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Franchise Agreement Provisions You Should Expect to Negotiate When Entering into Non-Traditional Locations

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1. Introduction

There is no perfect franchise agreement. And because there is no perfect franchise agreement, contract negotiation is inevitable. Franchisors and franchisees are going to find themselves at the negotiating table even if the franchisor claims that they do not negotiate. Why? It is simple – legal risks and a franchisor's business objectives are not always in harmony with each other. It is a balancing act. Visibility, barriers to entry, need for growth and expansion are just a few of the business objectives that can prompt a negotiation.

One way of seeking such business objectives is for franchisors to take their concept to non-traditional venues. The benefits of expansion in non-traditional venues are many. However, the franchisees that are capable breaking through the barriers to entry into these spaces are highly sophisticated and they can require substantial modification the franchise agreement in order to take on the venture.

A franchisor's time tested provisions are no longer sacrosanct if non-traditional venues are a part of their current business objectives. It is not, however, without good reason. This, together with insight on negotiation tactics as well as the legal and practical implications of entering into such negotiations are examined in this paper.

2. Non-Traditional Venues

A. Section 2(a) – What is a Non-Traditional Venue?

A non-traditional venue is a venue such as a hotel, convention center, airport, university, military base, casino, travel plaza, hospital, stadium, food truck or other mobile kiosk where the primary purpose of a customer's visit to the venue is for something other than purchasing goods from a franchised location.[1] For example, a businessman who visits an airport for the purpose of traveling might get hungry and purchase a sandwich from a franchised restaurant at the airport, or a father and son who visit a stadium to attend a baseball game might purchase hotdogs from a franchised hotdog vendor at the stadium. The built-in base of consumers in non-traditional venues make them an important component to a variety of franchises, particularly those involved in the food service industry.[2]

B. Who is the Franchisor Negotiating With?

Potential franchisees of a non-traditional venue are frequently larger and more sophisticated than franchisees of traditional locations, which may affect the negotiating power of the franchisee and lead to increased negotiations of the franchise

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[1] Chris Egan and Suzie Trigg. *Food Trucks, Kiosks and other Alternative Venues: Structuring and Drafting Issues*, American Bar Association 37th Annual Forum on Franchising (October 2014) [hereinafter, Egan and Trigg]; Mathis, Stuart. *Franchising Out of the Box: Identifying Non-Traditional Multi-Unit Sites*, Franchising World (July 2010).

[2] *See* Emerson, Robert. *Franchise Encroachment*. 47 Am. Bus. L.J. 191 (Summer 2010).

agreement.[3] Common differences between franchisees of a traditional venue and non-traditional venue franchisees include that non-traditional venue franchisees may own their own venue, have more financial resources, have multiple franchise agreements with multiple brands, and may have as much if not more operating experience than the franchisor. Additionally, if the franchisee does not own the venue, non-traditional venue negotiations frequently also include a third-party that has significant leverage over the negotiation process, such as a landlord or owner of the venue.[4] These third party landlords or owners of the venue may have additional requirements and impose specific restraints concerning the franchised location such as hours of operation, the design and layout of the franchised location, menu offerings, signage and limitations on how space is to be used for sale of products or services and storage in the facility.[5]

A landlord of a non-traditional venue has a particularly high level of negotiating power compared to a landlord of a traditional venue because access to a non-traditional venue is typically limited, either through government regulations or the limited number of non-traditional venue locations.[6] For example, if a franchisor wants to expand its franchising operations to an airport, and there is only one major airport in the target city, the franchisor must successfully negotiate with the landlord of the major airport in order to open a franchise in that location. In contrast, there are typically several location options for a traditional venue such as a stand-alone unit, which allows franchisors to negotiate with a number of different landlords and decreases the negotiating power of traditional venue landlords.[7]

While sophisticated franchisees may have more bargaining power than smaller franchisees, contracting with more sophisticated franchisees may be beneficial from an operational standpoint, since sophisticated franchisees often have franchising and business experience that will assist them in operating the franchised location(s).[8]

In contrast to the sophisticated franchisees that may operate at larger non-traditional venues, franchisors may also contract with much smaller franchisees for smaller non-traditional venues, such as food trucks and kiosks.[9] While the unique requirements for non-traditional venues will also apply to smaller non-traditional venues, the negotiation process for these smaller franchisees is likely to be more similar to the negotiation process for franchisees of traditional venues, that is, it is expected that the smaller franchisees will have less negotiating power and will request fewer changes to the form franchise agreement.

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[3] *See* Joyce Mazero and Suzanne Trigg. *Non-Traditional Generation: Franchise Systems Coming of Age with New Franchisees in New Venues*, Franchise Law Journal, Vol. 30, No. 4 227 (Spring 2001).

[4] *Id.*

[5] Kathryn Kotel, Joyce Mazero and Thomas Spratt, Jr. *Expansion into Airports, Universities, Military Bases and Beyond: Framing and Negotiating the Real Legal Issues in Non-Traditional Development Deals*, International Franchise Association Legal Symposium (May 2012); Egan and Trigg at 7.

[6] *Id*.

[7] *Id*.

[8] *Id*.

[9] Egan and Trigg at 9.

C. The Case for Entering Non-Traditional Venues

i. Captive Market

Despite the challenges, that are noted in detail below, there are many reasons why brands and operators want to enter the non-traditional space – access to a captive market being the primary reason. Consumers and employees in most non-traditional spaces have little or no opportunity to leave their venues in order to purchase goods or services, and often expect to pay more in a non-traditional environment for the same goods or services they enjoy in typical street side locations. Landlords typically plot their real estate allocation so as to diversify the venue's offering and avoid concept cannibalization, resulting in less competition among concepts. For example, a traditional Burger King and McDonalds may operate directly across the road from one another on the street, but would rarely exist in the same concourse of an airport or the same food court in a stadium.

ii. Visibility

Many non-traditional venues not only have captive markets, they have large markets. A presence in those venues means high visibility for a brand and exposure to a broad customer base. In 2018, nearly 90 million passengers passed through LAX[10]; in Austin, Texas nearly 16 million passengers passed through Austin-Bergstrom International Airport (a 14% increase over 2017)[11]. A well-placed brand might be seen by tens of thousands of passengers per day – passengers from all over the world. Even if those passengers do not patronize the brand while in the airport, they will remember seeing the name. An airport presence may help take a regional brand's recognition national, or a national brand's recognition international.

iii. Opportunities for Rapid Growth

Entry into the non-traditional space may be an opportunity for a brand's rapid growth. If a brand partners with a large concessionaire who already has a national or international presence, that concessionaire may have real estate in hand ready to convert to the brand's concept. A brand could add multiple units in a single year with one operator, including in new markets where the brand previously did not have any presence. HMSHost opened the first Starbucks in an airport in 1991; at that time, Starbucks was a regional coffee brand and the airport location was in Starbucks' home market of Seattle. Today HMSHost operates well over 400 Starbucks locations in airports and on tollroads across North America. As Starbucks' brand recognition grew, HMSHost had the real estate and opportunity to take Starbucks national in the airport venue. Recently, HMSHost has also partnered with emerging U.K. food concept Pret a Manger. At the time that HMSHost and Pret a Manger announced their partnership, Pret a Manger had a presence in seven countries: United Kingdom, United States, Hong Kong, France,

[10] Los Angeles World Airports. *Ten Year Summary of Passengers*, (March 15, 2019), https://www.lawa.org/en/lawa-investor-relations/statistics-for-lax/10-year-summary/passengers.

[11] Austin-Berstrom International Airport. *Aviation Activity Report,* (March 20, 2019) http://austintexas.gov/sites/default/files/images/Airport/news_releases/activity_reports_files/Dec_2018.pdf

China, Dubai and Singapore. Within months, HMSHost opened Pret a Manger's first store in Scandinavia, quickly followed by the Netherlands. In the United States, HMSHost opened Pret a Manger's first location in the State of Delaware, at the Delware House Travel Plaza on I-95, which is visited by thousands of travelers per day from throughout the east coast.

