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National Customer Account Management Issues

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NATIONAL CUSTOMER ACCOUNT MANAGEMENT ISSUES

I. INTRODUCTION

Some franchise systems need a national account program in order to attract and do business with customers who: may be too large to be serviced by a single franchisee; need service in diverse geographic areas; or prefer a single contact in order to control pricing, billing and customer satisfaction.

This paper will focus on best practices for structuring and administering a national account program to meet the needs of customers, franchisees and franchisors, and will discuss the legal and business issues that arise from a national account program, including benefits, encroachment issues, discrimination claims, good faith and fair dealing claims, pricing and antitrust issues, and other related distribution issues.

II. WHAT IS A "NATIONAL ACCOUNT CUSTOMER"?

Due to the variety of industries and business models utilized by franchise systems, it is essential to begin with a clear understanding of what we mean by the term "national account customer." For purposes of this paper, we define a "national account customer" as any customer who 1) has on-going demands for products or services that exceed the capabilities of any single franchised business; 2) has multiple locations in diverse geographic areas that fall within multiple territories in the franchise system; 3) prefers a single contact in order to control pricing, billing and customer satisfaction; or 4) requires a single contact due to centralized buying authority or in order to comply with regulatory issues.

It may be helpful to state what is *not* included in the definition of a "national account customer" for purposes of this paper. In many franchise systems, the franchisor reserves the right to directly sell products or services that are offered by the franchised business through *alternative distribution methods*. Often, this means sales through a website or other secondary channels. Because alternative distribution methods generally focus on the intermediary market method, rather than the end-user customer, alternative distribution methods do not meet our definition of a "national account customer."

Also, some franchise systems, particularly those in the food industry, will exempt from its territorial grant any locations in unique venues¹ – airports, amusement parks, casinos, hotels, military bases, sports facilities, universities and similar locations – having a customer base that is distinct from the customer base in the surrounding geographical territory. These exemptions are often referred to as "*non-traditional outlets*," and do not meet our definition of a "national account customer."

Many franchise systems have one or more *approved suppliers* from whom its franchisees must (sometimes may) purchase designated goods and services. An approved supplier program is generally used for purposes of maintaining quality controls and system uniformity. An approved supplier program often results in discounted prices to franchisees, and may result in rebate income to the franchisor based on the system's purchases of the supplier's products or services or some other criteria negotiated between the franchisor and the supplier. Franchise systems providing cleaning, restoration and damage mitigation services after fire and water damage have successfully used a hybrid of the national account approach to establish

¹ See, e.g., Franchising in Unique Venues, Jeffrey A. Brimer, Adam Ekberg and Scott Weber, 31st Annual Forum on Franchising, Austin, Texas, 2008.

relationships with national insurance companies resulting in service calls being dispatched to the system franchisees after a consumer reports a claim to its insurance agent, making the franchise system the "approved supplier" for the insurance company. In these and other approved supplier relationship, the franchise system is, in essence, the "national account customer" for the supplier, reversing the relationship that we have defined. For purposes of this paper, we do not intend to treat approved supplier relationships as national account customers.

Some franchise systems use the national account approach in dealing with government entities that are required to follow purchasing guidelines. While the technicalities of government contracting are beyond the scope of this paper, in some circumstances, a franchisor may be able to become listed on GSA schedules, allowing its franchisees to offer and sell the products or services of the franchise system to government agencies. For purposes of this paper, we do not intend to treat government contract relationships as national account customers.

National account customers might be large national or even global companies – Wal-Mart, Home Depot or Exxon-Mobil – with branch offices, manufacturing plants or other establishments throughout the United States and in other countries but could also be more local or regional in nature. National accounts could be private companies – branch offices of a bank or commercial or residential properties controlled by a large real estate developer – but might also be colleges, universities and technical colleges or government agencies.

Our sample franchise agreement provisions (Appendix I and II) and disclosure document language (Appendix III) comes from franchise systems operating in the auction business, car rental business, children's art programs, employment placement business, the fastener business, the plumbing business and retail sign shops. A national account program seems particularly attractive to and suited to franchise systems that are in service industries.

III. WHY HAVE A NATIONAL ACCOUNT PROGRAM?

Customers with regional, national or global operations are increasingly demanding and seeking suppliers and service providers that can service their regional, national or global needs. This trend is making a national account program attractive for both franchised and non-franchised companies. Several factors are contributing to the trend, including the desire by companies to 1) streamline purchasing arrangements by giving more business to a smaller group of vendors, 2) have fewer contracts to manage, 3) obtain potential cost saving as a result of volume discounts, 4) implement standardization, 5) obtain enhanced customer service with designated points of contact, 6) obtain value-added services tailored to the company, and 7) reduce administrative costs and burdens associated with having multiple suppliers for a single product or service need by all points of operation.

A franchise system's inability to provide service to companies seeking national account programs can hamper the franchise system's ability to attract and compete for attractive regional, national and global customers. For example, in certain industries, some non-franchised companies have been known to tell customers that the competing franchise system is not able to offer the same level of service and guaranteed terms on a regional, national or global basis because of the franchise business model. The structuring of national account programs may have become less complicated due to changes in the antitrust laws (see Section VIII). These changes may enable franchise systems to more easily compete with non-franchised companies for national account business.

A. PURPOSE AND BENEFIT FOR FRANCHISORS

There are a variety of benefits that a franchisor may receive from national account programs. National account programs have the possibility of generating sales across the entire franchise system which can represent significant revenue for the franchise system as a whole. For example, the CEO of Coverall Cleaning Concepts estimated that 10% of Coverall's future growth would come from national accounts.²

High profile national account business can bring publicity and prestige for the franchise system. This publicity and prestige promote the brand and help with selling the services and/or products to new customers. Winning a large national account can serve as an endorsement that can lead to additional business. For example, a car rental company that entered into a national account program to supply rental cars to a national accounting firm's employees in the United States could generate both prestige and an incredible amount of revenue across the franchise system. Or, a janitorial franchise company's national account program to provide cleaning services to all UPS Store locations across the United States would provide publicity as well as significant revenue.

Generally, sales through a national account program can be generated at a lower selling cost for a franchise system. The cost to send a representative from the franchisor to one decision maker for the entire company is less expensive and more efficient than having each franchisee pitch the local representative for each of the company's offices. Additionally, there may be cost savings in connection with billing, collection and other administrative duties required to service one account versus a lot of smaller individual accounts. Although there may be lower selling costs for the franchise system as a whole, a franchisor must consider whether the franchisor will be taking on additional duties for the franchise system in connection with the national account program (e.g. duties in connection with selling to and negotiating with national account customers, resolving customer service problems, and centralized billing) and whether the franchisor has the resources to handle these duties that may be typically handled by each individual franchisee.

Depending on the industry, national account programs may be critical to the success of some franchise systems, and prospective franchisees may expect a franchise system to have an established and successful national account program. A franchisor that has an established national account program may find it easier to attract new franchisees. For example, car rental franchisees may expect their franchisors to have national accounts with companies that have employees that do a large amount of travel. Similarly, personnel employment franchisees may expect their franchisor to have national accounts with companies that hire regularly temporary employees. Likewise, fire/water damage restoration franchisees may expect their franchisor to have national accounts with insurance companies. Franchisees may also expect the franchisor to maintain an appropriate sales force for national accounts. There have been a couple of cases³ that we will discuss in more detail elsewhere in this paper in which franchisees asserted breach of contract claims related to the franchisor's duties in connection with conducting a national account program.

² Daniel G. Jacobs, Cleaning Up, Smart Business Broward, June 2006.

³ Bean's Glass Service, Inc. v. Speedy Auto Glass, Inc., 2002 WL 974675, Bus. Franchise Guide (CCH) §12,343; U.S. District LEXIS 8975 (U.S. District Court, District of Massachusetts 2002) and Auto-Chlor System of Minnesota, Inc. et al. v. JohnsonDiversey et al., 328 F. Supp. 2d 980 (U.S. District Court, District of Minnesota 2004). See also Section XI.E.2 of this paper.

National account programs are one of the limited opportunities where the franchisor has the opportunity to sell directly on behalf of its franchisees. Aside from the obvious reason of increasing royalties or revenue from product or service sales in the franchise system, increasing franchisee sales through national accounts can serve other important purposes in some franchise systems. Some franchisees may be failing to maximize sales for their franchised business. When franchisees have been generating a significant amount of income over a number of years, some franchisors have noticed that certain franchisees become content with the income they are receiving and some franchisees are unwilling to continue growing the market and business because these franchisees feel the additional time and effort are not worth the additional revenue. National accounts can be a means to assist the franchisor in getting franchisees to continue growing their market and business if a franchisor has the right to require participation by its franchisees or if the franchisor can persuade its franchisees to participate. This can be an important tool when the franchisor has granted an exclusive territory that can only be serviced by one franchisee even though the territory is not being exploited to its full potential by that franchisee. See Section IV for a further discussion of territorial grants and encroachment issues.

Contracts for national account business can also bring a certain amount of stability to the revenues of a franchise system. During the term of the national account contract, a franchisor and its franchisees may be able to estimate a certain amount of consistent revenue from providing services and/or products. For a variety of reasons, this type of stability can be good for the franchisor and the franchise system.

B. PURPOSE AND BENEFIT FOR FRANCHISEES

Many of the benefits for the franchisor also apply to a franchisee. Like every other business owner, a franchisee wants to make money and increase its own business revenues. A properly structured national account program delivers products and services to customers at attractive prices or on beneficial business terms, resulting in sales and revenue for a franchisee. A national account program can provide additional customers, increased sales volume and lower costs for franchise owners.

A national account program often reduces selling costs by allowing a franchisee to obtain a customer without expending its own time, money and effort to acquire the customer. It is obviously more cost-effective when a single salesperson can approach the buyer at a company to negotiate a contract for services to be provided at all of the company's locations, rather than have every franchisee approach the manager of the local unit of the company.

A national account program may substantially reduce or eliminate administrative costs for franchisees. For example, a franchisor might establish a call center to handle the requests for services from national account customers and take responsibility for dispatching calls. In other systems, the franchisor may handle invoicing and collecting payment from the customer for the products or services being provided by franchisees. If the franchisor is responsible for invoicing and collecting, the process may also reduce or eliminate the risk to the franchisee of bad debt.

A national account program may bring more predictability and stability to sales volumes. A franchisee may be better able to plan its operations, including the need for staff and the quantity of supplies to have on hand, resulting in the reduction of waste and better cost control. With a better idea as to the quantity of supplies needed, a franchisee may also be better able to negotiate with its key suppliers.

A national account program may deliver customers to a franchised business that a franchisee could not have obtained through its own efforts. For example, while it may be possible for the owner of a single franchised business to persuade a branch of the U.S. military that the franchised business is able to refinish all of the bathtubs in the barracks of a military base located in the franchisee's assigned territory, it is likely impossible for that franchisee to obtain a similar commitment to refinish every bathtub in every barrack of every base operated in the United States by that branch of the military. A franchisee who believes it could have obtained the desired business from the local unit of the customer through its own efforts may not wish to participate in a national account program unless it sees that it in some way gains a benefit from its participation.

Although there may be many potential benefits for franchisees from a national account program, it does not necessarily follow that every franchisee in the franchise system will benefit to the same degree and often there can be no guarantee that every franchisee in the system will see the benefits. For example, a franchisee may have been servicing a local customer that becomes part of a national account program, and the program may not result in any additional financial benefit to a particular franchisee. In some instances, the national account program may change the dynamics of existing customer relationships. There might also be situations in which a national account customer has negotiated special contract terms that could result in additional servicing requirements that are not part of every franchisee's standard offered services, possibly creating a burden or adding additional costs for a franchisee to provide the contracted services. It cannot be stressed strongly enough that good communication is essential to ensure that a national account program is structured and functions in a manner beneficial to all parties in the relationship.

