Franchising and Franchise Law: An Introduction

By Howard Yale Lederman

Introduction

Franchising is a national and international strategy for growing a business. A franchise is a business and contractual relationship between a franchise owner called a franchisee and a franchise seller called a franchisor. Franchising begins with a franchisee seeking to buy a franchise from a franchisor. Franchising involves an agreement. The franchisor grants the franchisee, for a defined time period, the right to use the franchisor's business model and intellectual property, such as signs and logos, trademarks and service marks, business plans and operations manuals, necessary to operate the business. The franchisor also provides marketing and sales assistance, training, operating manuals, and other assistance to promote and grow the brand. In return, the franchisee pays an initial franchise fee, regular royalty payments on sales, and sometimes other payments, like advertising fees, to the franchisor.[1] The word "franchise" originated from the French word for freedom and involved a ruler's grant of a royal privilege to a subject "to perform public or other services in exchange for consideration."[2] But franchising has become synonymous with almost complete franchisor control and rigid uniformity.[3] Franchisor control over the franchisee is usually almost 100 percent.

"Franchisors typically display an intense commitment to standardizing routines and services across affiliated units. McDonald's standardized every aspect of operations, including food preparation, customer service, and cost control."[4] For example, a McDonald's franchise agreement reads:

> The McDonald's System is a comprehensive restaurant system for the retailing of a limited menu of uniform and quality food products, emphasizing prompt and courteous service in a clean, wholesome atmosphere…. The foundation of the McDonald's System and *the essence of this [Franchise] is adherence by [Franchisee] to standards and policies of [Franchisor] providing for the uniform operation of all McDonald's restaurants…including, but not limited to, serving only designated food and beverage products; the use of only prescribed equipment and building layout and designs; strict adherence to designated food and beverage specifications and to Licensor's prescribed standards of Quality, Service, and Cleanliness….*[5]

Why Franchising?

Why has franchising grown so much compared to alternatives, like company-owned outlets, independent dealerships, or independent distributorships?

Since franchisors often offer proven successful business models, many individuals interested in starting businesses choose franchising over more independent alternatives. A powerful incentive for them to do so is the high, new-small-business-failure rate—according to the U.S. Small Business Administration, only "about half of all new establishments survive five years or more[,] and about one-third survive 10 years or more."6 "Franchising makes the possibility of owning one's own business available to thousands of people to whom it otherwise would not have been available. For those [having] no previous business experience, franchising may offer a shortcut to ownership of a business."7

"For the most part, franchising substantially reduces the risk of owning and running a new business." Franchising is based on the franchisee's right to use the franchisor's intellectual property, like trademarks, service marks, signs, and logos. Since potential customers recognize the franchisor's intellectual property, they are likelier to become franchisee customers. "Because the franchisor usually has an established product or service, the franchisee runs considerably less risk of failing to launch a new product."[8]

Franchising reduces the barriers to opening a business. The franchisee does not have to create a product or service, find a location without help, or identify a market without help. Due to the franchisor's economic power, raising capital is much easier. Finding a desirable location and leasing desirable building space are easier.[9]

Franchising makes running a business easier. Many franchise systems provide established suppliers, "accounting systems tailored to the business, train the franchisee in operations, and provide continuing guidance and counseling."[10]

The franchisee can take advantage of the franchisor's greater purchasing power and thus obtain lower supply and service prices from franchisor purchase of greater volumes of these supplies and services.[11]

But franchising also has a downside for franchisees. "Most first-time franchisees barely survive the ordeal of opening a single unit. Getting a business off the ground can gut bank accounts, spike stress levels, and create 80-hour workweeks."[12]

For franchisors, franchising also has some big advantages over alternatives. Franchising enables the franchisor to create and "maintain a large number of consumer outlets to distribute his products without having to invest his own money in the retail end of the operation. This is perhaps the prime advantage of franchising as an alternative to company-owned sales outlets. A vast distribution system can be quickly accomplished with a relatively [low investment] in sales outlets."[13]

"Franchising is a method for spreading the capital cost of market expansion. Increasing the market for any product or service usually requires expenditures in facilities, sales outlets, personnel, inventory, and advertising. Immense effort must be put into opening a new market, and there is always a risk of failure. In franchising, the franchisee bears a considerable portion of these burdens, especially the cost of establishing new outlets and the risk of opening new markets. The franchisor is thus relieved of this cost[,] but nonetheless receives a fee for the use of its name, trademarks, and business concepts."[14]