D. Obstacles to Opening in Non-Traditional Venues

i. Obtaining the Real Estate

The initial hurdle an operator must clear in order to enter the non-traditional space is to obtain the real estate in which to operate its concepts. Frequently, non-traditional concession space is won through a competitive bid process in response to a request for proposals ("RFP"). Whether the requestor is a public institution, government agency or private entity, participation in an RFP process can cost bidders thousands of dollars with no guaranteed return.

1. Public Institutions and Government Agencies

RFPs published by public institutions and government agencies are typically governed by published rules of bureaucratic procedure and include strict guidelines with which bidders must comply. RFP requirements may be fixed by statute or regulation, and vary by jurisdiction or even by agency or institution within a jurisdiction. A single RFP may be hundreds of pages long, and include a deadline for response that is only weeks after publication. For example, The City of Atlanta, Hartsfield-Jackson Atlanta International Airport, published an RFP for two concessions spaces for personal spa services on April 18, 2018. Responses to the 175 page RFP were due by May 22, 2018 at 2:00pm. In the opening pages of Atlanta's RFP, it is specifically stated that in addition to the 175 pages of requirements included therein:

This procurement is being conducted in accordance with all applicable provisions of the City of Atlanta's Code of Ordinances, including its Procurement and Real Estate Code, and the particular method of source selection for the services sought in this RFP is Code Section 2-1189; Competitive Sealed Proposals. By submitting a Proposal concerning this procurement, Proponent acknowledges that it is familiar with all laws applicable to this procurement, including, but not limited to, the City's Code of Ordinances and Charter, which laws are incorporated into this RFP by reference. City of Atlanta, RFP FC-10404, p. 6-7.

The complexities of local procurement law may be impossible for a bidder to navigate on its own. For that reason, it is not unusual for bidders to hire local counsel and/or consultants who can aid them in compliance.

Who may become a bidder, and how a bid is structured, is typically laid out in detail in a public RFP, down to the number of pages the bid may include. A bidder often must meet certain threshold requirements including experience (in years and sales volume) in the non-traditional venue at hand and business registration in the state where the concessions are located in order to submit a bid. The content of the bidder's RFP

response will include information drafted by the bidder as well as various forms required by the requestor. In the Atlanta spa services RFP, for example, a bidder's response must follow the format required by the RFP and include the following information in the order it is requested: **an executive summary** (complete legal entity information, evidence of its authority to do business in Georgia, highlights of the bidder's concept, design, operations and management plan, the bidder's experience and why it should be selected to win the concession opportunity), **an operations and management plan** (including an executive and management organizational chart and names of personnel who would fulfill key roles, staffing plans, customer service plans, logistics for inventory and supplies, quality monitoring plans), **the concept, design and construction plan** (including space use plan, concept description, theme, merchandise offering, color renderings, materials, floor plans, proposed capital improvements, architectural design team, construction schedule), **business plan** (revenue, expense and rent projections, pro forma, plan for generating profitability and controlling expenses), and **overall experience and performance** (demonstration that bidder meets minimum qualifications, resumes for key personnel, letters of reference from other landlords, sample marketing programs). The Atlanta RFP also requires bidders to submit eight different forms and various appendices and exhibits, including financial disclosures, contractor disclosures, declarations and acknowledgements, as well as its financial offer (rent bid) in a sealed envelope. Bidders must submit one original and seven copies of their proposals, which must be printed on 8.5x11" paper, single sided, double-spaced, using 12-point font and inserted in a three-ring binder, and include indexed sections corresponding to the enumerated RFP requirements and forms. City of Atlanta, RFP FC-10404, pp. 13-21.

Public bids typically include a copy of the lease in the RFP for the bidders' review and comment. However, keeping in mind that bidders are competing with one another, and the requestor holds a monopoly on concession space, there is often little incentive and little opportunity to negotiate or push back on unfavorable lease provisions. Frequently lease terms are "take it or leave it", and quite pro-landlord, including the landlord's right to recapture concession space for any reason prior to expiration of the lease term. The lease included in Atlanta's spa concession RFP is 95 pages long, and includes the City's right to terminate the lease for convenience:

The City shall have the right to terminate the Agreement without cause at any time during the Term by giving written notice to Concessionaire at least 30 days prior to the date such termination is to be effective. Should the City terminate the Agreement prior to its expiration, the City shall reimburse the Concessionaire for the reasonable and proper unamortized costs of the capital Improvements, made by or at the cost of the Concessionaire, and approved in writing by the Aviation General Manager. City of Atlanta, RFP FC-10404, p. 77.

The lease also includes voluminous exhibits covering airport safety and security requirements, insurance and bonding, scope of services, and worker retention policies.

Throughout the bid period, there may be several interim deadlines: deadlines for site visits, for submitting questions to the requestor, and for correcting or updating the RFP, for example. Bidders must be vigilant in monitoring the requestor's website or portal

where RFP documents and updates are posted. As the Atlanta RFP advises: "The City may in accordance with applicable law, by addendum, modify any provision or part of the RFP at any time prior to the Proposal due date and time." and it "reserves the right to reject any Proposal or all Proposals, to waive any technical defect in a Proposal, or to cancel this Procurement at any time ..." City of Atlanta, RFP FC-10404, p. 10.

Bidders within an industry may know months or years ahead that an agency will be publishing an RFP. During that time, bidders will hire consultants or lobbyists to help them understand an agency's priorities and preferences, they will spend time on the ground in the jurisdiction learning trends and making connections with key decision makers, and if the RFP requires them to partner with franchisors or local businesses, they will look to lock in those partnerships early and exclusively. Responding to a single RFP for just a few concession spaces may take more than a year of work before the RFP is even published, and bidders may spend from the tens to the hundreds of thousands of dollars to compile the intelligence, relationships and materials needed to position their bids for success. And even then, nothing is guaranteed; an RFP may be changed or revoked mid-stream, it may be cancelled even after all bids are submitted, or the successful bidder may ultimately have its lease terminated for convenience only a few years into its term.

Despite their challenges, public RFPs do offer bidders some protections: bids are evaluated according to a disclosed scoring procedure, bidders may appeal the results of the awards, and conflicts of interest by public officials are typically prohibited (in Atlanta, for example, awards of food and beverage concession space were recently revoked when investigative reporting uncovered that the wife of the airport's deputy general manager was a business partner of the winning bidder in the winner's DCA concession operations). At the conclusion of a bid process, anyone may make a public records request to obtain the non-confidential portions of responses to an RFP.

2. Private Opportunities

RFPs issued by private businesses may include fewer bureaucratic requirements, but may also be subject to more arbitrary evaluation with no public appeals process or records disclosure. Far less burdensome than the City of Atlanta's spa services RFP, the Prairie Wind Casino & Hotel in Oglala, South Dakota published an RFP on its website in May 2018, with a July 1, 2018 submission deadline, seeking "a qualified private restaurant owner, restaurant firm, or restaurant franchise to manage the existing bingo meals, banquet and catering, deli and the restaurant space and staff." See "Overview" at http://prairiewindcasino.com/dining/deli-and-restaurant-request-for-proposal. The Casino informs potential bidders of its customer volume and food and beverage facility sizes: "In the year 2017 we had 311,000 customers visit our property. The size of our properties: Bingo dome is 14,700 square feet, convention center is 9,240 square feet, restaurant is 3,390 square feet, and the deli is 1,325 square feet." - These opportunities are not insignificant, with customer volumes running similar to enplanements in some U.S. airports including Key West, Tallahassee, Baton Rouge and Santa Barbara. Air Carrier Activity Information System (ACAIS) 2017 Passenger Boarding Data.

The Casino lists eighteen items as required contents for proposals, including certain biographical information, qualifications, descriptions of ownership and proposed management structure, references, financial statements, business plans, pro forma, development plans, marketing plans and a commitment to comply with customer service standards of the Casino. The RFP does not include lease documents, forms, formatting requirements or reference to any procurement rules or regulations. When the entire RFP is printed from the website, it fills two pages. While opportunities like this may be easier to pursue, they may be more difficult to discover. They may also be more difficult to win, because there is no prohibition on conflicts of interest and no published scoring procedure.