IV. TERRITORIAL GRANTS AND ENCROACHMENT ISSUES

Since franchising is a method of distribution, franchise systems operate in a variety of industries that reflect different approaches in their business models and may face different challenges in determining how franchisees ultimately provide the products or services associates with the brand to customers. In systems using a "bricks-and-mortar" approach, the focus is on attracting the customers into the franchised business to purchase the branded products. In some franchise systems, the location of the customer is of relatively little significance to the business model and, as a result, there may be little or no territorial grant or controls found in the franchise agreement.

A number of franchise systems grant rights to offer and sell the branded products or services within a defined territory. Few territorial grants are truly exclusive – allowing no one but the franchisee the right to offer or sell the products or services in the granted territory under any circumstances. Most territorial grants could be described as "protected" – in the granted territory, the franchisor agrees not to operate the franchised business and agrees not to grant rights for anyone else to operate the franchised business, but the franchisor reserves various other rights. In these instances, if the franchisor is to have the right to provide products or services directly or through a designee if the franchisee is unable or unwilling to provide products or services to a customer, any territorial rights granted to the franchisee must allow the franchisor and/or its franchisees and agents to provide products and/or services to national account customers in any territory granted to the franchisee.

Generally, franchise agreements include a provision where the franchisor reserves the right to enter into national accounts or operate a national account program. As discussed in

Section X.B, there are a variety of ways in which a franchisor can reserve the right for a national account program, and a national account provision may or may not appear in the reservation of rights section of the franchise agreement.

One of the obvious alignment of rights to service national account customers is to match the customers to the franchisee's assigned territory or market. However, even when a franchisee receives a specific territorial grant, in some instances, the franchisor may call upon the franchisee to service national account customers outside the franchisee's territory. Franchisors need to be cautious to ensure that they are not expanding the franchisee's territory by asking a franchisee to service a national account outside the franchisee's territory. The arbitrator in *In the Matter of Arbitration between Minnesota Shredding, Inc. v. Shred-It America, Inc.*⁴ determined that the franchisor had added 22 counties in Minnesota to the franchisee's territory by requiring the franchisee to service national account customers in such counties. Although the franchisee's franchise agreement provided that the franchisee could not expand its territory by servicing customer outside the territory, in finding that the territory had been expanded, the arbitrator relied on language in the franchise agreement that said that, at the franchisor's request, the franchisee was required to add contiguous areas within the state where the territory was located.⁵ The arbitrator determined that the franchisor's action in asking the franchisee to service certain national account customers outside the territory was a request that the franchisee add contiguous areas where the franchisee serviced these national account customers. Based on the finding of this case, when detailing how responsibility for servicing specific national account customers will be determined or assigned, it is recommended that the national account provision should disclaim the expansion of any territory in the franchise agreement by virtue of servicing a national account customer outside the territory.

In order for a franchisor to avoid encroachment claims, it is recommended that the franchisor specifically exclude from the territorial exclusivity the rights that the franchisor wants to reserve related to the national account program. Without a carve out for the national account program in the territorial grant, a franchisee could assert an encroachment claim. In *Interim Health Care of Northern Illinois, Inc. v. Interim Health Care, Inc.*,⁶ the franchisee asserted that the franchisor encroached on the franchisee's territory by servicing national accounts from an office that the franchisor had recently purchased from another franchisee. The franchise agreement in this case included language that barred the franchisor from establishing an office for certain purposes in the franchisee's territory and said the franchisor would furnish the franchisee with national account leads. The court found that the franchise agreement did not bar the franchisor from establishing an office for the same purpose of the franchisee's business outside the franchisee's territory and the franchisor was also not barred from providing the same services as the franchisee's business within the franchisee's territory. The court said that if the parties had wished to wholly restrict the provision of services in the territory, the parties would have said so in the franchise agreement. Another factor that may have impacted the court's decision is that there was prior history of the franchisees, including the plaintiff, providing services in each other's territory.

⁴ *In the Matter of Arbitration between Minnesota Shredding, Inc. v. Shred-It America, Inc.*, International Arbitration Tribunal. Case No. 50114T0018104 (May 25, 2005).

⁵ *Id.*

⁶ *Interim Health Care of Northern Illinois, Inc. v. Interim Health Care, Inc.*, 225 F.3d 876 (7th Cir. 2002).

V. GOOD FAITH AND FAIR DEALING

At least two court cases, *Interim*⁷ and *Leonetti*,⁸ have addressed allegations of breach of the covenant of good faith and fair dealing in connection with national account programs. These cases indicate that courts 1) are reluctant to find a breach of the covenant of good faith and fair dealing when it relates to the franchisor's obligation to find national accounts for the system and 2) will scrutinize a franchisor's conduct when assigning national account responsibility between a franchisee and company-owned unit.

In *Leonetti*, the plaintiff licensee of a bed and sofa licensor sought a preliminary injunction against termination based on, *inter alia*, the licensor alleged breach of the covenant of good faith and fair dealing. The licensee alleged that its sales goals were projected in light of certain representations that certain national accounts were imminent and would provide great volume toward the sales goal and the defendant had failed to obtain a certain national account. The license agreement between the parties provided that the licensor would "seek to cultivate the patronage of National Accounts . . ." The court denied the plaintiff's request for a preliminary injunction against termination finding that the statements regarding obtaining national accounts were in the form of predictions or expectations, and the licensor did not likely breach the covenant of good faith and fair dealing by failing to obtain a certain national account that the licensor had discussed with the licensee.

*Interim*⁹ involved claims that the franchisor breached the duty of good faith and fair dealing because the franchisor serviced patients in the franchisee's territory and the franchisor withheld some national account leads within the franchisee's territory. In affirming the lower court's grant of summary judgment, the court found that the franchisor did not violate the duty of good faith and fair dealing in connection with servicing patients in the franchisee's territory because the contract permitted the franchisor to service such patients.

However, the *Interim* court found that the franchise agreement was vague regarding what leads the franchisor was permitted to withhold from the franchisee and the justifications required to permit the franchisor to withhold leads. The court said that the franchisor "had wide discretion, and its exercise of that discretion was governed by a duty of good faith . . . This means it was not permitted to withhold national account leads for improper motives, or in a manner inconsistent with the reasonable expectations of the parties."¹⁰

The franchisor asserted that it withheld national account leads because it was dissatisfied with the franchisee's performance and doubted that the franchisee could handle additional business. The court found that 1) the franchise agreement's implicit assurance of assistance to the franchisee and the absence of any link between performance and national account leads, and 2) the lack of any notice to the franchisee that poor performance was jeopardizing national account leads weighed against finding that the franchisor exercised its discretion consistent with the reasonable expectation of the parties. Since the evidence weighed against finding that the franchisor properly exercised its discretion, the court found that

⁷ *Id.*

⁸ *Leonetti Furniture Manufacturing Co. v. Sealy, Inc., and The Ohio Mattress Co.*, No. 90-380-DA, 1990 U. W. Dist. LEXIS 20994 (U.S. District Court, District of Oregon 1990).

⁹ *Interim Health Care of Northern Illinois, Inc.*, 225 F.3d at 8.

¹⁰ *Id.*

the lower court's grant of summary judgment was improper on the issue of whether the franchisor had violated the duty of good faith and fair dealing. The fact that the withheld national account leads were going to and being serviced by an office owned by the franchisor and the franchisor had made several attempts to purchase the franchisee's territory may have been factored into the court's decision.

VI. TORTIOUS INTERFERENCE

There have been a few cases addressing tortious interference with business relationship in connection with national account programs. The franchisee in *Interim*¹¹ asserted that the franchisor tortiously interfered with the franchisee by taking national accounts located in the franchisee's territory for itself. The court, however found that the franchisee did not satisfy the requirement under Illinois law that there be a reasonable expectation by the franchisee of a valid business relationship with the third party. As discussed above, the franchise agreement permitted the franchisor and other franchisees to service patients in each other's territories provided that they did not violate any prohibition on where they could maintain offices. The franchisor's exercise of its contractual right negated the tortious interference claim.¹²

Similarly, in *Franklin Tractor Sales v. New Holland North America, Inc.*,¹³ the court affirmed a lower court's decision granting a summary judgment motion to dismiss a claim alleging that a construction equipment manufacturer tortiously interfered with its dealer's business relationship by the manufacturer implementing a national account program. The court found that the dealer agreement between the manufacturer and dealer unquestionably permitted the manufacturer to sell directly to national account customers. Further, the court found that, without a limitation on the manufacturer's right to sell directly to national account customers, the manufacturer's exercise of its right under the dealer agreement negated any tortious interference claim.¹⁴

The dealer in *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*,¹⁵ asserted, *inter alia*, claims of tortious interference with prospective business relationship against the manufacturer. In connection with ruling on several motions for summary judgment, the court found that the dealer had demonstrated that the manufacturer had tortiously interfered with the dealer's customer relationships by 1) inducing certain customers not to buy from the dealer and 2) usurping sales to national accounts by offering special deals and lower prices to national accounts that were not available to the dealers. The court did not grant the dealer's request for summary judgment on the tortious interference claim because the court said that the question of whether the customers would have purchased from the dealer without the manufacturer's interference was a question of fact that needed to be resolved by the trier of fact. It is noteworthy that although the dealer agreement in this case included no exclusive territory and provided for national account sales by the manufacturer, the court appears to have considered the manufacturer's questionable conduct in the court's analysis.

¹¹ *Id.*

¹² *Id.* See also *Voice-Tel Enterprises, Inc. v. Joba, Inc.*, 258 F.Supp.2d 1353 (N.D. Ga. 2003) (franchisor's lawful competition with franchisee for national account customers did not constitute tortious interference).

¹³ *Franklin Tractor Sales v. New Holland North America, Inc.*, 106 Fed. Appx. 342 (6th Cir. 2004).

¹⁴ *Id.*

¹⁵ *Toledo Mack Sales & Service Inc. v. Mack Truck Inc. et al*, 2005 WL 724117 (E.D. Pa 2005).

VII. DISCRIMINATION ISSUES

Although we did not find any cases related to discrimination claims in connection with national account programs, it is possible that a franchisee could assert such a claim related to how the franchisor allocates responsibility for product orders or servicing national account customers among the franchisees. Several states have statutes that prohibit discrimination among franchisees.¹⁶ Generally, these statutes and the cases interpreting these statutes provide that the distinction between the franchisees must be unfair or material and unreasonable. Some of these statutes also include exclusions for discrimination based on reasonable non-arbitrary distinctions. The Indiana law also provides that a franchisee must prove the discrimination and that the favored and disfavored franchisee were similarly situated.¹⁷

Having policies and procedures related to how the national account program operates and how servicing responsibility is assigned will make the program more transparent and provide supporting documentation in the event of any discrimination claims. It is recommended that the policies and procedures, at a minimum, address 1) responsibilities of the franchisor; 2) responsibilities of each franchisee; 3) how responsibility for product orders or service of national account customers will be assigned; 4) how customer service issues will be addressed; 5) how and why a franchisee can lose its rights as to any particular customer or to participate in the national accounts program; and 6) how pricing is determined. Even if all of the policies and procedures are not made available to the entire franchise system, the existence of the policies, when coupled with uniform application of the policies and procedures, would be useful in defending against allegations of discrimination. See Sections X and XI for more information about developing policies and procedures.