Compared to alternatives, franchising often enables a franchisor to expand a product or service market more rapidly. Rapid expansion often enables a franchisor to capitalize on product or service market opportunities more rapidly and thus increase sales and even dominate a market.[15]

Franchising enables a franchisor to capitalize on its intellectual property to create and market related products or services. For example, a hair salon franchisor can create hair salons and market hair care products at franchise outlets, an ice cream manufacturer can franchise ice cream shops, or a picture frame manufacturer can franchise "do-it-yourself framing" outlets.[16]

Franchising enables a franchisor to market complex products demanding substantial maintenance or repair. "Through franchising, the franchisor may provide for a network of franchisees…trained and qualified to service the product without incurring the cost of setting up service centers itself." The franchisor can control how the franchisee services the products,[17] and the franchisor can train the franchisee's employees on how to service the products. In addition, the franchisor can require the franchisee to maintain defined maintenance and repair equipment and a defined parts inventory. For example, in the motor vehicle, bicycle, and agricultural equipment lines of business, the manufacturers require and arrange for necessary training of the franchisee's employees on how to service these complex products, necessary servicing equipment, and the necessary parts inventory.[18]

"Franchising has inherent efficiencies as a method of doing business….it relieves the franchisor of the burden of managing individual sales outlets and of carrying the overhead and burden associated with those businesses." Moreover, the franchisor can secure lower prices for supplies and services with its greater purchasing power arising from "having many different outlets selling identical products or services[,] thus needing the same components, ingredients, and the like. In addition, "individual franchise [owners]…tend to be more productive than employee managers of company-owned stores."[19]

Franchising enables franchisors to capitalize on franchisees' knowledge of local market conditions.[20] Finally, franchising often enables franchisors to avoid the burdens and costs of complying with federal and state labor and employment laws and to pass these burdens and costs to franchisees.

The vast majority of courts have concluded that the franchisor-franchisee relationship is not an employer-employee relationship, but an independent contractor relationship.[21] "One of the hallmarks of franchising as a business model is that franchisors seek to ensure that their franchisees are seen and treated as independent contractors[,] rather than as employees."[22] The franchisee's employees are usually not the franchisor's employees,

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but a joint employer situation can arise in some circumstances.

Franchising Is a Growing and Important Part of Our Economy

Since 1945, franchising has mushroomed into a large and growing part of our economy. According to International Franchising Association (IFA) estimates, despite the recent severe recession, the number of franchising establishments remained substantial. Since 2011, the number has rebounded almost to its prerecession level:

2007: 770,835
2008: 774,016
2009: 746,646
2010: 740,335
2011: 735,571
2012: 747,359
2013: 757,857
2014: 769,683
2015 (Estimated): 781,794[23]

Franchise employment has remained substantial. The number of direct franchise-based employees has far surpassed its prerecession level:

2007: 7,994,000
2008: 8,028,000
2009: 7,800,000
2010: 7,786,000
2011: 7,934,000
2012: 8,127,000
2013: 8,334,000
2014: 8,569,000
2015 (Estimated): 8,816,000[24]

Franchising's gross domestic product has also far surpassed its prerecession level:

2007: $403 Billion
2008: $410 Billion
2009: $405 Billion
2010: $414 Billion
2011 $434 Billion
2012: 453 Billion
2013: 473 Billion
2014: 495 Billion
2015 (Estimated): 521 Billion[25]

"`Franchising is an American success story. Independently owned and operated local franchise businesses are growing faster, creating more jobs at a quicker pace and producing higher sales growth than other businesses. Franchising is an engine of economic expansion in the United States[,] and 2015 looks to be another strong year for franchise businesses[.]'"[26]

Over the last three decades, franchising has spread rapidly around the world.[27]

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Federal Pre-Franchise Agreement Disclosure Requirements

Before the parties can sign a franchise agreement, federal regulations require the franchisor to disclose extensive documents, facts, and information to the franchisee. The relevant federal rule is the FTC Disclosure Rule known as the Amended FTC Franchise Rule, the New FTC Franchise Rule, or just the FTC Franchise Rule (FTC Rule).[28] The Original and Amended FTC Rules have created minimum federal disclosure requirements. The FTC Rule does not preempt nonconflicting state laws requiring greater disclosure.[29] On December 21, 1978, the FTC issued the Original or Old FTC Rule effective October 21, 1979, mandating franchisor presale disclosure of 19 items of documents and information to potential franchisees.[30] On March 30, 2007, the FTC amended the Original or Old FTC Rule and issued the Amended or New FTC Franchise Rule mandating franchisor presale disclosure of 23 items and optional presale disclosure of one more important item under strict accuracy conditions.[31] The Original and Amended FTC Rules' main purpose is to prevent franchise fraud.[32] The 24 items are:

1. The Franchisor's Identity and any Parents', Predecessors', and Affiliates' Identities
2. The Franchisor's Business Experience
3. The Franchisor's Litigation History
4. The Franchisor's Bankruptcy History
5. The Franchisor's Required Initial Fees
6. The Franchisor's Required Other Fees
7. The Franchisor's Estimated Initial Franchisee Investment
8. The Franchisor's Restrictions on The Franchisee's Products and Services Sources
9. The Franchisee's Obligations to the Franchisor
10. Financing Available to the Franchisee
11. The Franchisor's Assistance, Advertising, Computer Systems, and Training Available to the Franchisee

12. The Franchisor's Territories Policy
13. The Franchisor's Trademarks Available to the Franchisee.
14. The Franchisor's Patents, Copyrights, and Proprietary Information Available to the Franchisee
15. The Franchisee's Obligation to Participate in the Actual Operation of the Franchise Business
16. The Franchisor's Restrictions on What the Franchisee May Sell
17. The Franchisor's Renewal, Termination, Transfer, and Dispute Resolution Policies
18. Public Figures Involved in the Franchise Marketing or Sales Program
19. The Franchisor's Financial Performance Representations to Potential Franchisees
20. The Franchisor's Company and Franchise Outlets and Franchisee Information
21. The Franchisor's Current, Audited Financial Statements
22. The Franchisor's Proposed Franchise Agreement Provisions Descriptions
23. The FDD Delivery Receipts
24. Exhibits-The Franchise Agreement[33]

Regarding Item 19, Financial Performance Representations, if the franchisor discloses any such representations, they must be accurate.[34] The franchisor cannot disclaim or compel the potential franchisee "to waive reliance on any [FDD representation]." The FTC Rule bars the franchisor from disclaiming or compelling a prospective franchisee to waive reliance on any FDD representation, unless the disclaimer or waiver relates to contract changes resulting from franchisor-franchisee negotiations.[35] The franchisor must disclose the mandatory documents, facts, and information to the potential franchisee at least 14 days before the potential franchisee signs a franchise agreement or pays a payment to the franchisor or a franchisor agent or affiliate related to the proposed franchise sale.[36] If the potential franchisee asks the franchisor to disclose the mandatory items earlier, the franchisor must do so.[37] If not disclosing financial performance information, the franchisor must include a prescribed preamble warning prospective franchisees not to rely on its agents' and employees' unauthorized financial performance representations.[38]

The franchisor must disclose the items above in a uniform format document called a Franchise Disclosure Document (FDD).[39] The FDD's documents, facts, and information must be current as of the close of the franchisor's fiscal year.[40] Within a reasonable time after the end of each quarter, the franchisor must prepare and furnish FDD updates to potential franchisees.[41]

If the franchisor changes any proposed franchise agreement provision materially and unilaterally, the franchisor must disclose any such change to the potential franchisee at least seven days before the potential franchisee signs the proposed franchise agreement. The franchisor must disclose any such changes in the form of a modified proposed franchise agreement.[42] Otherwise, if the franchisor presents a proposed franchise agreement materially different from the FDD sample franchise agreement, the FTC may proceed against the franchisor under the FTC Act for a deceptive practice.[43]

Before furnishing the FDD, the franchisor must notify the potential franchisee of available FDD formats and any conditions or requirements for obtaining or reviewing the FDD in any particular format.[44] The franchisor can furnish the FDD, all FDD updates, and all FDD changes in electronic formats. But the franchisor must furnish the FDD, all FDD updates, and all FDD changes to the potential franchisee in a form permitting the potential franchisee to download, store, print, or otherwise maintain them for future use.[45] Any provided electronic FDDs, FDD updates, and FDD changes cannot include audio, video, pop-up screens, or any external links. But any provided electronic FDDs, FDD updates, and FDD changes can include internal links and search features.[46]

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FTC Rule Exemptions

The FTC Rule has several exemptions, including:

- The Minimal Required Payment Exemption, which applies to situations in which required payments or payment commitments, until six months after the franchisee begins operating, total less than $540.[47]
- The Fractional Franchise Exemption, which applies to situations in which "the franchisee or any of its officers, directors, or [parent corporation] officers or directors, or [affiliate corporation] officers or directors has

more than two years of experience in the same type of business, and the parties have a reasonable basis to anticipate that the sales from the relationship will not exceed 20% of the franchisee's total dollar volume in sales during the first year of operation."[48]