Increasingly, private companies are acting as agents of public entities in RFP processes. In the airport venue, concession management companies like Westfield and Marketplace contract with airport authorities to manage airport concessions. The management company will publish its own RFP seeking food and beverage and retail concessionaires to fill the spaces it manages at the airport. These hybrid RFP opportunities combine aspects of the public and private RFP processes: while the bid process itself may be more flexible and perhaps less transparent, the management company must still pass down certain obligations that would have been imposed by the airport, had the airport conducted the RFP process itself.

ii. Developing the Real Estate - You've Won the Bid, Now What?

1. Smaller Footprint, Higher Cost

In most non-traditional venues, space is at a premium. An operator will have to squeeze a concept into a fraction of the space the concept would use in a traditional street-side location. In an airport, food and beverage concession spaces can range from a mere 100 square feet to 3,000 or more square feet. Storage space is expensive and difficult to come by, and some restaurant spaces may have to share a back of house, an in-terminal commissary or even a commissary or warehouse space external to the terminal. Occasionally, for example, one unit's kitchen may support a bar in another part of the terminal, or a restaurant space may not be vented, which may force menu changes and equipment substitutions. Units in non-traditional venues may be awkward shapes in low traffic locations – squeezed in to increase leasable (revenue-generating) space. A concessionaire will have to take the good with the bad when multiple units come are included in an RFP package.

While the spaces shrink, rents rise. A key component to a concessionaire's bid in response to an airport RFP is the concessionaire's rent offer. Rents may be a fixed dollar amount, a percentage of sales, or both. Typically in the airport venue and in tollroad rest stop locations rent is a percentage of the concessionaire's gross revenues accompanied by a minimum annual guarantee ("MAG") of a fixed dollar amount. In an RFP, an airport authority will frequently provide minimum thresholds or suggested ranges for rent offers and, since the bid process is competitive, rents keep rising as competitors fight for a finite amount of space. In some airports, rents can near or even exceed 20% of gross revenues. In our Atlanta spa services example, each concessionaire must propose its own rent, but

no less than 14% on retail revenues and 10% on services revenues, with a MAG in the range of $250,000-$400,000 per year; whichever amount is a higher dollar value – the percentage rent or the MAG – is the amount the concessionaire must pay to the airport authority. A recent RFP for an 818 square foot deli concept at Dallas/Fort Worth International Airport included a rent bid range of 16%-19% with a MAG of $233,100, while also requiring that 75% of full meal options (entrée, side and drink) range within $10.

Non-traditional venue construction costs also far outpace typical street side rates. Airport leases require concessionaires to invest a minimum capital expenditure on initial build-out and on a mid-term refurbishment. Sometimes those minimum investment figures are also a component of the competitive bid offer, and other times they are unilaterally set by the airport authority. In a top destination like Los Angeles International Airport, the minimum capital investment expectation can near $1,000 per square foot, even for a retail unit. Not only does an airport expect a certain level of investment, contractors are simply more expensive in the airport. Contractors need specialized knowledge to perform construction in the airport (for example, for security purposes all tools must be accounted for and secured at the end of each shift) and that expertise comes at a premium. An airport unit may cost two or three times as much to build out per square foot vis a vis a street side counterpart.

The rising costs to stop with rent and construction – labor is also more expensive in many non-traditional venues. In airports and on military bases employees will need to meet certain security requirements, and may be required to undergo security screening daily upon arrival to the venue. Picture the stress of getting to the airport (whether via public transportation or driving and parking in the economy lot) and passing through security on your occasional work trip or vacation, and now imagine having to do that every day just to get to work. How much more would someone have to pay you to do your job post-security in an airport terminal instead of in a typical office building? Some venues may be unionized, which may push wage and benefits costs higher and force concessionaires to retain labor relations counsel, and others may be subject to living wage ordinances. Airport concessionaires must work with TSA to gain appropriate security badging for their employees who need access to spaces beyond security checkpoints, and some airports require drug screening – measures which increase the cost of hiring and turnover.

While costs keep adding up, some non-traditional venues limit operators' ability to increase prices to compensate for rising overhead. We all expect to pay more for a bottle of water or a latte in the airport, but just how much more may actually be capped by a concessionaire's lease. Airport leases commonly include "street pricing" provisions such as "prices charged may not exceed street prices plus 10%". Although these provisions do acknowledge the added expenses when operating in the airport, they frequently lag behind the actual cost difference vis a vis operating a traditional street side location.

2. Venue Idiosyncrasies

In addition to generally higher operating costs across the non-traditional channel, each non-traditional venue has its own unique set challenges. Educational institutions

and sports venues are seasonal, which present hiring difficulties. University work-study programs may restrict an operator's labor pool to mostly students, and universities may require food and beverage operators to accept campus dining dollars, which may result in lower reimbursement rates than cash transactions. Casinos concessionaires may have to comply with complex licensing requirements in order to do business in the casino, and those requirements may vary widely by state, county or tribe. For leases in casinos on tribal land, contract terms and dispute resolution provisions may be governed by tribal law.

Government-operated facilities such as military bases, airports and tollroads may impose requirements or preferences for minority, small business or disadvantage business enterprise participation in a minimum percentage of the overall concession portfolio. The Federal Aviation Authority ("FAA") oversees the Airport Concession Disadvantaged Business Enterprise ("ACDBE") program; FAA funding to individual airports may be contingent on the airport's level of ACDBE participation, and concessionaires who do not qualify as ACDBEs themselves will have to partner with ACDBEs in order to meet that participation goal. The goal is determined by the airport estimating the percentage of business that would be conducted by socially and economically disadvantaged businesses in the absence of discrimination and its effects. Small businesses that are 51% owned by minorities, women and/or veterans may qualify as ACDBEs. Their participation in the airport concessions business is typically measured as a percentage of overall gross revenues.

Larger concessionaires will form joint ventures or LLCs with ACDBEs to meet participation goals, dividing capital contributions and management and operational tasks according to the participation breakdown. For example, if an airport lease includes a 35% ACDBE participation goal, a larger concessionaire may form an LLC with an ACDBE partner whereby the ACDBE contributes 35% of the initial capital investment and takes on 35% of the risks, duties and revenues of the business, while the larger concessionaire contributes 65% of the initial capital investment and takes on 65% risks, duties and revenues of the businesss.

Both an individual airport's ACDBE office and the FAA may enforce the ACDBE regulations, which are extensive. ACDBE joint venture/LLC agreements and programs are heavily scrutinized to combat fraud (for example, an ACDBE acting as a "silent partner" rather than actively participating in the risks and obligations of the business, or an ACDBE owner hiding assets in order to qualify as "disadvantaged"). Individual ACDBE owners may be politically well connected and concessionaires may compete for their partnership in order to gain advantages in the competitive RFP process or in negotiations for extended or additional leases. Airports may also impose similar requirements on suppliers and vendors, which oblige concessions operators to ensure that their supply chain and service providers are comprised of a minimum percentage or minority, veteran or female owned businesses.

3. What might the deal look like? What are you negotiating?

A. Food and Beverage Operations

i. Space and Time Constraints Drive Menu Offerings

Smaller footprints and customer time constraints mean streamlined menu offerings. In non-traditional venues like airports, toll road plazas and stadiums space is at a premium. A restaurant that may typically occupy 4,000 square feet on the street could need to be condensed into 1,500 square feet in the non-traditional space. A restaurant that normally requires a vented kitchen may not have venting; it may not even have its own dedicated kitchen or storage space. Efficiency is key. With such limited space, every element of the kitchen must play multiple roles – there is no room for equipment used only to prepare a single dish and there is little room to accommodate recipes that require a high volume of SKUs (stockkeeping units). The brand and the non-traditional operator will need to identify a core menu, which can be executed quickly and according to brand standards within the limits of the space the operator has been awarded. Some landlord guidelines may even dictate service times for individual units: a 2017 Dallas/Forth Worth International Airport RFP for casual dining pub or wine bar expressly stated that the unit is "expected to have a menu and style of service that allows customers to be served their drink orders in less than two (2) minutes and their food orders in less than fifteen (15) minutes." The menu will also need to be tailored to the demographics of the non-traditional venue's customers. In stadiums and airports, for example, customers taking food to their seats or on their flights prefer something hand-held or bite sized rather than an entrée that requires use of a knife and fork. Airport casual dining customers rarely have time for dessert.