VIII. ANTITRUST ISSUES

A treatise on antitrust issues is beyond the scope of this paper but we provide the following brief discussion of key issues in connection with a national account program and refer you to previous papers on the topic for more information.¹⁸

Under a broad antitrust analysis, every franchise system consists of a *vertical* market relationship between the franchisor and its franchisees, and a *horizontal* market relationship among franchisees. If the franchisor, directly or through its controlled outlets, also sells products or services at the same level as its franchisees, it creates a *dual distribution system*.

Section 1 of the Sherman Act¹⁹ prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce." Only those restraints that restrict competition unreasonably

¹⁶ See e.g., Haw. Rev. Stat. § 482E-6(2)(C); Ill. Franchise Disclosure Act of 1987 § 18; Ind. Code § 23-2.2.7-2(5); Wash. Rev. Code § 19,100.180(2)(c).

¹⁷ Wright-Moore Corp. v. Ricoh Corp., 908 F.2d 128 (7th Cir. 1990), aff'd 980 F.2d 432 (7th Cir. 1992).

¹⁸ See e.g., Practical Implications of Antitrust Constraints, Michael K. Lindsey and Suzanne E. Wachsstock, 29th Annual Form on Franchising, Boston, Massachusetts, 2006; Franchising and Antitrust – The Critical Issues, Thomas J. Collin and Alicia L. Downey, 28th Annual Forum on Franchising, Orlando, Florida, 2005; Problems of Dual Distribution Systems, Barbara O. Bruckmann and Allan P. Hillman, 25th Annual Forum on Franchising, Scottsdale, Arizona, 2002; Antitrust Counseling for the Transactional Lawyer: Overcoming Antitrust Hurdles, Erik B. Wulff and Margaret M. Zwisler, 24th Annual Forum on Franchising, San Francisco, California, 2001.

¹⁹ Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-7 (2004).

are unlawful under Section 1 of the Sherman Act.²⁰ Some restraints of trade are *per se* unreasonable, while others require analysis under the *rule of reason*. If the restraint is manifestly anticompetitive or would always or almost always tend to restrict competition, it is a *per se* violation of Section 1 of the Sherman Act.²¹

A. PRICING CONTROL ISSUES

Vertical price-fixing arrangements – commonly known as resale price maintenance – in which a seller of goods attempts to contract, combine or conspire with another entity to set the price at which goods are resold in an independent commercial transaction with a subsequent buyer, were historically prohibited as *per se* violations of Section 1 of the Sherman Act. However, since the 1997 decision in *State Oil Co. v. Khan*,²² vertical *maximum* price-fixing is no longer a *per se* violation of Section 1 of the Sherman Act, but such arrangement will be evaluated under the *rule of reason*. And, since the 2007 decision in *Leegin Creative Leather Products v. PSKS, Inc.*,²³ vertical *minimum* price-fixing is no longer a *per se* violation of Section 1 of the Sherman Act, but such arrangements will also be evaluated under the rule of reason.²⁴

In the last reported case (pre-*Khan*, pre-*Leegin*) involving franchise system national account programs, *Wisconsin Music Network v. Musak Ltd. Partnership*,²⁵ the court found that the music provider franchisor's multi-territorial account program did not impose fixed resale prices on its franchisees and was not an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

Horizontal price-fixing arrangements among competitors remain prohibited as *per se* violations of Section 1 of the Sherman Act. If franchisees actually compete against one another, then franchisees may be competitors, and any agreement as to prices would be a *per se* violation of Section 1 of the Sherman Act. See Sections X.A, X.B.4 and XI.A for more information about price issues in a national customer account program.

B. MARKET DIVISION ISSUES

Many franchise systems follow a model of assigning territories to franchisees in order to achieve market penetration and assist the brand in competing against non-branded or non-franchised competitors. Since the 1970's, vertical non-price restrictions, such as geographical territory assignments by a franchisor, have been analyzed under the *rule of reason*. In general, these restrictions are acceptable as long as the restriction does not impose an unreasonable restraint on competition,²⁶ and may be imposed for the purpose of controlling distribution of the franchisor's products or services.

²⁰ See *Standard Oil Co. v. United States*, 221 U.S. 1, 60-68 (1911).

²¹ See *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (dealing with territorial and customer restraints).

²² 118 S.Ct. 275 (1997).

²³ 127 S.Ct. 2705 (2007).

²⁴ See also *Controlling Franchisee Pricing after Leegin*, Arthur I. Cantor and Kay Lynn Brumbaugh, 31st Annual Form on Franchising, Austin, Texas, 2008.

²⁵ 5 F.3d 218, 222 (7th Cir. 1993).

²⁶ *324 Liquor Corp. v. Thomas Duffy*, 107 S.Ct. 720, 724 (1987); *Sylvania* at 39.

Horizontal non-price agreements among competitors, such as allocation of customers or territories, continue to constitute a conspiracy in restraint of trade, and are *per se* violations of Section 1 of the Sherman Act.

C. OTHER FEDERAL ANTITRUST ISSUES

Other federal statutes that may regulate franchisors and franchisees are the Clayton Act²⁷ and the Robinson-Patman Act.²⁸ One inquiry is whether a franchise company has market power – an analysis that focuses on whether the business' percentage of sales in the relevant market is sufficient to allow it to restrict output or raise prices, considering the number of viable competitors in the market or the ability of new competitors to enter the market. If the franchise company does not have market power, it may not be necessary to consider other federal antitrust issues, even if the relationship might otherwise give rise to a potential tying claims, for example, but it is a highly factual determination, and caution should be exercised. Every franchise company must make its own determination as to which laws apply after carefully investigating the specific facts and circumstances of its proposed arrangement.

D. OTHER STATE ANTITRUST ISSUES

All fifty states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands, have an antitrust law.²⁹ Many state laws are modeled after the federal laws but there are differences among the state laws and between state laws and federal laws. There are also differences as to whether and to what degree any particular state will defer to judicial interpretation of the federal laws. Some state antitrust statutes require the state to interpret their state law in accordance with the prevailing judicial interpretation of federal antitrust law. For this reason, among others, more than 30 states filed briefs with the U.S. Supreme Court during its consideration of the *Leegin* case.

IX. CUSTOMER SATISFACTION ISSUES

After spending time and effort to identify and negotiate a contact with a national account customer, the extent to which franchisees comply with the national account contract – by delivering products and services on the anticipated terms – could be the principal deciding factor that assures the national account customer that the single-point negotiations has value. Typically, the national account customer will expect the franchisor to monitor performance issues and assist in resolving any satisfaction issues. As a result, it is recommended that the franchisor anticipate these issues and develop policies and procedures for handling any disputes that may arise.

A. OPTIONS FOR ADDRESSING CUSTOMER SATISFACTIONS ISSUES

Many franchise systems have established methods of assuring customer satisfaction when dealing with the customers of the franchised businesses. Many of these existing methods can be adopted to ensure that national account customers are satisfied with the performance of franchisees under the national account program.

²⁷ Clayton Antitrust Act of 1914, 15 U.S.C. §§ 12-17; 29 U.S.C. §§ 52-53 (2004).

²⁸ Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a (2004).

²⁹ See e.g., ABA Section of Antitrust Law, *State Antitrust Practice and Statutes* (4th Edition 2009).

Promptness – if the franchised business provides services at a customer's location, an issue that frequently affects customer satisfaction is whether the service provider is accessible when needed, available to provide services on the customer's desired timeframe and honors its commitment for delivery of services. For example, in certain service-oriented systems, the franchisor would need to ensure that the national account call center is adequately staffed and trained to handle initial calls from customers, that a reliable method exists for dispatching the request to the proper franchisee, that ensures the request for service was received and that the franchisee honors the commitment or promptly advises whether there is any impediment to providing the service at the time requested.

Quality issues – it is expected that every franchised business would strive to provide the same quality of service to national account customers as it provides to all of its other customers, but a franchisor will need to consider how it will handle any customer complaints about poor quality goods or services. The plan may be as simple as providing a toll-free number for customers to contact the franchisor, with a method of tracking the calls, a system for responding appropriately and documenting when issues are resolved. Open communication with affected franchisees will often be key to improving quality and avoiding repetitive errors. It is also recommended that a franchisor have a contingency plan for dealing with extreme behaviors, whether unreasonable customer expectations or ineffective franchisee operations.

Invoicing and price issues – assuming that the initial negotiations about prices represent a fair value to all parties, national account customers ought to be satisfied by delivery of the promised goods or services at the negotiated price. It is recommended that a franchisor consider a method of periodically auditing the prices being charged – not in an attempt to catch someone doing something wrong but to ensure that the transactions are adhering to the terms of the contracts. If the goods or services being delivered require bids or other variable pricing, it may be even more important to have a reliable method of monitoring the practices. It should also be obvious that accurate and timely invoicing – avoiding inaccurate or wrong information, sent to the wrong address, sent to the wrong person, etc. – is another key to continued customer satisfaction.

B. EXCLUDING FRANCHISEES TO ADDRESS CUSTOMER SATISFACTION ISSUES

The preferred method of dealing with a complaint in a franchise system in most instances is to ensure that the franchisee know that a customer is unhappy with the product or service, and let the franchisee do what the franchisee decides is needed to "make it right" with its customer. However, since the national account customer has generally negotiated with the franchisor and relied on the franchisor's representations in entering into the relationship, there may be times when the franchisor must accept that "the buck stops here" or a national account customer may have insisted on a central point of contact for handling any customer satisfaction issues. Whether or not required by a national account customer, it is recommended that the national account program be structured to anticipate that, in some instances, the franchisor will need to resolve a complaint directly with the customer, and deal with the franchisee separately. In these instances, in particular, it is recommended that the franchisor maintain open communication with individual franchisees as issues are resolved – such actions will maintain or improve relations with franchisees, and often help a franchisee better manage its own business. For example, a franchisee may not have realized, for a variety of reasons, that a particular employee has a bad habit that is causing customer satisfaction issues. By communicating the issues back to the franchisee, the franchisee may be able to take steps to prevent recurrences.

X. BEST PRACTICES FOR STRUCTURING A NATIONAL ACCOUNT PROGRAM

A successful national account program is not self-executing – a franchisor must be willing to devote the resources needed to plan, establish and administer the program. In order to compete effectively, a franchisor must be able to negotiate with national account customers over the price, quality and dependability of its products or services, and its system's responsiveness to customer requests. In order to keep a national account program viable, the franchisees must be able and willing to fulfill the expectations of national account customers.

A. NATIONAL ACCOUNT PROGRAM TEAM AND MANAGER

For any franchisor seeking to initiate a national account program, it is highly recommended that the franchisor establish a team responsible for structuring the national account program. A team has the advantage of providing several points of view and sufficient manpower to divide responsibilities among its members about the decisions that must be made in order to structure and implement the national accounts program. The members of the team will vary depending on the nature of the franchise system but should include those who will assume primary responsibility for the various components of the national accounts program. At a minimum, it is generally recommended that the national accounts team include:

1. Someone employed by the franchisor who has the skills and ability to manage the national account program (for purposes of this paper, we refer to this member as the "manager"), and given sufficient authority to reach the national account customers' decision-makers.

2. A representative from the franchisor's in-house legal department, or an outside legal advisor, in order to advise as to laws that may affect the program and to document contractual matters relating to the national customer accounts program.

3. A representative from the franchisor's operations department and, if specialized training is identified as desirable or required for the national accounts program, a representative from the training department, if such a department exists.