- The Leased Department Exemption, which applies to situations where "[t]he franchise relationship is a leased department[]" defined "as an arrangement under which a retailer licenses or permits a seller to conduct business from its premises[,] and where the seller does not purchase goods, services, or commodities from the retailer or any person with whom it requires the seller to do business." Leased departments sometimes arise "in certain department store departments."[49]
- The U.S. Petroleum Marketing Practices Act Exemption, which applies to situations where the U.S. Petroleum Marketing Practices Act covers the franchise relationship.[50]
- The Large Investment Exemption, which applies to situations where "[t]he franchisee's initial investment," with certain exclusion, "totals at least $1,084,900[,] and the prospective franchisee signs an acknowledgement verifying the grounds for the exemption" in specified language.[51]
- The Sophisticated Investor Exemption I, which applies to situations where "[t]he franchisee (or its parent or any affiliate) has been in business for at least five years and has a net worth of at least $5,424,500."[52]
- The Sophisticated Investor Insider Exemption II, which applies to situations where at least one buyer "of at least a 50% ownership interest in the franchise within 60 days of the sale, has been, for at least two years, an officer, director, general partner, individual, with management responsibility for the offer and sale of the franchisor's franchises or the administrator of the franchised network; or within 60 days of the sale, has been, for at least two years, an owner of at least a 25% interest in the franchisor."[53]
- The Oral Franchise Agreement Exemption, which applies to situations where "[t]here is no written document [describing] any material term or aspect of the relationship or arrangement."[54]

Kinds of State Franchise Laws

Besides the FTC disclosure rule, there are three kinds of state franchise and other laws regulate franchising: registration laws, disclosure laws, and relationship laws. The first two kinds are pre-contract laws, while the last kind is a post-contract law. State registration laws require franchisors to register their franchise opportunities with a state agency before offering them to potential franchisees. Like the FTC Rule, state franchise disclosure laws require pre-contract franchisor disclosures regarding the franchise opportunities. State franchise relationship laws regulate post-contract franchisor-franchisee relationships. These laws cover such areas as franchise agreement terminations, franchise renewals, and franchise transfers. The Michigan Franchise Investment Law (MFIL)[55] is a combination disclosure and relationship law. In contrast, California and Wisconsin have two separate laws regulating disclosures and relationships.

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The MFIL has franchise presale disclosure requirements similar to the FTC Rule. At least ten business days before the potential franchisee signs a franchise agreement or at least ten days before the franchisor receives any consideration, "whichever occurs first," the franchisor must provide an FDD or similar document to the franchisee disclosing documents and information similar to the FTC Rule's required disclosure.[56] In the franchise sale process, the franchisor's directors, officers, and salespeople must adhere to the FTC Rule and applicable state disclosure and registration laws strictly. Also, if selling franchises in more than one state, franchisors must adhere to all the relevant states' disclosure and registration laws.[57]

It is important to note that only the FTC can enforce its disclosure rule, which does not include an express or implied private right of action. Instead, an aggrieved franchisee must look to its state's little FTC Rule or state franchise or similar law.[58]

What Is a Franchise?

The FTC Rule and the MFIL have a similar three-part franchise definition. To be a franchise, a business relationship must meet these three requirements: (1) a franchisee has the right to operate a business identified or associated with the franchisor's logo, sign, service mark, trademark or similar intellectual property; (2) significant franchisor control over or assistance to the franchisee; and (3) a required franchisee payment, a franchise fee, to enter the business.[59] Whether a business relationship is a franchise does not depend on which terms the parties use to describe their relationship. For example, if the parties use terms like "license," "consulting agreement," "dealer agreement," or "distributorship agreement," but if their relationship has the above three characteristics, the courts will regard their relationship as a franchise and hold applicable the FTC Rule and any related state franchise laws.[60]

The key is not whether the franchisor provides a trademark or other commercial symbol, exercises significant control, or provides significant assistance. The key is whether the franchisor represents that, after the franchisee signs the franchise agreement, the franchisor provides a trademark or other commercial symbol, exercises significant control, or provides significant assistance.[61] The franchisor's precontract and contemporaneous representations regarding the relationship's characteristics as of the franchise agreement date define and govern the parties' agreement and their post-agreement relationship.[62] The FTC intended for the courts and the franchising community to read the three franchise definitional elements broadly. For example, the word "trademark" encompasses other forms of intellectual property, such as logos, service marks, symbols, trade dress, and trade names.[63] "Indeed the right to use the franchisor's mark [including the preceding forms of intellectual property] is an integral part of franchising."[64]