1. Challenges to Implementing System Updates and Promotions

With space tight, costs high and lease terms short, there may be limited ability for an operator to implement system updates that require the installation of new or different equipment. With kitchen layouts tight, an operator may not be able to accommodate new or limited time menu items that require the installation of new equipment. Even if the equipment could fit, lease terms in non-traditional venues are short – in the airport space, they typically run seven to ten years – giving operators a limited timeframe in which to recuperate their expensive initial capital investment. When a space nears the end of its lease term, an operator has very little chance of earning a return on investment in new equipment. Given that customers are captive in the venue, and concept plans are designed to prevent cannibalization, limited time menu items and pricing promotions rarely drive additional traffic, but they do impose substantial financial burdens on operators.

2. Meeting Venue Demands

While operating in the non-traditional space may require menu streamlining on one hand, it may require menu expansion on the other. A brand that opens for lunch and dinner on the street side may be required to serve three day parts in a travel or casino

venue. The brand and operator will have to work together to develop a breakfast menu suitable for the consumer demographics of the location. For example, a casual dining restaurant in the airport may add pancakes to a breakfast offering, but a quick service airport restaurant will likely want to stick to hand-held breakfast sandwiches to go. A restaurant in an international terminal or in a casino may want to service breakfast all day, while locations in a domestic airport terminal or on a military base may stick to traditional breakfast hours.

Some landlords may also include specific requirements regarding menu offerings, or sourcing. Going back to the 2017 DFW casual dining pub RFP, the airport there required the menu to "feature at least one vegan and one vegetarian menu item that are low-cholesterol, fiber-packed, plant-based entrée. The menu must identify the items as being vegan and/or vegetarian" and to "have at least 12 draft beer selections including 4 local beers". Common in stadiums, and gaining some traction in travel venues, landlords sometimes negotiate beverage rights for an entire venue. While a brand may require its franchises to sell Coke products in street side locations, it is possible that a landlord could negotiate beverage rights for its entire premises with Pepsi, forcing the brand to accommodate the landlord's exclusivity arrangement if the brand desires to have a presence in the landlord's venue.

ii. Concessionaires are Multi-Brand Operators

Most non-traditional concessionaires are multi-brand operators. Managing multiple brands across limited space and resources requires streamlining at the concessionaire level as well. A large concessionaire may seek to streamline systems, vendors and employment procedures, among other things. When negotiating with franchisees who only operate the franchisor's brand, there is wide flexibility to adapt the franchisee's business to the franchisor's policies – the franchisee does not need to consider how those changes might affect other operations. When negotiating with a large, multi-brand franchisee, it is the franchisor who will likely need to accommodate some franchisee policies in agreement language. A concessionaire may seek to negotiate its franchise agreements to accommodate policies that reach across all of its operations. For example, a concessionaire may have a pre-existing agreement with a single vendor for use of the same point of sale system or credit transaction processing device. Or a concessionaire may not have the ability to accommodate a unique liquid dairy supplier for each franchised concept operated out of its commissary at a large airport, or a unique pest control vendor for each unit under its lease. On the employment side, union policies may prohibit a concessionaire from assigning an employee in multiple job functions; or a unit's small footprint may mean that the pro forma for the location does not support a dedicated manager, rather, there is a manager overseeing multiple concepts in close proximity.

Restrictions regarding corporate form, approval over bylaws, stock legends and the like, and broad non-compete language typically appear in traditional franchise agreements but are likely to be struck from non-traditional agreements with larger multi-brand operators. A company that operates multiple franchised and licensed concepts would be unable and certainly unwilling to give control over its governing documents to a

single brand, or any third party. Non-compete language that generally prohibits franchisees from owning or managing other restaurant businesses will be unsustainable for multi-brand operators and non-competes, if they are allowed to remain at all, will need to be narrowly tailored to the concept type or a limited physical zone of exclusivity.

iii. Landlords Reign Supreme

When concessionaires must compete for real estate, landlords wield heavy handed power. And when those landlords are government entities, the power is even greater. While traditional street side franchise agreements may include terms offering the franchisor a right of first refusal for the purchase of the franchised business, or the right to step in and take over operations in the event the franchisee fails to meet brand standards, or even requiring the franchisee to execute a form of lease addendum granting the franchisor said rights in addition to consent rights over lease amendments or extension options, concessionaire lease provisions or landlord procurement policies will nearly always prohibit such terms. Landlords also control the length of a concessionaire's lease term. The lease nearly always grants the landlord the right to terminate an individual unit early due to the landlord's need to recapture the space for another purpose, or simply for convenience. Unlike a traditional franchisee who may own his real estate, a non-traditional franchisee cannot guarantee the franchisor any particular agreement term; and a non-traditional franchisee who must compete for favor with the landlord is not in a position to push back for a brand when the landlord requires closure of a unit.

B. Retail

Much of the above applies to non-traditional retail operations as well. Just like for food and beverage, space in non-traditional venues is limited, and the customer is typically rushed. But rather than dealing with menu items and day parts, retail brands are faced with inventory and product mix. Retail brands will also need to collaborate with their non-traditional franchisee partners to understand the demographics of the venue and develop a core offering of merchandise.

Clothing brands will need to consider: does the layout accommodate dressing rooms, and even if it does, do customers have time to try on clothing? Are they in a venue where they would be comfortable trying on clothing (in the airport, customers are unlikely to try on)? Are customers passing by my store arriving from or departing to a different climate? What is the most efficient use of limited inventory space (perhaps limit seasonal and trendy items in favor of staples and classics)? Other retail categories need to consider portability and demographics. What can your customers carry with them (in an airport, will the items fit in carry-on luggage)? Is your audience international or domestic; business travelers or tourists and families?

4. The Negotiation

A. Franchisee Lawyer Negotiation Tactics

i. Education

The primary role for franchisee counsel is that of educator. When beginning a relationship with a new franchisor partner, there will be a steep learning curve for the franchisor both in learning the idiosyncrasies of franchisee's operating environment (airport, casino, university, military base, etc.) and in learning how the specific franchisee organizes its own operations. While a given franchisor may be an expert in perfectly cooked hamburgers, it may be a novice in airport operations. For example, did you know that in many airports, post-security, all kitchen knives must be permanently tethered to their work spaces? Did you know, before reading this paper, that an airport landlord can typically recapture a concessionaire's real estate at any time? Educating the franchisor on the benefits, but also the limitations and challenges the franchisee faces in its venue, builds the franchisor's confidence in franchisee's expertise and sets the stage for the rest of the negotiation. Both parties should keep in mind that they share a common goal of successfully operating the franchised business, while each plays a part in educating the other on how to do so.

ii. Pragmatism

After laying an educational foundation regarding the franchisee's non-traditional venue and how the franchisee operates in that space, franchisee's counsel has set the stage to negotiate pragmatic changes into the franchisor's standard agreement. Certain changes may be non-negotiable: a franchisee cannot promise a longer franchise term than its underlying lease term; a franchisee must give its landlord approval rights over certain aspects of the unit's design; a franchisee must abide by the collective bargaining agreement in place at its operating venue (which may prohibit cross-functional job assignments, for example). Other changes may not be made mandatory by obligations to a landlord or labor union, but may be made necessary by franchisee's nature as a multi-brand operator: it may be unworkable for a franchisee to use a bespoke point of sale system for each brand it operates; it may be unworkable for a franchisee to commit to nationwide exclusivity in the franchisor's brand category; it may be unworkable for a franchisee to procure and store logoed disposables for every brand it operates. It is important for franchisee's counsel to walk its franchisor partner through its edits to the franchisor's standard agreement; in a vacuum, many changes may seem unreasonable, but when given context by franchisee's explanation, franchisor can begin to put itself in franchisee's shoes and understand the justification for franchisee's changes.

iii. Leverage

Despite franchisee counsel's efforts in education and pragmatism, occasionally a franchisor is unable or unwilling to put itself in franchisee's shoes and negotiate, especially when the negotiation affects provisions a franchisor may typically treat as non-negotiable. In those circumstances, the franchisee may need to leverage its access to

non-traditional opportunities in order to encourage a franchisor to take a flexible approach to certain franchise agreement provisions. A non-traditional franchisee builds negotiating leverage by having access to opportunities that require special qualifications and expertise, like airport concessions opportunities, which franchisor's traditional operators can neither compete for nor afford to operate. If a franchisor wants access to LAX's 90 million customers, chances are it must partner with an airport concessionaire.