4. A franchisee representative, although different franchise systems will reach different conclusions on the extent of franchisee involvement in structuring the national account program. Some franchisors give their franchisees significant input into how the national account program will be structured and operated. This approach may be necessary if franchisees have the right to refuse to service national account customers or if a franchisor wants to establish a national account program for a franchise system that has franchise agreements that are silent on national account programs or have territories that preclude the franchisor from operating a national account program. Some franchisors seek input on, or approval of, policies, procedures or contracts for the national account program through a small group of franchisees. If the system is large, thought should be given to diversity in representation on any franchisee advisory council – large and small units, ethnic and gender diversity, and territorial diversity. Having franchisee involvement in this manner can help obtain franchisee support in and get meaningful franchisee input to gauge how issues will be received by franchisees. However, there may be disadvantages to having too many franchisees involved in decisions related to a national account program. Extensive franchisee involvement can 1) be time consuming – arranging meetings and reaching consensus on issues, 2) jeopardize the confidentiality of sensitive competitive information, 3) be a barrier to a quick response to opportunities and market demands, 4) bring resistance to implementing change if there is risk or

additional expense, or 5) risk the best interest of the system being high-jacked by individual agendas. Regardless of the final determination of franchisee representation on a national account team, it is recommended that a franchisor keep communications open with its franchisees, and any franchise advisory council that exists or may be established, and be willing and able to demonstrate that it is considering both the positive and the negative impact of the program on franchisees.

B. STRATEGIC PLANNING ISSUES

After the national account team is established, it is recommended that the manager examine the core competencies of the franchise system and identify prospective national account customers who have a need for the products or services of the franchise system. This examination ought to consider the advantages and benefits of each prospective national account customer and the value component to the franchise system. If the manager spends time pursuing national account customers that the system cannot effectively service, time and energy can be wasted on unproductive relationships.

The manager will need to be knowledgeable about the products and services being offered by the franchise system, and must be able to demonstrate how the relationship will benefit the customer as many of the more desirable national account customers will have purchasing departments that may have well-established procedures. Negotiations with national account customers over the price, quality and dependability of the franchise system's products or services, and responsiveness to customer requests are often key issues that can determine the success of the national account program.

In evaluating the ability of the franchise system to provide service to a prospective national account customer, one important component may be the synergy between the locations of franchised businesses and the locations of the national account customer. If the franchise system offers products that are easily obtained or shipped – such as fasteners – this may not be a significant issue. If, however, the offered products are more complicated, or the franchise system offers services – such as plumbing – then the manager must consider how to handle any discrepancy between the locations of the units of the prospective national account customer and the locations of the system's franchisees. If the franchise system is large, this will be less of an issue. In a smaller franchise system, the manager may decide that focus should be placed on regional customers whose units more closely match the location of the franchisees.

Pricing is obviously a critical component of any national account program. Price negotiations must be consistent with the existing provisions in franchise agreements, take into account the royalty fee and advertising fee structure if the revenue from national accounts is included in gross sales (as is typically the case), and comply with the law (see Section VIII). Franchisees are always concerned about the economics of pricing arrangements with each national account customer and may naturally be concerned when the right to set pricing resides solely with the franchisor. It is possible that a national account customer may not translate into profit for a franchisee or that the headaches and problems associated with servicing the account may not justify the small profit margin. Some national account provisions give a franchisee the right to negotiate pricing for products or services the franchisee will be providing to national account customers. However, this approach may be cumbersome and may defeat the customer's reasons for seeking a national account contract. A more balanced approach may be to give the franchisor control of negotiating pricing for national accounts but establish certain maximum discounts or other pricing parameters that the franchisor must abide by in operating the national account program.

Careful consideration must be given to the administrative structure of the program. If central billing will be needed, does the franchisor have software and/or staff to handle it? If dispatching will be required, does the franchisor have or need a call center? How will the franchisor monitor customer satisfaction with the products or services and deal with any customer complaints? Does the franchisor's operations department have sufficient staff and any other tools that it will need to monitor the quality of products and services being provided by franchisees? If these resources are necessary to a successful system, but not yet available, does the franchisor have the ability or a viable plan to provide these resources?

Assuming the franchisor has adequately considered how various elements of the program will impact franchisees, and the national account team manager has properly structured the program with input from the national account team, including franchisees or the franchisee advisory council, then franchisees are more likely to "buy-in" to the program, understand the need to be dependable, responsive to customer requests and deliver quality products and services.

C. DRAFTING DOCUMENTS

When advising a franchise system that will be offering products or services that could benefit from a national account program, it is recommended that consideration be given during the drafting stage to include provisions in the franchise agreement, and related disclosures in the franchise disclosure document, that will allow the franchisor the flexibility to establish a national account program in the future.

One of the initial considerations is how much detail is appropriate to reserve these rights to the franchisor under the franchise agreement. In almost every instance, the franchise agreement will need to clearly establish that national account customers "belong" to the franchisor, so that the franchisor has the right to control the rights to provide the branded goods or services to national accounts customers.

Also, assuming that the franchisor will have rights to establish pricing for the national account program, the franchisor needs to ensure that national account program is excluded from any language in the franchise agreement permitting the franchisee to set the franchisee's own pricing.

A franchisor must also be careful about what obligations the franchisor commits to related to the national account program. In order to maintain flexibility, the franchisor needs both the right and the option to maintain a national account program. There may come a time in the lifecycle of the franchise system when a national account program is not feasible for various reasons. It may be impossible to predict exactly how the franchise system will develop in the future, and a franchisor does not want to risk breaching the franchise agreement for not maintaining a national account program when it may not be practical or cost-effective to do so.

1. FRANCHISE AGREEMENT PROVISIONS

One approach is to draft a national account provision that is broad and without much detail, and use the operations manual to fill in the details. The advantages to this approach are that it a) is simple to draft, b) does not require the flushing out of issues at the beginning, and c) gives the franchisor a significant amount of flexibility to evolve based on the market and specific opportunities. The disadvantages to this approach are that a) franchisees may not have a good understanding of the playing field, b) a broad provision may increase the

chances for disputes, c) some prospective franchisees may be reluctant to sign a franchise agreement giving the franchisor broad discretion in this area, and d) a court could find certain decisions by the franchisor to be an unreasonable exercise of discretion.³⁰ Appendix I includes sample provisions that take the broad approach to national account provisions.

Another approach is to draft a national account provision that has more detail. The advantage to this approach is that it eliminates, or reduces many of, the disadvantages noted above for the broad approach. However, the most problematic issue with having a detailed approach is that, in most instances, it limits the franchisor's flexibility. To remain competitive and respond to industry changes, individual customers, and individual markets, most franchisors need the ability to make changes to the franchise system and how it operates. Therefore, it can be critical to a franchisor to have a national account provision that is not going to lock the franchisor into a national account program that cannot be updated and changed based on the needs and demands of customers. Appendix II includes sample provisions that take the detailed approach to national account provisions.

Whether a franchisor chooses to include a broad national account provision or detailed national account provision in the franchise agreement, best practices suggest that the provision should require any franchisee who participates in the national account program to adhere to franchise system standards when providing goods and services, as well as requirements of the operations manual related to the national account program.

One of the prime areas in national account provisions where the broad versus specific approach can be seen is how "national account customers" is defined. Many provisions provide that the franchisor has the right to designate any customer as a national account customer. There are other provisions that refer to the operations manual for the definition of national account customers or refer to a list of national account customers contained in the operations manual which can be updated in the discretion of the franchisor. These types of definitions give the franchisor incredible latitude in the customers that the franchisor can place under the national account program.

An overreaching definition of national account customers could significantly impact the available customers for the franchisee's business and limit the franchisee's ability to market to and negotiate contract terms with certain customers in the franchisee's territory or market. Narrower definitions of national account customers include definitions such as: a) a customer that leases or purchases products in more than one state or franchisee territory, b) any governmental agency or any person or entity that has more than one location for which products and services of a business may be applicable, c) a company operating in the territory of more than one franchisee and such company agrees to purchase significant quantities of their requirement for the services for a price negotiated by the franchisor, or d) businesses, institutions, governmental agencies and other agencies who have a presence that is not confined to the territory granted to one franchisee. Although these are examples of narrower definitions of national account customers, these definitions encompass a large number of potential customers.

After establishing that national account customers "belong" to the franchisor, another important issue is who holds the rights to provide the products or services of the franchised business to national account customers. The first option is for the rights to national account customers to reside solely with the franchisor. In these instances, the franchisor may,

30 *Sensormatic Electronics Corp. v. First Nat. Bank of Pa*, 424 F.Supp.2d 842 (W.D.Pa. 2006)

at its option, allow its franchisees or other agents to provide the products and/or services of the franchised business if the franchisor elects not to directly provide those products or services. The second option is a shared approach, where generally, the franchisee has a right of first refusal to provide the products and/or services in its assigned territory or surrounding area. The third option is for franchisees to automatically have the right to provide the products and/or services to national account customers. If a franchisee is given rights to provide goods or services to national account customers, consideration must be given to including contract provisions to ensure that the franchisee is obligated to honor the negotiated terms of the national account contract in exchange for the granted rights.

If the franchisee is given the right to service national account customers (either automatically or under the shared approach), the contract provision should specify which national account customers the franchisee will have responsibility to service. This could be based on the national account customers in the franchisee's territory or market. If there are no assigned territories, the franchisor must use other criteria for assigning responsibility to service national account customers. In these situations, the national account provision should give the franchisor sole and absolute discretion to allocate responsibility for national account customers and the franchisor should establish a written policy on how responsibility for national account customers will be assigned by the franchisor. However, allocating responsibility for national account customers between franchisees could result in discrimination claims as discussed in Section VII or result in encroachment claims as discussed in Section IV.

When drafting provisions that give a franchisee the right to service national account customers, consideration must be given to whether or not the franchisee has the option to refuse to service a national account customer for various reasons (e.g., special contract terms, pricing, etc.). If the franchisee has the option to refuse to service a national account customer, it is critical that the franchisor have the right to make other arrangements and that the franchisor have a method for providing the products or services to the customer. Without an right and option for filling the gap, the franchise system would potentially be unable to service the national account customer, leaving the customer without coverage in a certain area, a result that is contrary to the purpose of a national account contract.

Generally, franchisors reserve the right to "fill the gap" by providing products or services directly or through an agent, or having another franchisee provide the products or services. However, this reservation of rights – to "fill the gap" – is often the single largest source of contention between a franchisor and its franchisees. Even though the franchisee refused the business, there are often hard feelings about the outcome, regardless of who eventually provides the products or services.

Even with the option of filling the gap, the available gap fillers may a) be costly, b) result in inconsistency and quality issues, c) be timely to implement, d) take a considerable amount of administrative resources to identify, negotiate and implement, e) not be received well by the national account customer, f) create confusion in the market as a result of multiple operators in a market, and g) be unavailable in highly specialized industries.

When the franchisee must service national account customers, some national account provisions will include language saying that the franchisor is the franchisee's attorney-in-fact to execute agreements in connection with the national account program. This type of language can be useful in ensuring that franchisees adhere to the prices and terms that the franchisor has negotiated with national account customers. Similarly, where the franchisor has reserved the sole right to service national account customer and has opted to use franchisees,

the national account provision may say that the franchisees are agents of franchisor.³¹ In acting as the franchisor's agent, these franchisees must comply with the terms of the national account contract that the franchisor has negotiated with the customer.

