or accrued before the Effective Date. Assignors will execute any and all instruments that Franchisor requests to evidence that liability. In addition, simultaneously with the execution of this Assignment Agreement, Assignors, as owners of Assignee, will sign the attached Personal Guaranty.

**4. Subsequent Transfer of Franchise Agreement.** Assignee and Assignors, as owners of Assignee, acknowledge and agree that any subsequent Transfer (as defined in Section XX.X of the Franchise Agreement) is subject to the restrictions on Transfer set forth in Section XX of the Franchise Agreement.

**5. Representations.** Assignors and Assignee represent and warrant to Franchisor (and understand that Franchisor will rely on these representations and warranties) and agree that:

**A.** Assignors own all of the interests in Assignee as identified in Appendix A. The Assignors’ ownership interests in Assignee are in the same proportion as the Assignors’ original ownership interests in the Franchise as shown in Exhibit XX to the Franchise Agreement.

**B.** Neither Assignee nor its owners have any ownership interest (direct or indirect) in or perform services for any Competing Business (as defined in the Franchise Agreement).

**C.** After the Assignment, Assignee will: (1) own all of the assets used in the operation of the Franchised Business; and (2) be the only entity involved with the operation of the Franchised Business.

**D.** Assignee will, upon request, provide to Franchisor copies of all entity documents referenced in Section XX of the Franchise Agreement. Assignee’s governing documents permit Assignee to enter into this Assignment Agreement and to operate the Franchised Business.

**E.** Assignee: (1) is a legal entity that was validly created under the laws of the state in which the Franchised Business is located; and (2) is qualified to do business in the state in which the Franchised Business is located.

F. The individual who signs this Assignment Agreement on behalf of Assignee has authority to do so.

G. Franchisor will have the right to condition its consent to the Assignment on any factors, including those factors set forth in Section XX of the Franchise Agreement. Any such conditions are identified in the attached Consent. **[Note: If the franchise agreement permits you to require certain additional conditions be met for a transfer to an entity formed by the original owners, AND you want to impose those additional conditions, then include this paragraph and list the conditions in the attached consent. If there are no other conditions, then you can delete this section from this agreement.]**

6. **Release by Assignors.** In order to induce Franchisor to consent to the Assignment, Assignors (on behalf of themselves and their respective heirs, representatives, successors and assigns) (collectively, "Assignor Releasors") freely and without any influence, forever release and covenant not to sue Franchisor and its affiliates and their respective past and present officers, directors, shareholders, agents and employees, in their corporate and individual capacities (collectively, "Franchisor Releasees"), with respect to any and all claims, demands, liabilities and causes of action of whatever kind or nature, whether known or unknown, vested or contingent, suspected or unsuspected (collectively, "claims"), which any Assignor Releasor now owns or holds or may at any time have owned or held, including, without limitation, claims arising under federal, state and local laws, rules and ordinances and claims arising out of, or related to the Franchise Agreement and all other agreements between any Assignor Releasor and any Franchisor Releasee, the sale of franchises to any Assignor Releasor, and any Franchisor Releasee's performance of its obligations under the Franchise Agreement or any other agreement between any Franchisor Releasee and any Assignor. Assignors (on behalf of the Assignor Releasors) agree that fair consideration has been given by Franchisor for this release, and they fully understand that this is a negotiated, complete and final release of all of their claims.

7. **No Waiver.** Assignors and Assignee recognize and agree that Franchisor's consent to the Assignment will not constitute a waiver of any claims Franchisor may have against Assignors nor will it be deemed a waiver of Franchisor's right to demand exact compliance with any term of the Franchise Agreement, nor will such consent be deemed a waiver of Franchisor's continuing right to give or withhold consent to any future transfers.

8. **Notices.** No notice, demand, request or other communication relating to this Assignment Agreement will be binding on Assignors, Assignee or Franchisor unless the notice is in writing, refers specifically to this Assignment Agreement and if: (A) to Assignors, is addressed to Assignors at \_\_\_\_\_; (B) to Assignee, is addressed to Assignee at \_\_\_\_\_ (Attn: \_\_\_\_\_); or (C)

to Franchisor, is addressed to *[franchisor name]*, \_\_\_\_\_ (Attn: \_\_\_\_\_). Any party may designate a new address for notices by giving written notice of the new address pursuant to this Section. Notices will be effective as stated in Franchise Agreement.