A concessionaire's leverage is even greater when it is seeking to partner with a franchisor to develop real estate in hand, rather than real estate to be bid through an RFP. With real estate in hand, a franchisor is guaranteed a new unit if it can strike a deal with the franchisee; if the franchisor is unwilling to negotiate, the franchisee can hand that guaranteed store count over to another brand, perhaps even one of franchisor's competitors. Non-traditional franchisees maintain close relationships with their landlords, conduct market research and hire lobbyists and consultants to predict venue trends. Through these activities, the franchisees themselves may play a large role in shaping landlords' goals and thus, which brands are best suited to meet those goals. When deciding which brands to propose or develop, multi-brand concessionaires will naturally compare their experience working with various franchisors and favor further development with those who value franchisee's expertise and treat the franchisor-franchisee relationship as a partnership.

B. Franchisor Lawyer Negotiation Tactics

The primary goal of franchisors during the negotiation of a franchise agreement for a non-traditional venue is to minimize changes to the base franchise agreement and ensure that any negotiated changes to the franchise agreement do not compromise the products or services provided and the overall customer experience at the franchised location. There are several negotiation tactics available to franchisors to achieve this goal. For all types of franchises, franchisors should use the importance of a consistent customer experience, regardless of the venue, as an argument against proposed changes that will impact the quality and consistency of the products offered at the franchised location. Specifically, if the franchisee is requesting changes that require the franchisor to pare down the franchised concept in such a way that the franchised location does not have what is necessary to ensure a positive customer experience, this will negatively impact the franchised location as well as the franchise as a whole.

For example, if a pizza franchise requires a certain type of oven to produce its proprietary pizzas and a franchisee attempts to negotiate the right to use a smaller, different type of oven that changes the flavor profile of the pizza, this will compromise the quality of the franchise's core product, which needs to be identical at all locations. If one franchised location sells pizza that does not taste the same, this could potentially compromise the franchised brand's image and overall success, a point which should convince potential franchisees to concede on certain requested changes.

Additionally, for certain types of franchises, local connections and geographic ties can make the franchise particularly desirable for locations such as airports and other tourist destinations where customers are seeking local brands and experiences. For

example, if there is a local well known and beloved custard shop on the boardwalk of a beach town in Florida, an airport in that beach town might benefit from having a franchised location of the custard shop in the airport, where vacationing customers can experience a taste of the boardwalk at the airport. If there is no other comparable custard experience available, the franchisor can use this as negotiating leverage.

Also, a franchisor that has an up and coming brand may have an advantage in the negotiation process by arguing that its brand is more desirable and will likely be more profitable in the long run since newer brands are just beginning the cycle of success and may potentially have more growth than older brands that may be losing popularity.

C. Negotiated Provisions

i. Compliance with System Standards and Adherence Operations Manuals

As noted above, in the context of non-traditional venues, there may be instances where the typical standards set by the franchisor are either not possible or perhaps they are cost prohibitive. To maintain brand consistency a franchise agreement will require strict adherence to the operations manual[12]. Franchisors additionally have the luxury of being able to implement certain changes simply by amending the operations manuals[13]. Therefore, franchisees seeking to obtain non-traditional venues must negotiate carve-outs or restrictions on both the franchisors ability to require strict adherence to the manuals as well as their ability to implement changes through updates to the manuals that may negatively affect the franchisee in the context of their unique location.

A non-traditional venue with a short lease term will result in different requirements from the franchisee as it related to system standards. For example, the typical requirements found in franchise agreements such as a requirement to modernize or upgrade a point of sale system, may simply be too onerous for a franchise considering a non-traditional venue to accept.

Finally, consider the following concepts: i) point of sale system; ii) supply chain; iii) specialized equipment; iv) pricing promotions; and v) information technology. Each of these may have dedicated provisions in any given franchise agreement, but all are often captured by the system standards provision of the franchise agreement. Each of these

[12] Example Provision: "Compliance with Manuals. In order to protect the reputation and goodwill of Franchisor and the System, and to maintain uniform standards of operation under Franchisor's Proprietary Marks, Franchisee shall conduct the Franchised Business in strict accordance with Franchisor's Manuals."

[13] Example Provision: "Modification of Manuals. In order for Franchisee to benefit from new knowledge, information, methods, and technology adopted and used by Franchisor in the operation of the System, Franchisor may from time to time revise the Manuals, and Franchisee agrees to adhere to and abide by all such revisions (at its expense). Franchisee agrees at all times to keep its copy of the Manuals current and up-to-date. In the event of any dispute as to the contents of Franchisee's Manual, the terms of the master copy of the Manuals maintained by Franchisor at its home office shall be controlling. Franchisor may provide any supplements, updates or revisions to the Manuals via the Internet, email, the System-wide intranet/extranet or any other electronic or traditional mediums it deems appropriate."

concepts are often affected when applied to non-traditional venues. As such, they will require adjustment in order to reach agreement with the prospective franchisee.

ii. Provisions Regarding Territory and Leases

1. Site Selection Area

As is the case with all brick and mortar franchisees, franchisees will need to identify sites for the their franchised businesses and develop these sites in accordance with their development schedule. The process of the finding this real estate is addressed in most franchise agreements as either exclusive or non-exclusive with respect to some geographic area. Non-exclusive site selection areas encourage faster development. This comes as the result of competition over available spaces. Conversely, exclusive site selection areas protect franchisees from having to settle for a non-ideal location at the risk of losing the site to a fellow franchisee. The absence of the same pressure results is slower development for brand but potentially better relations between franchisor and franchisees as well as neighboring franchisees.

At the negotiating table a franchisor utilizing non-exclusive site selection areas will undoubtedly be asked to provide for exclusive rights by prospective franchisees. This poses several challenges to the franchisor. Established franchisors will not likely be able to provide for this type of request since preexisting franchisees will already have the right to look non-exclusively in the site selection area. To grant such exclusivity will violate the rights of existing franchisees. Young franchise systems on the other hand may be able to accommodate this request. If there are few or no existing franchisees in a particular market, then offering exclusive site selection rights can be managed. Compared to other provisions however, there should be significant consideration offered by the franchisee for such a request, such as an accelerated development schedule.

2. Exclusive territory

Once a location is determined, many franchise agreements allow for a radius or other geographic polygon of protection. Franchisees may seek additional rights with respect to this territorial protection. The most obvious of which is an increase in the size of the protected area. This can either come as a request to modify either the size of protected area itself or the factors that determine the size of the protected area. Negotiating the underlying factors of protection can be advantageous to the franchisee, if the franchisee has a better understanding of the local market compared to the franchisor. Another right to be sought by the franchisee is a right of first refusal to develop captive markets contained within the protected territory if the Franchise Agreement has a carveouts or reserved rights for such markets.