While detailed analysis of national advertising funds is beyond the scope of this paper, consideration should be given to whether or not it is appropriate to allow the national account program to use funds contributed to the national advertising fund, either in order to secure national account customers, or to underwrite some of the costs of the program. Before advertising funds are used for a national account program, careful review and analysis of existing franchise agreements should be undertaken. Unless the existing franchise agreement provides for this use of advertising funds, consent from all franchisees would have to be sought and secured in order to use advertising funds in this manner. For any established franchise system, this is an issue that deserves and may require franchisee input and consent.

2. FRANCHISE DISCLOSURE DOCUMENT PROVISIONS

If the franchisor and the franchise system is new, it is unlikely to have established a national account program, so the related disclosures in the franchise disclosure document are likely to be minimal. Appendix III contains sample language for a franchisor that has reserved the right to establish a national accounts program, but has not yet implemented the program.

If and when the franchisor launches its national account program, the disclosures in the franchise disclosure document must be tailored to the relevant facts at the time. Appendix III also contains sample language for a franchise system that has implemented a national accounts program based on franchise agreement terms found in Appendix I and II.

3. OPERATIONS MANUAL PROVISIONS

Even when a franchise agreement contains detailed provisions regarding a national account program, there will invariably some details that are not appropriate for inclusion in the franchise agreement or that are subject to periodic change. Accordingly, any national account provision should reference the operations manual and system standards for the substance of these many details that cannot or should not be detailed in the franchise agreement.

The details in the operations manual should be sufficiently detailed to enable franchisees to provide products or services to national account customers in accordance with the contract negotiated by the franchisor. The operations manual may sometimes impose the conditions required for a franchisee to participate in the national account program but, as discussed in Section XI.D, the operations manual should not contradict the express terms of the franchise agreement.

4. NATIONAL ACCOUNT CONTRACT PROVISIONS

The exact content of a national account contract will vary based on the nature of the franchise system but every such contract is likely to address the following issues:

³¹ If a franchisor elects to have its franchisees act as its agents, consideration should be given to vicarious liability issues associated with the arrangement since, in a typical franchise relationship, the franchisor asserts that the franchisee is an independent contractor and expressly disclaims any agency relationship. A discussion of vicarious liability issues is beyond the scope of this paper.

Price – for products, the price may be subject to periodic change on a specified timetable or based on the occurrence of certain events. For services, the price may be fixed or variable depending on the type of service, but may be subject to a "not greater than" provision that franchisees must honor. The obligation to adhere to negotiated pricing is often the key component in a national account contract and there must be consistency on this issue among 1) the national account program structure; 2) the franchise agreement provisions; and 3) the contract between the franchisor and each national account customer.

Invoicing and Payment Terms – centralized invoicing is often one of the more attractive features of a national account program and generally requested for the convenience of the customer. Payment terms may follow standard commercial terms for the industry in which the franchised business operates, or may be tailored specifically to the customer's wants or needs. Centralized invoicing is the norm for some franchise systems, but highly unusual in other franchise systems, so the national account program structure must address this issue.

Quality Controls – any special customer requirements should be spelled out in the contract; otherwise, the standard common to the industry of the franchised business will generally apply. Quality standards and controls that are consistent with those typical in the brand's System are more easily administered and subject to fewer problems or complaints from customers and franchisees.

Dispute Resolution – it is important to specify how communication regarding disputes will be handled and to provide for legal and equitable remedies if the standard dispute resolution procedures do not resolve the dispute. Because the customer locations, franchisee locations and the franchisor are often in different states, consideration must be given to choice of law provisions as well as jurisdiction and venue for disputes.

XI. BEST PRACTICES FOR ADMINISTERING A NATIONAL ACCOUNT PROGRAM

The advantages of a national account program are often clear – increased customer base, increased system revenue, increased brand recognition, increased morale and, possibly, increased franchise sales.

The disadvantages of a national account program are generally revealed during planning and implementation – development costs, opportunity costs, the stress placed on the system, potentially uneven return on investment to participants, and unforeseen factors. After completing the strategic planning analysis, it is recommended that implementation of a new national account program be tested in a control market before introducing the national account program system-wide. In that way, any flaws or unanticipated challenges can be identified and promptly corrected. It is also during the testing stage that final decisions about the process for dealing with complaints – from customers or from franchisees – are most effectively made.

A. RECOMMENDED RESOURCES FOR A SUCCESSFUL NATIONAL ACCOUNT PROGRAM

After spending sufficient time on strategic planning, a franchisor must be willing to devote the resources that are needed to establish and administer the program on an on-going basis. Some resources, such as the human resources for the national account team that will plan and implement the national account program (see Section X), are common to all franchise systems. Other resources are more specific to the nature of the franchised business, such as the need for a call center, billing software, or specialized training, products or equipment.

B. TIPS FOR IMPLEMENTING A NATIONAL ACCOUNT PROGRAM FOR AN EXISTING FRANCHISE SYSTEM

When implementing a national account program in a system in which the franchise agreements were drafted with sufficient flexibility as suggested above, the process can focus on the business challenges associated with making the program work. Open communication with franchisees at various phases will be critical to the success of the national account program.

If some circumstances, however, a franchisor may want to implement a national account program in an existing franchise system in which these potential issues were not considered when the franchise agreements were originally drafted. In these situations, the strategic planning stage will, by necessity, include dealing with the challenges presented by the existing franchise agreement provisions.

1. TIPS FOR WORKING WITH EXISTING PROVISIONS IN FRANCHISE AGREEMENTS

If the franchise agreements for all or part the franchise system grant territory exclusivity without reservations, it may be extremely difficult to implement a national account program. In these situations, the operations manual may be a means to implement the program but remember that the operations manual is not intended to and should not contradict the express terms of the franchise agreement. Careful consideration must be given to the exact wording of the provisions to determine whether there is a work-around. If not, the recommended action may be to present a reasonably well-developed plan to a franchise advisory council, and seek consent from the franchise system to amend the franchise agreements to allow the program, at least on a test basis.

When implementing a national account program for an existing franchise system, language in the franchise agreement that allows a franchisee to set its own prices could be an issue or a barrier. Careful consideration should be given to the exact wording of the provision to determine whether the program will work with the limitations presented, or whether the franchisor will need to seek consent from the franchise system to proceed with the preferred pricing structure.

If the franchise agreements for all or part of the franchise system preclude the franchisor from implementing a national account program, the franchisor will need to seek consent from its franchisees. It may be natural for some franchisees to fear that something is being taken away, or focus only on what the franchisee stands to lose, rather than what it might gain. In this situation, the franchisor will need to take whatever action is necessary to gain the confidence of its franchise system that the national account program will be beneficial. If a franchisor cannot achieve this goal, the program may need to be altered or the plan abandoned. In order to gain the confidence of franchisees and secure their consent, a franchise may decide to provide additional financial incentives, whether through lower royalty rates or other enticements. The process of reaching agreement on a workable national account program in the face of contractual prohibitions can be expected to be time-consuming, difficult and likely to involve extended negotiations with a franchisee association or its counsel.³²

³² Richard Gibson, Franchisees Balk at Handyman Plan, The Wall Street Journal, July 2, 2009.

2. TIPS WHEN THERE ARE NO PROVISIONS IN EXISTING FRANCHISE AGREEMENTS

If the franchise agreements for all or part the franchise system do not have language providing for a national account program, careful consideration must still be given to the exact wording of the franchise agreement. In some instances, the absence of an express provision may not negate the possibility of creating a program. In these situations, the operations manual may be a means to implement the program, since the provisions would not contradict the express provisions of the franchise agreement.

In other circumstances, the wording of the franchise agreement may make it extremely difficult to implement a national account program and the operations manual may be of little or no use. In those instances, a franchisor would be advised to seek the consent of its franchise system or each affected franchisee, and should be prepared to demonstrate the viability of the proposed national account program. If a franchisor cannot achieve this goal, the program may need to be altered or the plan abandoned.

C. TIPS FOR USING CONFIDENTIALITY AGREEMENTS

There is often the need for the exchange of confidential information when initiating negotiations with a national account customer and both the customer and the franchisor want assurances that its own confidential information will not be misused or disclosed. The national account team manager (see Section X) assigned the responsibility for negotiating contracts should be familiar with the issues presented by a confidentiality agreement, and should work closely with legal counsel to ensure that the company will live up to any agreements that it makes and that any agreements entered by the company do not hinder the ability of the franchise system to negotiate and enter into contracts with other national account customers. See Appendix III for sample confidentiality provisions.

D. TIPS FOR USING THE OPERATIONS MANUAL

An operations manual typically has several key purposes. It generally provides a basis for initial and ongoing training. It also serves as a regularly updated source of reference for franchisees, promoting efficiency. Finally, it protects the brand by giving the franchisor a method to regularly maintain and enforce system compliance. An operations manual fulfills these key purposes by detailing the day-to-day and step-by-step instructions on how to operate the franchised business to ensure customer satisfaction, and by periodically providing identifying criteria that applies to various rights and obligations under the franchise agreement. An operations manual is not intended to be a tool for the franchisor to create obligations that do not already exist under the franchise agreement.

As a practical matter, a franchisor's ability to use the operations manual to implement a national account program will depend on issues such as 1) the territorial exclusivity that has been granted to the franchisees, 2) the impact of the change on franchisees, 3) the extent to which the franchise agreement permits the use of the operations manual to implement new programs, 4) whether any applicable franchise relationship laws or common law claims could result from the change through the operations manual, and 5) the system's history about how the operations manual has been used to make changes to the franchise system. If franchisees object to substantial changes in the operations manual, even if those changes are permitted by the franchise agreement and relevant law, it may behoove a franchisor to communicate the rationale for the change and obtain franchisee acquiescence, rather than attempting to impose the change unilaterally.

Assuming that the franchise agreement was properly drafted, a franchisor may generally exercise business discretion to make changes to the operations manual.

Provisions in the operations manual intended to implement a national account program are not likely to be effective to overcome restrictions in the territorial grant or modify other provisions of the franchise agreement that are inconsistent with a national account program.

E. TIPS FOR AVOIDING LITIGATION

The good news is that there have been relatively few instances of litigation over national account programs.³³ When a franchisor proposes to exercise its rights to operate a national account program, in addition to exercising good business judgment about the program, a franchisor should always consider 1) how their conduct will be viewed by a court, and 2) how a court will view the competitive effects on the franchisees. The development of a national account program to respond to customer requests and demands is far more likely to be viewed in a favorable light than a national account program developed by a franchisor to usurp business from its franchisees.

1. DISPUTES WITH CUSTOMERS

Again, the good news is that we found no cases brought by customers against a franchisor or franchises solely because of a national account program. The good business principles used to ensure customer satisfaction, discussed in Section IV are the best tools for a franchisor and its franchisees in avoiding disputes with customers.

2. DISPUTES WITH FRANCHISEES

There have only been a few reported cases involving national account programs. In *Beans Glass Services, Inc. v. Speedy Auto Glass, Inc.*,³⁴ the franchisee asserted that the franchisor breached the franchise agreement which provided that the franchisor would “maintain a Sales Force that calls on the insurance industry and national and/or regional accounts” but the court never considered the claims because the franchisee had signed a settlement and release agreement releasing the franchisor from any claims for past conduct and terminating any future obligations of the franchisor related to the regional and national account program.

*Auto-Chlor System of Minnesota, Inc. et al. v. JohnsonDiversey et al.*³⁵ involved a similar allegation of breach of contract. The plaintiffs, dealers of commercial dishwashers, asserted, *inter alia*, that the manufacturer and its affiliates failed to perform their obligation to develop national account and chain accounts. The court granted the manufacturer summary judgment on the claim that the manufacturer had not carried out its obligation to develop national and chain accounts when the dealer contracts were silent on national or chain accounts and the sole basis of the claim was various statements that the manufacturer had made concerning such accounts.