**9. Entire Agreement.** This Assignment Agreement and the documents referred to in this Assignment Agreement constitute the entire, full and complete agreement concerning the matters covered by this Assignment Agreement and supersede any and all prior or contemporaneous negotiations, discussions, understandings or agreements. There are no other representations, inducements, promises, agreements, arrangements, or undertakings, oral or written, relating to the matters covered in this Agreement other than those set forth in this Assignment Agreement. No obligations or duties that contradict or are inconsistent with the express terms of this Assignment Agreement may be implied into this Assignment Agreement. Except as expressly set forth in this Assignment Agreement, no amendment, change or variance from this Assignment Agreement will be binding on the parties unless mutually agreed to by the parties and executed in writing.

**10. Miscellaneous.**

**A.** All terms not defined in this Assignment Agreement will have the meaning given to them in the Franchise Agreement.

**B.** All captions in this Assignment Agreement are intended solely for the convenience of the parties, and none will be deemed to affect the meaning or construction of any provision of this Assignment Agreement.

**C.** This Assignment Agreement may be executed in counterparts, and each copy so executed and delivered will be deemed to be an original.

**D.** Franchisor will be a third party beneficiary to this Assignment Agreement.

**IN WITNESS WHEREOF**, the parties have duly executed this Assignment Agreement as of the day and year as written above.

**WITNESS:**

**ASSIGNORS:**

\_\_\_\_\_

\_\_\_\_\_

Print Name: \_\_\_\_\_

Print Name: \_\_\_\_\_

Date: \_\_\_\_\_

\_\_\_\_\_  
Print Name: \_\_\_\_\_

\_\_\_\_\_  
Print Name: \_\_\_\_\_

Date: \_\_\_\_\_

**ATTEST:**

**ASSIGNEE:**  
Name of Entity: \_\_\_\_\_

By: \_\_\_\_\_

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

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**CONSENT TO ASSIGNMENT BY [Franchisor entity]**

*[Franchisor entity name]* hereby consents to the Assignment in accordance with the provisions of the foregoing Assignment Agreement. All capitalized terms that are not defined in this Consent will have the meaning given them in the Assignment Agreement. **[Note: If there are any other conditions that you will require, then these should be listed here.]**

**ATTEST:**

***[FRANCHISOR ENTITY NAME]***

By: \_\_\_\_\_

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

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**PERSONAL GUARANTY**

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**APPENDIX A**

**LISTING OF OWNERSHIP INTERESTS**

**[or replace with similar page from franchise agreement]**

## EXHIBIT E

### SAMPLE CONSENT TO TRANSFER OF OWNERSHIP INTERESTS TO A TRUST

THIS CONSENT AGREEMENT (the "Agreement") is made as of the \_\_\_ day of \_\_\_\_\_ by and among:

- [Franchisor entity], a [type of entity and state of formation] ("Franchisor");
- [Franchisee entity], a [type of entity and state of formation] ("Franchisee");
- [Trustee Name] ("Trustee"), individually and as trustee of [Name of Trust], a revocable trust established under [State] law by a Trust Agreement dated as of [Date] (the "Trust").

#### RECITALS

A. Trustee owns a [membership/stock/partnership] interest in Franchisee (the "Ownership Interest").

C. Pursuant to a [Franchise System Name] Franchise Agreement dated as of [Date] ("Franchise Agreement"), Franchisor granted Franchisee the right to operate a [Franchise System Name] ("Franchised Business") located at \_\_\_\_\_. Trustee is personally liable for all obligations of Franchisee under the Franchise Agreement pursuant to a Personal Guaranty dated as of [Date].

D. Trustee has established the Trust for tax and estate planning purposes. Trustee wishes to transfer [his/her] individual Ownership Interest in Franchisee to the Trust.

E. Under the Franchise Agreement, Franchisor's consent is required for the transfer of legal ownership of the Ownership Interests in Franchisee to the Trust.

E. Franchisor is willing to give its consent on the terms and conditions of this Agreement.

NOW THEREFORE, the parties agree as follows:

1. **Franchisor's Consent.** Subject to the terms and conditions of this Agreement, Franchisor consents to the transfer of the following Ownership

Interests to the Trust and to the reallocation of beneficial ownership between Franchisee's owners: Trustee will transfer \_\_\_% of his Ownership Interest in Franchisee to the Trust. The ownership interests following the aforementioned transfer shall be as set forth in the attached Schedule 1, which shall replace Exhibit X of the Franchise Agreement.