3. Captive Markets

Captive markets almost always include the non-traditional venues out-lined above[14]. An increasing number of franchise agreements contemplate airports, convention centers and other captive audiences as an exception to the protected territory[15]. As such, franchisees may attempt to restrict or eliminate this exception. Since entering into these captive markets typically requires a more sophisticated franchisee, franchisors should use caution when negotiating these rights away. If captive markets are not excluded from the protected area and if the franchisee who has the protection is unwilling to enter the captive market, then the franchise system will suffer a loss of market share should a competitor enter captive site. Even if franchisors do not negotiate their rights in this context, they should be mindful of any existing contractual protocols and their duty to act in good faith when enforcing contractual provisions[16].

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[14] Example Provision: "Non-Traditional Sites. For purposes of this Agreement, the term "Non-Traditional Site" means: (i) any facility serving a captive market, including hotels, resorts, airports, public facilities, sports stadiums and arena, concert halls, college and school campuses, military bases, and any other mass gathering events or locations; and (ii) any other location Franchisor determines is not traditional and wherein a [insert unit type] or other establishment [insert franchise description] might be reasonably anticipated to be located."

[15] Example Provision: "Designated Territory. Upon locating and securing a Premises, Franchisor will designate a geographical area surrounding the Premises wherein Franchisor will not open or operate, or license a third party the right to open or operate, another [Insert Brand Unit] utilizing the System and Proprietary Marks (the "Designated Territory"), for so long as Franchisee is in compliance with this Agreement. Excepted out from the Designated Territory will be venues within the Designated Territory that Franchisor consider "Non-Traditional Sites". The boundaries of the Designated Territory, once determined by Franchisor, will be described in the Data Sheet. Franchisee acknowledges that it does not have any other territorial rights within the Designated Territory.

[16] In Delaria v. KFC Corp., the franchisor unsuccessfully argued that it was not required to bargain in good-faith with the owner of the closest franchise before building a nearby non-traditional franchise. No. 4:94-cv-116, 1995 WL 17079305, at *7 (D. Minn. Jan. 13, 1995) (preliminary injunction denied to both parties, but no subsequent litigation history; the parties likely settled after this order). The plaintiff operated several KFC franchises in the Minneapolis area. Litigation ensued when KFC Corporation (KFCC) opened three non-traditional franchises near the franchisee (at the University of Minnesota and at two nearby convenience stores) without allowing the plaintiff an adequate opportunity to apply to operate these franchises. Significantly, the franchise agreement expressly required KFCC to "notify the franchisee which is closest to the proposed site [of a new franchise], even if the new location is not within the franchisee's protected area. Specifically, KFCC must provide 30 days prior written notice to the franchisee. The franchisee is then permitted to apply for an opportunity to operate the new franchise." Id. at *8.

KFCC made two arguments: first, because the proposed sites of the new franchises were non-traditional venues, KFCC was excused from any contractual obligation to allow the plaintiff to apply to operate the franchises. KFCC provided no authority to back up this argument. Id. Second, it argued that the franchise upon which it allegedly encroached was non-compliant with its national franchise standards and should be terminated, thereby mooting the plaintiff's claim. The court denied relief to both parties, stating neither met the burden for injunctive relief and, as such, disposition only appropriate on the merits. Id.

4. Lease Riders and Collateral Assignments

Many franchisors enjoy the benefit of requiring franchisees to adhere to predetermined provisions with respect to the leases the franchisees will be entering into. Lease Riders or Collateral Assignments of the Lease permit franchisors to cure defaults on behalf of a franchisee as well provide an opportunity to assume the lease of the defaulting franchisee. These documents also provide many other favorable terms for the franchisors that require them. Although some landlords will accept these documents as written, many will want to negotiate key terms or even incorporate only the critical elements of the documents in the lease whereby avoiding the need for the additional document altogether. Franchisors should be prepared to negotiate with Landlords on these documents. Franchisees should be prepared to negotiate for a certain level leniency or reasonableness when it comes to the franchisor's negotiation with their would-be landlord. In the case of airports or government-managed captive markets, franchisors should be prepared to have these riders rejected in their entirety. Such landlords have little incentive to entire in these agreements given the level of competition for the sites.

iii. Term and Termination

Provisions concerning the term and termination of a franchise agreement may be required to be tied to a lease of a particular venue. As noted already, lease terms for non-traditional venues can be much shorter than a traditional lease. As a result the franchisee will need the term of the franchise agreement adjusted accordingly. Similarly, other terms relating to termination may require modification. The ability to repurchase assets and enter into the space simply may not be an option with a particular venue. Franchisors should be mindful this not simply a negotiation with a franchisee, but that a third party has much control over the matter, and if the franchisor desire the expansion opportunity they will need to yield to accommodate these requirements.

iv. Franchise Fees

Defending the value of a brand is an underlying component to the justification behind a franchisor's position to refrain from lowering royalty rates and other fees during negotiations. However, in light of bringing franchisees into the system who can develop in non-traditional venues, these often coveted provisions may require adjustment if the benefits outweigh foregoing the opportunity. Franchisors should recognize that in additional the benefits that come with non-traditional venues, franchisees who specialize in this often have sites identified prior to entering into negotiations with franchisors. Therefore, speed to entering into this new market should be factored into the franchisor's analysis. That coupled with the fact that institutional Franchisees require a less burdensome level of support, may be enough for franchisors to concede that it is in the brands best interest to reduce its fees.

5. Considerations of Entering into Negotiated Changes in Certain Registrations States

A. California Franchise Investment Law

Franchisors should be aware of potential additional disclosure requirements that certain negotiated changes of the franchise agreement may trigger. This is particularly important in the context of non-traditional venues, since franchise agreements for non-traditional venues are more likely to have negotiated changes. California and Wisconsin are currently the only states that specifically regulate the disclosure of negotiated items. Specifically, the California Franchise Investment Law ("CFIL") imposes additional registration and disclosure requirements on franchisors registered in California when certain negotiated changes are made to a franchise agreement.[17] The CFIL provides that only a franchise agreement that is described in a disclosure document that has been registered with the California Department of Oversight (the "Department") can be offered and sold to a resident of California or to a franchisee whose franchise will be located in California which means that, absent an exception to this rule, a franchisor is required to amend its registration prior to completing a sale and to re-amend the agreement if the franchisor does not subsequently offer the same amended franchise agreement to all future franchisees.[18] However, the CFIL provides two exceptions to this requirement, one in a statute at Cal. Corp. Code §31109.1 (the "Statute") and one in the regulations at Cal. Code of Regs. §310.100.2 (the "Regulations"). These exceptions are difficult to navigate, since the exceptions in the Statute and Regulations are inconsistent with each other.

The Regulations provide that negotiated changes can be made to a franchise agreement without going through the re-registration process for each amended franchise agreement if all of the following requirements are met: (1) the FDD is registered, (2) the franchisor registers a "Notice of Negotiated Sale" with the Department, (3) the franchisor provides the prospective franchisee, at the time of disclosure of the FDD, copies of all Notices of Negotiated Sales filed by the franchisor in the last 12 months, (4) after the negotiated sale occurs, but before selling any additional franchises, the franchisor must amend its FDD to disclose that the terms of the franchisor's FDD have been negotiated with other franchisees, and must attach a copy of all Negotiated Sales Notes filed in California in the last 12 months, and (5) the franchisor must certify or declare in an appendix to its application for renewal that it has complied with all of the requirements of the regulations if this exemption is claimed.[19]

The Statute provides that negotiated changes can be made to a franchise agreement without going through the re-registration process for each amended franchise agreement if all of the following requirements are met: (1) the FDD is registered, (2) within five business days after a request by the prospective franchisee, the franchisor provides to the franchisee (a) a summary description of each material negotiated term that was negotiated by the franchisor for a California franchise during the previous 12 months and

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[17] Cal. Corp. Code § 3100 *et. seq.*
[18] Cal. Code Regs. § 31125.
[19] Cal. Code Regs. § 310.100.2.