³³ See cases cited in this article.

³⁴ *Bean's Glass Service, Inc. v. Speedy Auto Glass, Inc.*, 2002 WL 974675, Bus. Franchise Guide (CCH) §12,343; U.S. District LEXIS 8975 (U.S. District Court, District of Massachusetts 2002)

³⁵ *Auto-Chlor System of Minnesota, Inc. et al. v. JohnsonDiversey et al.*, 328 F. Supp. 2d 980 (U.S. District Court, District of Minnesota 2004).

XII. CONCLUSION

National account programs can have substantial benefits for many franchise systems and we believe that national account programs will continue to be important as an area of focus for revenue growth for many franchise systems.

When drafting or revising a franchise agreement, best practices indicate that whether or not a franchisor currently has any desire or intent to implement a national account program, it is generally in the best interest of the franchise system to 1) reserve the right to the franchisor to implement a national account program; and 2) draft sufficiently flexible language to allow the national account program to be structured for maximum benefit to the franchise system.

When structuring and implementing a national account program, a franchisor ought to consider and understand the benefits and detriments of the proposed national account program from the point of view of all involved parties. Only after careful evaluation, including franchisee input, should a franchisor make a final determination as to whether and how to implement a national account program. If trying to implement a national account program in an existing franchise system for franchise agreements that are silent or prohibit actions that are consistent with a national account program, a franchisor will need to pay particular attention to the franchisees' point of view and be able to convince its franchisees of the benefits of the proposed national account program.

We also believe that a successful national account program, one that reflects positively on the franchise system, will take a balanced approach – considering the point of view of the franchisor and its franchisees as well as the customer – in order to be financially rewarding to both franchisor and franchisees, provide good customer service; and avoid any negative impact on the relationship between the franchisor and its franchisees.

APPENDIX I

FRANCHISE AGREEMENT – SAMPLE BROAD-FORM PROVISIONS

Auction:

National Accounts. We may designate any customer with locations in more than one locality as a National Account. If we have a reasonable basis to believe that any National Account customer is at risk of ceasing to do business with you or your conduct is otherwise impairing our relationship with any National Account, we may notify you that we intend to contact the customer and thereafter arrange for future services through us, our affiliates or another [Brand] franchisee, on a single transaction or on-going transaction basis, as we in our sole discretion consider appropriate under the circumstances.

Car Rental:

National Accounts. Franchisor shall have the right to enter into service contracts with agencies and departments of the federal, state/provincial and local governments, national industries and institutions and other national accounts (collectively, "National Accounts") requiring the availability for rental to such National Accounts of vehicles to be maintained by Franchisee. Franchisee shall accept all such rentals and otherwise service such national Accounts in the same manner as is required by the provisions of this Agreement for other customers of Franchisee.

Children's Art:

International, National and Regional Clients. The marketing rights granted to you in Section [] do not restrict us or our affiliates from contacting international, national or regional educational or recreational organizations or other clients with headquarters or locations in the Development Territory for any purpose, including the purpose of promoting the use or increased use of services and products marketed by us or our franchisees, or for the purpose of creating or servicing a National Account program offering.

Hygiene Services:

National and Regional Accounts. Franchisor may solicit national and regional accounts in the Territory. If Franchisor obtains a national or regional account with a service location in the Territory, Franchisor will refer that business to Franchisee. Franchisee is not obligated to accept any national or regional account referred by Franchisor, but if Franchisee accepts any national or regional account, Franchisee must comply with Franchisor's conditions, standards, procedures, policies and pricing for servicing that account, as provided in the Manual. If Franchisee declines to accept a national or regional account, is unable to provide all of the products and services requested by the account or refuses to service it at the prices and according to the standards determined by Franchisor, to protect the reputation of the System and preserve the account, Franchisor may service that account in the Territory and/or may license or appoint another person to service that account in the Territory, including another franchisee or a company unrelated to Franchisor, without any compensation to Franchisee. Franchisor reserves the right to charge a referral fee.

Fasteners:

During the Term, if you are in compliance with this Agreement, we will not grant a License to another Person authorizing the sale of Approved Products to your Protected Customers, nor will we directly sell Approved Products to your Protected Customers in the Licensed Market. . . . Any Protected Customer with multiple locations (including a National Account) will be deemed a Protected Customer only as to its delivery location, and will not be deemed a Protected Customer as to its other locations. If your Protected Customer is a National Account, and we reasonably believe that the Customer may cease to do business with you, or you are not willing to honor all of the terms negotiated by us with an National Account, we may directly solicit the sale of and sell products to your Protected Customer, but the customer will otherwise remain your Protected Customer.

“National Accounts” means Customers or potential customers in the Licensed Market who either (1) have multiple purchasing or “ship-to” locations or (2) require scientific information, special devices, special services, technical data, engineering data or special procurement procedures or pricing. The determination of whether a Customer is a National Account is in our sole discretion. You must honor all of the terms of any agreement between us and a National Accounts Customer in order to sell to a National Accounts Customer, even if a location of the National Accounts Customer has previously been designated as your Protected Customer.

Plumbing:

If a National Account customer submits a request for service within the Territory that cannot be referred to Franchisee under that National Account customer’s contract or under the standards and procedures of any National Accounts Program being administered by Franchisor or its designee, Franchisor reserves the right, in its sole discretion, to appoint a corporate employee, another [Brand] franchisee or any other third party to perform the subject services or to assist Franchisee in performing the subject services in order to ensure customer satisfaction and protection of the Marks.

RELATED PROVISIONS:

Marketing Fund:

The Marketing Fund may be used to support any National Accounts Program that is intended to attract National Account customers for services that are provided by franchisees in the [Brand] System, and that is being administered by Franchisor or its designee.

Compliance Certification:

Have any of our employees or representatives made any statement, promise or agreement concerning the amount or type of national account customers that may be available to you if you purchase a [Brand] Franchise?

APPENDIX II

FRANCHISE AGREEMENT – SAMPLE DETAILED PROVISIONS

Sign Store:

1. National Accounts Program.

(a) Franchisor may develop various National Accounts under the National Accounts Program.

(b) Definition. A "National Account" is a customer, a group of customers or an entity acting on behalf of a customer group or customers that operate (as under common ownership or control) under the same trademarks or service marks through independent franchise or some other association or entity, for which Franchisor has arranged to provide services at multiple locations. National Accounts may include: corporations; organizations; federal state and local government entities and organizations; school systems; political campaigns; and other persons and entities that may have a need for purchasing products and services from Stores at multiple locations. The locations of some of the National Accounts and the locations at which some of the National Accounts require services of a Store, may be located within or outside the general geographic area in which Franchisee's particular Store is located.

(c) No Territorial Rights. Regardless of any other provisions of this Agreement, Franchisor grants to Franchisee no territorial rights of any kind whatsoever in connection with the National Accounts Program. Franchisee agrees that Franchisor, other Stores, and third parties designated by Franchisor participating in the National Accounts Program, may solicit, or permit other franchisees or third parties designated by Franchisor to solicit, customers or others located anywhere in the geographic area in which Franchisee's Store is located, whether or not Franchisee currently provides services to them, in order to develop them as National Accounts. Franchisor, other Stores, and third parties designated by Franchisor participating in the National Accounts Program, may do so without violating any of Franchisee's rights under the Franchise Agreement.

(d) Best Efforts. Franchisee must use Franchisee's best efforts to perform services to National Accounts located: (i) in the general geographic area in which Franchisee's Store is located; and (ii) outside of the general geographic area in which Franchisee's Store is located, if directed to do so by Franchisor. Franchisee must use Franchisee's best efforts to perform services to National Accounts on the terms and conditions specified in the program for those National Accounts, which Franchisor, in Franchisor's sole discretion, may modify or amend from time to time. The terms of various National Accounts may vary from National Account to National Account depending on the situations and circumstances. Franchisee is bound by the rules governing each National Account.

(e) Alternative Services. Franchisee must fully perform services for any National Account which Franchisor designates. In addition, Franchisee recognizes that some National Accounts, for whatever reason, may decide that they do not want to do business with Franchisee. If that happens, Franchisor, in Franchisor's sole discretion, will cooperate with Franchisee, at

Franchisee's expense, to the extent Franchisor deems reasonably practicable, to resolve the National Account's concern. However, if after Franchisor exercises what Franchisor believes, in Franchisor's sole discretion, to be reasonable efforts to rectify the problem, the National Account continues to refuse to do business with Franchisee, then Franchisee agrees that Franchisor, or any other franchisee or any other third party that Franchisor designates (the "Other Franchisee") may provide services to that/those National Account. Franchisee also agrees, that Franchisor or Other Franchisee may perform services for any National Account located anywhere in the same or different geographical area as Franchisee's Store, for whom Franchisee has declined to provide services or whom refuses to do business with Franchisee. Franchisor or Other Franchisee who provides services for a National Account will not be liable to Franchisee or obligated to pay to Franchisee any compensation for doing so nor will Franchisor or Other Franchisee be considered in breach of any provision of this Agreement or any other agreement between Franchisee and Franchisor. Franchisee releases Franchisor and Other Franchisee providing services to the National Accounts, from any liability or obligation to Franchisee for providing services to such National Accounts. Franchisor will indemnify, defend and hold Franchisee harmless from and against any claims brought by a National Account arising out of Franchisor's or Other Franchisee's performance of services for a National Account in accordance with this Agreement.

(f) Reports and Forms. For purposes of coordinating efforts and results of National Account's programs, Franchisee must provide Franchisor with copies of all reports, forms and notices, relating to performing services for National Accounts that Franchisor may specify from time to time. Franchisee also agrees to coordinate with Franchisor any solicitations Franchisee conducts that may have potential for development as National Accounts.

(g) Billing and Collection. Franchisee recognizes that various National Accounts may require billing and collection procedures that differ from those specified in the Franchise Agreement. Franchisee is required to comply with any of the billing and collection procedures specified by Franchisor for various National Accounts. For example, Franchisor may require Franchisee to participate in a centralized billing and collection procedure through which all billing for a National Account will be accomplished. Accordingly, Franchisor may require that all contracts, invoices, and billings for products and services be submitted to a centralized billing service which Franchisor or the applicable National Account designates. If Franchisee receives any payments from any National Account which requires centralized billing, Franchisee must immediately remit such payments, properly endorsed, directly to the centralized billing service, without any deduction

(h) Pricing. If Franchisee participates in the National Accounts Program, Franchisee agrees not to charge greater fees for services and products which Franchisor specifies as the maximum for such National Account.

(i) Eligibility. Due to the need to ensure adherence to quality standards and performing services for National Accounts, Franchisee will not be eligible to perform services for a National Account unless the Franchisee is in full compliance with the Franchise Agreement.

Other Franchise Agreements. The provisions of this Section [] are incorporated into and made a part of each other franchise agreement currently in effect between Franchisor and Franchisee and each other such franchise agreement is hereby amended to include the provisions of this Section [], and will survive with respect to such other franchise agreements regardless of the termination, expiration, non-renewal or transfer of this Agreement.

Personnel:

National Accounts. Franchisor shall have the right, on behalf of itself, Franchisee and/or other franchisees utilizing the Marks, to designate any client as a "National Account Customer" and to negotiate and enter into agreements to provide temporary personnel services to multiple locations of such National Account Customers, including locations within the Territory.

A. Following the execution of a contract with or the acceptance of a bid by a National Account Customer that contemplates the provision of temporary personnel services to one or more National Account Customer locations within the Territory, Franchisor may, at its option, provide a copy of such contract or bid to Franchisee.