**2. Opinion of Counsel.** Franchisor's consent under Section 1 is given contingent on prompt receipt by Franchisor of the written opinion of Trustee's counsel that:

**A.** The Trust Agreement for the Trust provided to Franchisor is a true and complete copy of the Trust Agreement;

**B.** The Trust is in full force and effect, and there have been no amendments to the Trust Agreement;

**C.** Trustee has the power under the Trust Agreement and [State] law to cause [his/her] Ownership Interest in Franchisee to vest in the Trust, and any other documents, consents, government filings, or other actions needed to vest ownership of [his/her] Ownership Interest in Franchisee in the Trust have been completed;

**D.** Trustee has the authority under the Trust Agreement and [State] law to bind the Trust to all of the terms and conditions of this Agreement and the Franchise Agreement and to direct and control the affairs of Franchisee; and

**E.** No person has any right under the Trust documents that would interfere with the exercise of Franchisor's rights or the performance of Franchisee's obligations under this Agreement or the Franchise Agreement.

**F.** Franchisor has not made any representations or warranties to Franchisee and/or Trustee in connection with [his/her] transfer of the Ownership Interest in Franchisee.

**3. Reliance.** Franchisee, Trustee and Owner acknowledge that Franchisor is relying on Section 2 above in giving its consent under this Agreement.

**4. Personal Liability of Trustee and Owner.**

**A.** Notwithstanding ownership of the [stock/membership/partnership interest] by the Trust, Trustee shall be deemed to be the principal owner of Franchisee for any relevant purpose in the Franchise Agreement.

**B.** Nothing in this Agreement releases Trustee from any obligation to Franchisor arising under [his/her] Personal Guaranty. Trustee acknowledges that [he/she] will be jointly and severally liable for all matters covered by the Personal Guaranty, including but not limited to Franchisee's obligation to

indemnify Franchisor and its affiliates for any claim arising from the development and operation of the Franchised Business.

**5. Future Ownership Changes.** Trustee, individually and in [his/her] capacity as trustee of the Trust, acknowledges and agrees that any future distribution or transfer of legal and/or beneficial ownership of Franchisee pursuant to the Trust Agreement, including but not limited to a transfer of beneficial ownership upon the death of Trustee, will be subject to any applicable restrictions on transfer of ownership set out in the Franchise Agreement.

**6. Release.** In order to induce Franchisor to sign this Agreement, Franchisee (on behalf of itself and its affiliates and their respective past and present officers, directors, shareholders, agents and employees, in their corporate and individual capacities) and Trustee (on behalf of himself/herself and his/her heirs, representatives, successors and assigns) (collectively, the "Franchisee Releasors") freely and without any influence forever release and covenant not to sue Franchisor, affiliates, and their respective past and present officers, directors, shareholders, agents and employees, in their corporate and individual capacities, with respect to any and all claims, demands, liabilities and causes of action of whatever kind or nature, known or unknown, vested or contingent, suspected or unsuspected (collectively, "claims") which any Franchisee Releasor now owns or holds or may at any time have owned or held, including, without limitation, claims arising under federal, state and local laws, rules and ordinances, claims for contribution, indemnity and/or subrogation and claims arising out of, or relating to, any agreement between any Franchisee Releasor and Franchisor, its parent, subsidiaries or affiliates, the sale of franchises to any Franchisee Releasor, the development and operation of any [franchise system name] businesses operated by any Franchisee Releasor that is franchised by Franchisor and the performance by Franchisor of its obligations under any agreement between Franchisor and any Franchisee Releasor. Franchisee and Trustee (on behalf of the Franchisee Releasors) agree that fair consideration has been given by Franchisor for this release and they fully understand that this is a negotiated, complete and final release of all of their claims.

**7. Event of Default.** If any representation or warranty made herein or in any other agreement, document, certificate, or financial or other statement furnished to Franchisor in connection with this Agreement proves to have been untrue or misleading in any material respect as of the time made, such circumstance shall constitute a default under Section XX of the Franchise Agreement.

**8. Conflicts with Other Agreements.** All parties agree that, in the event of any conflict between the terms of this Agreement and the terms of any other agreement relating to the transfer of the Ownership Interest, the terms of this Agreement shall govern.



9. **Applicable Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of \_\_\_\_\_.

10. **Captions.** All captions in this Assignment Agreement are intended solely for the convenience of the parties, and none shall be deemed to affect the meaning or construction of any provision of this Assignment Agreement.

11. **Counterparts.** This Agreement may be executed in counterparts, and each copy so executed and delivered shall be deemed to be an original.

IN WITNESS WHEREOF, the parties have executed this Agreement by their duly authorized representatives.

**FRANCHISEE**

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**THE [ \_\_\_\_\_ ] TRUST**

By: \_\_\_\_\_  
\_\_\_\_\_, Trustee

Date: \_\_\_\_\_

**[Trustee name], Individually**

\_\_\_\_\_

Date: \_\_\_\_\_

**FRANCHISOR:**

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_