(B) a statement indicating that copies of the negotiated terms themselves are available upon written request, and the name, phone number, and address of a franchisor representative from whom the franchisee may obtain the negotiated terms, (3) the negotiated terms, on the whole must benefit the prospective franchisee, and (4) the franchisor must certify or declare in an appendix to its application for renewal that it has complied with all of the requirements of the statute if this exemption is claimed.[20]

There are two primary differences between the Regulation and the Statute. First, the Regulation requires a franchisor to file "Notice of Negotiated Sale of Franchise" with the Department within 15 business days after a negotiated sale is consummated, and second, the franchisor is required to amend its FDD to disclose the negotiated changes and attach all Notices of Negotiated Sale as an exhibit to the FDD. While the interplay between the Statute and Regulations is unclear, many practitioners interpret the Statute and Regulation to operate parallel to each other; that is, either exemption can be used, assuming, if the exemption in the Statute is used, that the negotiated change benefits the prospective franchisee.[21]

Additionally, the Wisconsin Franchise Investment Law requires a franchisor to amend the registration statement if there are negotiated changes in the offer or sale of a franchise, but this requirement only applies if the changes are material with respect to prospective franchisees who were not involved in negotiating the changes, so this requirement is not expected to apply to most negotiated changes.[22]

B. Exemptions

Exemptions are unique in that can create a situation for a non-disclosable negotiated change in the state of California. Certain requirements of the CFIL pertain to negotiated changes that were offered pursuant to sections 31111 and 31121 of the Statute. If a negotiated sale occurs under an exemption such as under 31109, then no disclosure is required if a the franchisor later sells under different terms pursuant to section 31111.

6. Practical Impact of Material Changes

Creating a mutual meeting of the minds is an essential component of entering into a contract. In the franchise context, franchisors have long since held the upper hand in creating contracts that suit the needs of their interests. Consistency in Franchise Agreements permit franchisors to not only develop but to depend on processes which will aid in the implementation of the franchisor's back of office. However, as we have identified in this paper, material negotiations can be advantageous to both franchisors

[20] Cal Corp. Code § 31109.1.

[21] Memo from Business Law Section Franchise Law Committee section of the State Bar of California to the California Office of Governmental Affairs. *Proposed New Statutory Exemption for Negotiated Sales* (July 31, 2015); *see also* Kruetzer, Matthew. *Negotiated Sales in California*, American Bar Association (June 29, 2017).

[22] Wis. Stats. § 553.31(3).

and Franchisees alike. So as a result, franchisors need to be prepared to manage the long term effects of these negotiations.

In practice, a negotiation is a part of a larger process. Just as franchisees are expected to follow the systems, franchisors must create and follow consistent practices in order to maintain a long-term harmony within their franchise network.

A. The Franchise Sales Process

Tactics of negotiation typically reside in the sales and approval process. The principles below can be applied to any negotiation process between franchisor and prospective franchisee; not just those relating to non-traditional venues. Although getting to 'yes' may be the primary objective of a negotiation, franchisors must also have good practices around authorization, documentation and data retrieval.

i. Negotiation

Depending on the developer assisting the prospective franchisee though the sales process, requests merely for clarification may come to the franchisor's management team in the form of a negotiation. Less experienced developers are often challenged by prospects to answer questions which can sometimes lead to the developer making requests to the franchisors management for concessions. Often franchisees are merely seeking clarity on the practices of the franchisor. While other times a true negotiation is the intent of the prospect.

Every franchisor will differ in the manner with which it proceeds in negotiations. The players involved may vary widely, but consider the following: each and every franchise agreement provision was designed and included for a particular purpose. Some provisions are simply a matter of legal boilerplate intended to protect the franchisor. Others are of a more operational nature and will impact the team that supports franchisees. Still others, affect information technology and the team that processes and reports information. Since any given provision can affect various teams, the individuals who are involved in the negotiation should be well versed in all aspects of the franchisor's systems. They should not only have the ability to negotiate on behalf of the franchisor, but they should also know who to contact to confirm that the contemplated negotiations will not disrupt the processes of the franchisor.

This is not to say that the negotiation process requires the involvement of many individuals. On the contrary, as the individuals involved increases, so does the time it takes to reach a deal with the prospective Franchisee. However, simply having a negotiator or authorizing person with good understanding of both the franchisors operational practices as well as their tolerance for deviation from the standards will go along way in reaching a deal quickly.

ii. Authorization

The authorization of a negotiation as a component of the larger sales process may vary widely from franchisor to franchisor, but one common theme is most certainly

addressed by every franchisor who negotiates: that is, that someone must agree to the terms of the transaction on behalf of the franchisor. The individual authorizing the terms of the transaction may or may not be the same individual that is conducting the negotiations. This authorization should be documented and maintained by the administration as it may be useful in future negotiations.

In its most basic form, an approval from the franchisor is simply a matter of signing off of the terms that have been negotiated. It is for this reason, that the individual negotiating on behalf of the franchisor must only bring the terms of the deal to the authorizing individual after a review of all the potentially affected departments has been conducted.

iii. Documentation

Once the terms of the transaction have been negotiated and authorized, the next component of the process is documentation. This seemingly simple part of the process does yield several considerations for best practices. Generally, negotiations can typically fall into one of three variations. A letter of understanding, an addendum, or a modification to the text of the franchise agreement. The sophistication of the Franchisee with which you are negotiating, as well as the desire to close a deal, will impact the manner in which the changes are memorialized.

A letter of understanding, if used simply for adding clarity to a deal, can often create comfort for the parties. It additionally creates a basis for representations made prior to formalizing the contract. Beyond the matter of providing these simple benefits however, questions of whether or not a letter of understanding is binding will arise. The answer generally depends on whether it contains the elements of a contract. Sophisticated franchisees certainly require more formal documentation when handling matters of significance in their negotiations.

Perhaps the easiest to manage, from a franchisor's point of view, as well as the most enforceable form of documentation is the addendum. An addendum containing material changes are preferred over other forms of modifications because they are convenient, clearly summarize the differences between the original and the revised terms, and offer a way for the franchisor to track its modified contracts in a way that other ways of documentation cannot. A well drafted addendum will reference each section or article that has been modified so that the document can later be used to enter such information into the franchisor's franchise management software.

Modifications to the franchise agreement itself, except for provisions intended for modification, should be avoided. Unless the franchisor has an infallible process for maintaining a record of the changes, this method of document management creates too many complications for franchisors. Summaries with section or article references will need to be created if these changes are to be adequately tracked; a step that is inherent in the addendum process. Redlines to the franchise agreement are commonly received by franchisors from attorneys who are not dedicated to the practice of franchise law. Franchisees of the type contemplated by this paper, however, are likely to have very

specific reasons for requesting changes in this manner should they chose to do so. As such, the franchisor may very well have good reason to consider this, but the implications will require additional work for the franchisor.

Regardless of the manner in which a negotiation is papered, franchisors should always consider the source of the negotiated change. According to the Franchise Rule, when a franchisor makes unilateral changes to the franchise agreement, the franchisee must be disclosed the completed document a minimum of 7 days before signing. However, if the changes are a part of negotiation that are initiated by the franchisee, then no additional waiting period is required[23].

B. Recordation and Retrieval

i. Necessity of Recordation and Retrieval

It is vital for every franchise system to be able to maintain an accurate record of all franchise agreements. Additionally, these records should be easily recalled and summarized for various legal and operational functions. Once a material change has been memorialized, it must further be recorded in a manner that allows the franchisor to manage its contracts effectively.

In order to appropriately enforce system standards, a franchisor's operational team must be able to identify when the common standards do not apply and when common operational systems, such as site visit checklists, will require modification. Although it may seem obvious that franchisees with locations in non-traditional venues may have different obligations, if the franchisor's operational staff does not have direct access to the requirements of the franchisee, then their legal or administration team will need to provide this information in a way that sets the appropriate expectations.

ii. Franchise Management Software.

For ease of retrieval, summaries of the negotiated provisions should be added to a franchise management software. This can be particularly useful for operational staff who may not have direct access to franchisee legal files. Such entries may also be useful during due diligence if the franchise system has gone to market and is receiving due diligence requests.