B. If Franchisee elects not to provide services to a National Account Customer in conformity with the terms of the National Account contract, Franchisor shall have the right, exercisable in its sole discretion, to:

1. provide, directly or through any other franchisee utilizing the Marks, temporary personnel services to the National Account Customer location(s) within the Territory on the terms and conditions contained in the bid or contract between Franchisor and the National Account Customer; and/or

2. contract with another party to provide such services to the National Account Customer location(s) within the Territory on the terms and conditions contained in the bid or contract between Franchisor and the National Account Customer, utilizing the Marks or any other trademarks, service marks or trade names.

Neither the direct provision of temporary personnel services by Franchisor, or another franchisee or agent of Franchisor, to any National Account Customer, nor Franchisor's contracting with another party to provide such services as authorized in this Section [], shall constitute a violation by Franchisor of Section [] of this Agreement, even if such services are delivered from an office located within the Territory.

SYSTEM ACCOUNT PROGRAM AGREEMENT

This System Account Program Agreement (the "Agreement"), when completed and signed by ("Franchisee"), is an offer by Franchisee to participate in the ("Franchisor") System Account Program ("ASAP"), and it is not effective until it is approved and signed by Franchisor. In order to obtain Franchisor's approval, the undersigned Franchisee agrees to the following:

1. Franchisor may tender on Franchisee's behalf such terms and conditions as Franchisor deems necessary to secure system account contracts with institutional accounts that use [] and other related products made or distributed by Franchisor ("Franchisor Products"). Franchisee's participation authorizes Franchisor to represent that Franchisee will comply with the terms and conditions tendered or negotiated by Franchisor, and Franchisee agrees to do so. Franchisee understands that the terms and conditions of contracts with Franchisor System Accounts ("Franchisor System Account Contracts") are likely to include pricing for Franchisor Products that is lower than the normal prices charged by individual franchisees of the Franchisor system. Franchisee is not entitled to receive the benefits of any Franchisor System Account Contracts that were presented, bid on, or entered into prior to Franchisee's becoming a participant in the ASAP.
2. For purposes of the ASAP, a "Franchisor System Account" means an institutional account that maintains locations in two or more territories and uses Franchisor Products; and a "Primary Marketing Area" means:
 - a. A geographic region served by a franchisee and described as the franchisee's "Primary Marketing Area" in its franchise agreement ("Franchisee Marketing Area");
 - b. A geographic region served by Franchisor through a business owned by Franchisor ("Company Marketing Area"); and
 - c. A geographic region that is neither a Franchisee Marketing Area nor a Company Marketing Area ("Open Marketing Area").
3. Franchisor is not required to pursue a Franchisor System Account Contract with any particular customer, or upon any particular terms (subject to the limitation discussed in Section 1, above).
4. Franchisee will use its best efforts to ensure that orders from customers with Franchisor System Account Contracts are delivered and filled. Franchisee understands that it must deliver and fill such orders in accordance with the terms set forth in the customer's Franchisor System Account Contract, and that Franchisee's participation in the ASAP is conditioned upon its compliance with the obligations imposed by the ASAP.
5. This Agreement to participate in the ASAP shall terminate in any of the following circumstances:
 - a. If Franchisee withdraws from the ASAP, which it may do at any time, upon 90 days notice.
 - b. If Franchisor, at its sole discretion, terminates the ASAP, which it may do at any time, for any reason whatsoever, upon 90 days notice.

- c. If Franchisor terminates Franchisee's participation in the ASAP, which Franchisor may do at any time, for reasonable cause which may include a default under the Franchise Agreement, upon such notice as Franchisor deems reasonable under the circumstances.
 - d. If not previously terminated, at the time of termination or expiration of Franchisee's franchise agreement.
 - e. If Franchisee violates any of the terms of this Agreement.
6. Upon Franchisee's withdrawal or termination from the ASAP, Franchisee will not be eligible to participate in those Franchisor System Accounts that have not yet been bid or presented to the customer. However, if Franchisee's franchise agreement remains in effect upon Franchisee's withdrawal or termination from the ASAP, or (at Franchisor 's request) upon any termination of the ASAP, Franchisee must honor all Franchisor System Account Contracts that were signed, bid, or presented during the period in which Franchisee participated in the ASAP.

FRANCHISEE

By: _____

Name: _____

Title: _____

Date: _____

By: _____

Name: _____

Title: _____

**NATIONAL ACCOUNTS PROGRAM
PARTICIPATION FORM ADDENDUM**

This ADDENDUM is entered into by and among FRANCHISOR; FRANCHISEE; and ADMINISTRATOR.

WHEREAS, Franchisor and Franchisee have entered into franchise agreement ("Agreement") pursuant to which Franchisee was granted a license to use the Marks and System in the operation of a Franchise in the Territory; Administrator secures national account customers and administers a national accounts program ("NAP") for Franchisor; and Franchisee wants to participate in the NAP.

NOW, for and in consideration of the mutual covenants, terms and conditions contained herein and other good and valuable consideration, the receipt of which are hereby acknowledged, the parties hereto agree as follows:

1. Administrator represents that it is pursuing and attempting to negotiate national account contracts for products and services provided by franchisees in the System. Franchisee acknowledges that Administrator is not required to pursue a national account contract with any particular customer or on any particular terms. Administrator, in its sole discretion, shall determine the best method of pursuing, negotiating with and servicing national account customers, and shall establish the terms of each account, based on the customers' needs and the NAP service providers' capabilities.

2. Administrator may, but is not required to, contact Franchisee in connection with any national account customer requiring service within a reasonable distance outside Franchisee's Territory.

3. Administrator agrees to contact Franchisee to refer work in the Territory in connection with any request from a National Account customer for a product or service of the type provided by Franchisee, except as follows:

a) if a customer has notified Administrator in writing that the customer does not want to deal with Franchisee for any reason;

b) if Franchisee has notified Administrator that Franchisee is not qualified, interested or available to perform a particular job or a particular type of work;

c) if Franchisor has notified Administrator that Franchisee is in default or otherwise not in good standing under the Agreement;

d) if Franchisee does not meet minimum insurance requirements for a national account contract;

e) if Administrator is unable to timely contact Franchisee for a customer work request despite making reasonable efforts to do so;

f) if Administrator is required by a national account contract to obtain multiple bids on the customer's work requests;

In any of the above instances, Administrator may subcontract the work to any third party, including another [Brand] franchisee; or

g) if Administrator is required by a national account contract to follow other procedures or preferences that are inconsistent with the territorial grant in the Agreement between Franchisor and Franchisee, Administrator agrees to refer work in the Territory to Franchisee to the extent permitted under those contracts or procedures.

4. Franchisee's participation in the NAP is voluntary. Franchisee may terminate further participation in the NAP for any reason, by giving written notice to Administrator in accordance with Section [] and to Franchisor in accordance with Section [] of the Agreement. Franchisee may decline any particular job tendered by Administrator for any reason; provided that Administrator will be free to subcontract the declined job to any third party, including another [Brand] franchisee. If Franchisee declines three consecutive jobs without specifying reasonable grounds for declining the jobs, Administrator may treat it as notice of Franchisee's intent to cease participation in the NAP.

5. Franchisee understands and agrees that Franchisee must be and remain in good standing with Franchisor under the Agreement in order to participate in the NAP. Franchisee acknowledges that it has read and understands the standards and procedures of the NAP and Franchisee agrees to comply with the standards and procedures of the NAP. Franchisee agrees to service national account customers when requested to do so in accordance with NAP standards and procedures and any terms in the contract with the national account customer that have been communicated to Franchisee. Franchisee specifically acknowledges that Administrator may represent to a national account customer that Franchisee will comply with terms and conditions negotiated between Administrator and the national account customer.

6. Franchisee acknowledges that jobs with national account customers may not be assigned or subcontracted without written permission from Administrator, and that Franchisee's participation in the NAP is not assignable without the express written consent of Franchisor.

7. If Franchisee fully complies with all of a national account customer's reasonable reporting and authorization requirements, Administrator agrees to pay Franchisee for each job in accordance with the standards and procedures of the NAP, whether or not Administrator actually collects payment from the national account customer for the work that was performed by Franchisee, but if Franchisor notifies Administrator that Franchisee is delinquent in Franchisee's payments to Franchisor, Administrator may, in its sole discretion:

- a) deliver to Franchisee any monies owed to Franchisee under the NAP.
- b) deliver to Franchisor an amount sufficient to cover Franchisee's delinquent payments owed to Franchisor by Franchisee.
- c) hold any monies owed to Franchisee under the NAP until the delinquency is resolved but not longer than [] .

8. Franchisee understands and agrees that charges to national account customers will include a fee owed to the Administrator for administering the NAP, servicing customers and collecting from customers. Administrator represents that it will establish its fees with the goal of making the fees low enough to maintain the reasonableness of Administrator's charges to

national account customers, but high enough to cover Administrator's costs and provide for a reasonable profit.

9. This Addendum will terminate:

- a) automatically if the Agreement terminates, expires or is not renewed;
- b) on written notice to Administrator and Franchisee if Franchisor decides, for any reason, to terminate its franchisees' participation in the NAP;
- c) on written notice to Franchisor and Franchisee, if Administrator decides for any reason that it will no longer pursue or service National Account customers needing products and services provided by franchisees in Franchisor's System;
- d) on written notice to Franchisee, if Administrator terminates Franchisee's participation in the NAP for Franchisee's failure to substantially comply with the written standards and procedures of the NAP.

10. Each party agrees that it shall take any necessary steps, sign and execute any and all necessary documents, agreements or instruments which are required to implement the terms of this Addendum, and each party agrees to refrain from taking any action which would have the effect of prohibiting or hindering the performance of any other party.

11. Franchisee agrees to hold Franchisor and Administrator harmless from and against any and all damages arising out of or occasioned by negligent, faulty or improper service or repair work performed by Franchisee or its representatives under the NAP.

12. Franchisee agrees that all insurance required by the Agreement will cover Franchisee's activities under the NAP and will name Administrator as an additional insured.

13. All notices must be in writing and must be addressed to the recipient as follows, or addressed to such other address as a party has specified by notice:

If to Franchisee:	Name Address City, State ZIP Telephone: Fax: Email:
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If to Franchisor:	Name Address City, State ZIP Telephone: Fax: Email:
-------------------	--

If to Administrator:	Name Address City, State ZIP Telephone: Fax: Email:
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A notice will be deemed delivered:

a) if hand-delivered, on delivery with (1) signed receipt from recipient, or (2) acknowledgment by party delivering notice that recipient refused to accept the notice.

b) if by overnight courier, the next business day after deposited with a courier, charges prepaid.

c) if faxed, on delivery if sent during the recipient's normal business hours without receipt of notice of non-delivery.

d) if by email, on delivery if sent during the recipient's normal business hours with request for confirmation of delivery and without receipt of a notice of non-delivery.

13. Franchisee agrees to notify Administrator of any change in Franchisee's ownership or management, business address, fax number, telephone number, email address, or the Territory in which Franchisee is authorized to provides services, not less than 7 business days before such change is effective.

Signed on this _____ day of _____, 20__.

FRANCHISEE:

[]

BY: _____

Printed Name: _____

Title: _____

Countersigned on this _____ day of _____, 20__.

FRANCHISOR:

[]

BY: _____

Printed Name: _____

Title: _____

Accepted as of the _____ day of _____, 20__.