Common data management platforms used in franchising such as FranConnect® or Naranja® can easily be modified to add data fields for this purpose. Adding fields permits reports to be designed and later generated such that franchisors can identify each and every franchisee with a negotiated provision. Additional fields can also be added to identify both the sections modified and a summary of the of changes. Even though franchise management software has become exceedingly user friendly, redundancy in capturing this information is still a good practice for franchisors.

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[23] 16 C.F.R. § 436.2(b)

Another practice that can benefit franchisors is the creation of a naming convention for certain negotiated changes. Creating such systems as a matter of policy help administrators maintain and communicate records.

C. Managing Disparate Franchise Agreements

i. The Franchisor - Franchisee Relationship

Franchisors should be mindful of the impact that negotiated changes have on the relationship between the themselves and their franchisees. Although every precaution may be taken at the time of negotiation, franchisors should not expect all of their negotiated changes to remain confidential. Although less problematic with a sophisticated franchisee, a confidentiality provision despite its usefulness, may not be enough to keep a franchisee from disclosing the terms of their negotiation with other franchisees. When a franchisee does in fact breach the confidentiality clause of their agreement, the level of legal or equitable damages may not rise a level where legal action is appropriate. However, the disclosure, depending on the circumstances, may create contention within the franchise system and franchisors may find themselves dealing with requests for the similar treatments, or in the worst case scenario, potential discrimination claims.

ii. Operations

1. Contract Compliance

Matters of contract compliance are often viewed in the context of protecting a brand from the damaging actions of a franchisee who has deviated from the system. Although there are many examples of best practices when considering placing a franchisee in default for violating the terms of their franchise agreement, for the purposes of the subject of this paper, the key consideration for a franchisor is to confirm that there are no negotiated provisions that would prevent a franchisor from initiating its means of enforcement. In practice, this means that franchisors must have a mechanism for comparing the offensive behavior to any previous negotiated change. This applies regardless of whether a non-traditional venue is involved.

2. System Modification

System improvement, brand image, market disruptors and many other factors may drive change in a franchise system. What ever the reason may be, given the contractual nature of the relationship between franchisor and franchisee, material system modification will require a review of the issued franchise agreements to confirm the franchisor is empowered to create such material change. Prior to implementing material system-wide changes, a franchisor should review which franchisees may have provisions limiting the franchisor's ability to implement such changes. If resulting addenda from the negotiations were properly documented, this process can be expedited by creating and running reports from the franchisor's franchise management software. Of course, as the size of the system increases, so does the time involved in reviewing the feasibility. Nevertheless, the process can at least be simplified if proper steps were taken during the

documentation process. franchisors should recognize that limiting their ability to freely implement system wide change may be a fair exchange for getting the visibility as well as the opportunity for rapid growth that can come from negotiating with franchisees.

7. Conclusion

As much as franchisors may desire to preserve the terms of their franchise agreements, as well as maintain the consistency of their product offerings and standards, there are significant business opportunities that can be met by seeking expansion into non-traditional venues. With these opportunities comes a different level of franchisee, a negotiation, and certain practical follow through. There are good reasons however, as this paper describes, for taking these actions . Meanwhile, the alternative is to not take them and allow competing brand to gain the visibility and growth made possible by this unique markets.

Exhibit A

DELI AND RESTAURANT
Request for Proposal (RFP) May 2018

FOR: Banquet and Catering. Deli, and a Restaurant located at the Prairie Wind Casino 35 miles north of Pine Ridge, South Dakota on highway 18.

BY: Prairie Wind Casino & Hotel, Oglala Sioux Tribe, Pine Ridge South Dakota 57770

DEADLINE: 4:00 p.m. Mountain Time, July 1, 2018

CONTACT: Travis Barden
Purchasing Agent
605.867.8946

OVERVIEW:

The Prairie Wind Casino and Hotel is searching for a qualified private restaurant owner, restaurant firm, or restaurant franchise to manage the existing bingo meals, banquet and catering, deli and the restaurant space and staff. We are looking for a restaurateur that has successfully operated and managed a banquet and catering, deli, and restaurant. Preferred experience in a casino and a hotel setting. In the year 2017 we had 311,000 customers visit our property. The size of our properties: Bingo dome is 14,700 square feet, convention center is 9,240 square feet, restaurant is 3,390 square feet, and the deli is 1,325 square feet.

ASSISTANCE:

The Prairie Wind Casino and Hotel will provide the banquet and catering, bingo, deli, and restaurant space. All equipment and supplies will provided. The point of sale equipment will be provided. The existing food and beverage inventory will be provided as startup. No rental fees will be charged. Security is provided. Equipment will be maintained free of charge. Marketing will be provided free of charge.

REQUIRED CONTENTS OF PROPOSAL:

Each respondent must provide, at a minimum, the following information:

1. Name, address, email address, telephone number and fax number of the respondent;

2. Name, address, email address, phone number and fax number of representative that is authorized to act on behalf of and represents respondent;

3. Name, address, email address, phone number and fax number of a designated contact person for all notices and communications regarding the submitted proposal;

4. Statement signed by the respondent(s) or authorized representative certifying that: a. All of the information contained in the proposal is true and correct; b. Respondent agrees to all terms and conditions, reservations and stipulations contained in this RFP document, including but not limited to those specified; and c. Signator is authorized to make the commitments and representations contained in the proposal on behalf of the respondent.

5. Identify the owner and operating team and describe team members' qualifications and experience, with particular attention to the experience and qualifications related to the proponent's proposal. Also include their name and contact information.

6. Provide a resume of successful operations similar to what you are proposing along with any other information deemed relevant to how your proposal addressed this criterion;

7. Provide a description of the proposed ownership and management/marketing structure for the proposed operation. Include information on any significant restaurant projects completed in the past ten (10) years involving such ownership and management/marketing;

8. Provide at least three references, including name, address, email address, phone number, fax number, contact person and description of relationship with proposed business;

9. Provide current financial statements for entities and individuals comprising the proposed ownership entity (including members, if LLC, and general partners, if partnership).

10. Provide a narrative summary describing why respondent is qualified to undertake the proposed operation;

11. Provide a narrative description of the proposed operation;

12. Provide a business plan and project budget including individual line items for each major expense. The business plan should include an operating budget, market analysis and projections, management structure, and if needed, proposed financing arrangements. The budget should also include a three (3) year income and expense projection. This projection should also identify sources of working capital to cover initial operating deficits and start-up costs and any new equipment the respondent believes is needed. The business plan should address daily operations, planning, special events, promoting, reporting and operations to achieve the greatest benefits and enhance the overall experience for the community and surrounding area. The business plan should also include description of the types of workers expected to be involved in the facility's operation and the number of each type of worker proposed to be involved;

13. Provide a detailed operating proforma for the first year, including all anticipated income and expenses for the completed project. Also, provide a statement of sources and uses of funds for financing the project;

14. Note: Prairie Wind Casino and Hotel does not provide financing for this project. Provide a copy of any financial commitment letters from lenders and/or equity partners or contributors. If respondent identifies any funds other than respondent's own funds as sources in any materials presented in response to the requirements specified, commitment letters from all such other sources are required as part of this RFP;

15. Provide a narrative description of how the project will be managed and by whom once completed, including marketing, leasing, and/or sales. Also include the responsible parties' experience and qualifications for the work;

16. Provide a narrative description and timetable outlining milestones for all proposed development activities, including a definitive schedule for opening the facility and a date certain when the facility will be open for business;

17. Provide a narrative describing the proposed marketing, promotion and advertising plans for the development as applicable. The party must work with the casino marketing department monthly on these proposed marketing, promotions, and advertising plans prior to implementation.

18. The respondent must comply with all customer service requirements and with the overall vision of the Prairie Wind Casino and Hotel.

IT IS REQUIRED THAT PROPOSALS FOLLOW THE ABOVE FORMAT AND INCLUDE ALL REQUESTED INFORMATION. SUPPLEMENTAL INFORMATION IS ENCOURAGED TO SUPPORT YOUR PROPOSAL AT IT PERTAINS TO THE REQUIREMENTS.