ADMINISTRATOR

[]

BY: _____

Printed Name: _____

Title: _____

APPENDIX III

SAMPLE FRANCHISE DISCLOSURE DOCUMENT PROVISIONS

Item 12:

Auction company:

You will not receive an exclusive territory. You could face competition from other franchisees, from us or our affiliates, or from other channels of distribution that we control. You may offer your services, solicit for business, advertise and sell anywhere, so long as you comply with the laws of the jurisdiction relating to the activities of the franchised business and you offer, solicit, advertise and sell only in accordance with our standards and specifications, including complying with restrictions as to Protected Customers and National Accounts.

We may designate any customer with locations in more than one locality (e.g., a bank with locations in multiple regions) as a National Account. If we have a reasonable basis to believe that any National Account customer is at risk of ceasing to do business with you, or your actions or inactions are damaging the brand, we may contact the customer after notifying you, and may arrange for future services through us, our affiliates or another franchisee, on a single transaction or on-going transaction basis, as we in our sole discretion consider appropriate under the circumstances.

Children's Art:

Your marketing rights restrict us from operating a company-owned business in the territory that offers the same services and products that you offer, except through the National Accounts program, and from granting any other person the right to operate a business in the territory that offers the same services and products that you offer under the [Brand] trademarks or different trademarks.

We may contact international, national or regional educational/recreational organizations with headquarters or locations in the territory for any purpose, including promoting the use or increased use of [Brand] services or products marketed by us or our franchisees. If designated as a National Account, program services may be reviewed by the franchise advisory council and may be provided by us, or you, or a combination of us and you. We may also share revenue from a National Account by granting a royalty rebate, in our sole discretion.

Hygiene services:

We may solicit national and regional accounts in your territory. To promote uniformity and consistency, we may set the prices to be charged for each national and regional account. If we obtain a national or regional account with a service location in your territory, we will refer that business to you. If you refuse to provide products or services to a national or regional account in your territory, are unable to provide all of the products and services requested by the account or refuse to service it at the prices and according to our standards, to protect the reputation of the [Brand] system and preserve the account, we may service that national or regional account in your territory and/or may license or appoint another person to service that account in your territory (including another [Brand] franchisee or a company that is not affiliated with us).

Fasteners:

We may sell products that are similar to or the same as the Approved Products directly to National Accounts or to any wholesaler or end-user that is not a Protected Customer, or that does not fall within the Licensed Market. A Protected Customer with multiple locations (including a National Account) will be considered a Protected Customer only as to its delivery location, and will not be considered a Protected Customer as to its other locations. If any Protected Customer is a National Account and we have reason to believe that the customer may be at risk of ceasing to do business with you, or you do not agree to honor the pricing terms negotiated with the National Account, we may sell Approved Products to the National Account, but the customer will still be designated as your Protected Customer.

Plumbing:

We periodically evaluate national account opportunities to be administered through us, our parent, an affiliate or a third party. Our parent or affiliate may also solicit national accounts for the franchisees of certain franchise systems affiliated with us. A national account is generally a large organization with multiple locations that need products and services provided by franchisees in our franchise system around the country who has entered into a formal or informal agreement to have the services of the specified franchise delivered to all of the customer's locations. A national accounts program may provide for calling a central number for those services. If a national account program is offered, you have the option to participate. If you elect to participate in a national accounts program that we offer, you must conform to its standards and procedures and you may be required to sign an agreement with terms we specify, which may include provisions that require the payment of administrative or other fees, offering of special products or services at certain times or for certain prices and special insurance, indemnity, quality control and other provisions.

Sign Store:

You offer through any channel of distribution we determine. Additionally, you will receive no territorial right of any kind under the National Accounts Program. Either we, other Stores, or third parties we designate, may solicit in your geographic area to develop customers as national accounts.

Item 16:

Plumbing:

You have the sole discretion as to the prices to be charged to your customers, but we will offer you guidelines and advice. For certain national account customers, however, the administrator may set the maximum price that you may charge for defined services and/or products. You have the option not to participate in any national account program. If you elect not to participate, we may authorize another party, including another [Brand] franchisee, to perform any work in your territory requested by a national account customer.

Sign Store:

We will not restrict you from soliciting any customers, no matter who they are or where they are located, except to the extent your right to service certain customers is affected by the national account program. If the national account customer refuses to utilize your services, for whatever reason, either we, another [Brand] franchisee or someone else we designate will service the national account customer. The maximum pricing and terms of service for national account customers will be set by us and will change at our discretion. You must follow our rules for handling them. In some cases, we may bill them for services you perform.

If Marketing Funds may be used in connection with National Account Program, Item 11:

Neither we nor our affiliates receive payments from the Marketing Fund, except for reasonable advertising, marketing and administrative costs and overhead, and except for payments made to us or our designee used to help attract and service national account customers that need products and services of the type provided by our franchisees.

APPENDIX IV

CONFIDENTIALITY AGREEMENT – SHORT-FORM SAMPLE

This **CONFIDENTIALITY AGREEMENT** ("Agreement") is entered into by and between **FRANCHISOR** and **NATIONAL ACCOUNT CUSTOMER**.

WHEREAS, Franchisor and National Account Customer are interested in the evaluation of potential business opportunities between the parties, but each party must first provide the other party with information either marked as confidential and such other information as may be identified and treated as confidential ("Confidential Information").

NOW, THEREFORE, Franchisor and National Account Customer agree as follows:

1. Non-Disclosure. Except as otherwise set forth in this Agreement, neither party will disclose any Confidential Information of the other party to any third party without prior written approval of the party owning the Confidential Information. Each party agrees to limit disclosure of Confidential Information to such employees who have a need to know such Confidential Information or any attorneys, accountants or consultants assisting with evaluation.
2. Non-Use. Each party agrees not to use the Confidential Information of the other party except as contemplated by this Agreement.
3. Protection of Confidentiality. Each party agrees to accord to the Confidential Information of the other party the same degree of care and use the same confidentiality protection practices as exercised or employed with respect to its own confidential and proprietary information, including obligating any employees or agents who receives Confidential Information to covenant not to disclose such Confidential Information and agree not to use such Confidential Information for any other purpose.
4. Exclusions. This Agreement does not apply to (a) information that is previously known to the recipient, (b) information that is or becomes part of the public domain other than through a wrongful act of the recipient, (c) information that is independently developed by the recipient, (d) information that is otherwise in the hands of the recipient by a means other than breach of this agreement, or (e) information that is sought pursuant to a subpoena or written discovery ("Process") provided that the recipient of the Process must immediately notify the owner of the Confidential Information of the receipt of the Process, so that the owner of the Confidential Information has the right to request that the person on whose behalf the Process was issued delete the Confidential Information from the scope of the Process, and if such person refuses, then the owner of the Confidential Information may seek any and all available remedies, including, without limitation, commencing proceedings to enjoin the disclosure of Confidential Information or intervening impending proceedings to seek the entry of protective orders or other appropriate relief. Nothing in this Agreement will be construed to interfere with a party's obligations to comply with lawful court orders; however, no disclosure of Confidential Information pursuant to Process will be deemed to place the Confidential Information in the public domain or to relieve the party from the future performance of all of its confidentiality obligations under this Agreement, absent express orders of the court to the contrary.

5. Return of Documents. At any time, on request by the party owning the Confidential Agreement, the receiving party will return all documents or other tangible property or records that contain Confidential Information or certify that the documents or other tangible property or records containing Confidential Information have been destroyed.
6. Legal Fees and Costs. If either party breaches this Agreement, the defaulting party will pay the reasonable attorney's fees and other costs incurred by the other party in enforcing or commencing to enforce the provisions of this agreement. If any legal proceeding is commenced to enforce or interpret any provisions of this agreement, the prevailing party will be entitled to recover reasonable attorney's fees in addition to costs and disbursements allowed by law.
7. Notices. All notices required by this Addendum must be in writing and must be addressed to the recipient as follows, or addressed to such other address as a party has specified by notice.

If to Franchisor:

Name
Address
City, State ZIP
Telephone:
Fax:
Email:

If to National Account Customer:

Name
Address
City, State ZIP
Telephone:
Fax:
Email:

A notice will be deemed delivered: (a) if hand-delivered, on delivery against receipt or on refusal to accept the notice; (b) if by overnight courier, the next business day after deposited with a courier, charges prepaid; (c) if faxed, on delivery if sent during the recipient's normal business hours without receipt of notice of non-delivery; and (d) if by email, on delivery if sent during the recipient's normal business hours with confirmation of delivery request, and without receipt of a notice of non-delivery.

8. Entire Agreement. This agreement sets forth the entire understanding of the parties and cannot be changed except by written statement signed by both parties. There are no representations of any kind except as contained herein. This agreement will be binding upon and inure to the benefit of the parties, their legal representatives, successors and assigns.

9. Effective Date: _____

FRANCHISOR:

[]

BY: _____

Printed Name: _____

Title: _____

NATIONAL ACCOUNT CUSTOMER:

[]

BY: _____

Printed Name: _____

Title: _____

SPEAKER BIOGRAPHIES

Michaele (Shelley) Weatherbie

Shelley Weatherbie is a partner in the Tysons Corner (Virginia) office of Akerman Senterfitt LLP where she is co-chair of the firm's Franchise Practice Group. Her practice focuses on advising franchise companies on legal and regulatory compliance issues, including: drafting and registering franchise disclosure documents; developing and implementing legal compliance systems; branding and intellectual property protection; dispute resolution; and counseling on other laws and regulations affecting franchise business operations. Ms. Weatherbie is a member of the American Bar Association, its Forum on Franchising, the Steering Committee for the Forum's Women's Caucus, and a member of the International Franchise Association's Supplier Council. She is a former member of the Steering Committee for the Forum's Corporate Counsel Division.

Ms. Weatherbie has 18 years of franchise experience, including two years as General Counsel to a holding company with two national franchise systems, based in Waco, Texas; over five years as General Counsel to a holding company with seven national franchise systems; based in Waco, Texas; two years as General Counsel to a national franchise system based in Nashville, Tennessee; and nine years in private practice, based in Washington, DC and Virginia. She received her J.D. degree from Baylor University School of Law and her B.A. degree from Ottawa University. Ms. Weatherbie is a member of the State Bar of Texas and is admitted to practice law in the District of Columbia, Virginia and Tennessee. She has been recognized by *Who's Who in International Franchise Law* and has been named a Legal Eagle by *Franchise Times* magazine. Ms. Weatherbie has written articles and spoken on franchise law at various venues.

Gerald Wells

Gerald Wells is a partner in the Atlanta office of DLA Piper LLP (US). Mr. Wells' practice focuses on franchising, licensing, distribution, mergers and acquisitions, and general corporate law. Mr. Wells has worked in the legal departments of Hewlett-Packard Company and US Office Products Company, where he served as Senior Corporate Counsel. US Office Products Company was the parent company for several companies, including two franchise companies. Mr. Wells' in-house experience involved a wide range of business matters and intellectual property transactions. He has published articles on franchising in the *Franchise Law Journal*, *Franchise Lawyer* and other publication and spoken at programs on franchising.

Mr. Wells received his B.A. degree from the University of Maryland, and his J.D. degree from the College of William and Mary. He served as a law clerk to the Honorable Hart T. Mankin of the United States Court of Appeals for Veterans Claims. Mr. Wells is admitted to practice in the District of Columbia, Georgia, and Maryland. He is a member of the Maryland State Bar Association Committee on Franchising and Distribution Law (1995 to present, and its Secretary 1999 to 2000). Mr. Wells is a member of the State Bar of Georgia Franchise and Distribution Law Section (2008 to present).