To be significant, the franchisor's assistance or control "must relate to the franchisee's overall method of operation—not a small part of the franchisee's business."[65] Examples of significant control include:

- Site approval for new franchise locations
- Store or center appearance or design requirements
- Territorial or similar restrictions
- Hours of operation
- Production or service methods
- Accounting practices
- Employment policies and practices
- Marketing campaigns requiring franchisee participation or payments
- Restrictions on kinds of clients or customers served
- Inventory controls[66]

Examples of significant assistance include:

- Some kinds of marketing and sales assistance
- Employee training
- Employment policies and practices assistance
- Accounting systems assistance
- Site location assistance
- Website assistance
- Systemwide networks assistance
- Detailed operations and similar manuals[67]

The following are not significant assistance or control:

- Some kinds of marketing assistance
- Trademark restrictions
- Compliance requirements with federal, state, or local laws or regulations[68]

The FTC reads the minimum payment or franchise fee requirement "broadly," encompassing many kinds of payments, including:

- A mandatory initial franchise fee,
- Mandatory rental payments,
- Mandatory advertising assistance fees,
- Some mandatory equipment and supplies payments,
- Mandatory training fees,
- Mandatory security deposits,
- Mandatory escrow deposits,
- Mandatory accounting charges,
- Mandatory marketing literature charges,
- Mandatory equipment rental payments,
- Mandatory equipment purchase payments for equipment obtainable only from the franchisor,
- Mandatory continuing royalties on sales.[69]

However, the minimum payment or franchise fee requirement does not encompass these kinds of payments:

- Payments for inventory or supplies at bona fide wholesale prices
- Payments to third parties for ordinary business expenses[70]

The FTC Rule defines "franchise," "franchise seller," and "franchisee" broadly. The FTC Rule defines franchisee as "any person[,] who is granted a franchise."[71] The FTC

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Rule defines franchisor as "any person[,] who grants a franchise and participates in the franchise relationship."[72]The FTC Rule defines "franchise seller" as "a person that offers for sale, sells, or arranges for the sale of a franchise[.]"[73]

Kinds of Franchises and Kinds of Franchisee Payments

There are two kinds of franchises—a product franchise and a business format franchise.[74] A product franchise is a franchise relationship, where the franchisee sells the franchisor's products or services, sometimes exclusively, sometimes not. While permitting the franchisee to use its trademarks and other intellectual property, the franchisor does not sell a business model or system to the franchisee. The focus is on the product or service. Examples include motor vehicle dealerships and soft drink bottlers. A business format franchise is a franchise relationship, where the franchisor sells the right to use a business model or system. The focus is on the business model or system. The franchisee operates under a 100 percent franchisor-controlled business model or system. Most restaurant, fast food, hotel/motel, and moving franchise systems are business format franchises. Franchisees can be single-unit or multi-unit franchisees.[75]

The franchisor can collect revenue in several ways, such as by an initial franchise fee, wholesale price markups for inventory sold to the franchisee, ongoing royalties, advertising fees, accounting fees, management consultation fees, training fees, and location selection fees.[76]

Dealerships and Distributorships

The terms "dealership" and "distributorship" are often considered the same as and used interchangeably with "franchise." They meet most franchise definitional requirements. But they are different, sometimes far different. Although similar to a franchise, especially a product franchise, a dealership is just different enough from a franchise to trigger different legal standards. Compared to a franchisor, a manufacturer's control over its dealer is usually less. A manufacturer's marketing assistance is usually less comprehensive. The manufacturer does not charge the dealer an initial fee. Rather, the manufacturer makes money from selling inventory to the dealer. Examples of dealers are motor vehicle manufacturers, agricultural equipment dealers, and office equipment dealers.[77]

In contrast, a distributorship differs from a franchise greatly. The manufacturer "rarely provides a marketing system or plan[.]" The manufacturer "may, at most, provide some advertising support or assistance in promoting the product." The distributor does not pay any initial fee for the right to sell the [manufacture's] products or to use its trademark." Distributorships include wholesalers and certain kinds of retailers, such as industrial chemicals, equipment, and machinery.[78]

Disclosure and Registration

In twelve states, the franchisor must file its offer with a state agency. In three states, the franchisor cannot sell franchises without first furnishing a disclosure document to the franchisee, but they do not require registration. To register, the franchisor files an FDD with applicable state additions and the required fee with a state agency. The state agency reviews and approves or disapproves the disclosure document. If the state agency disapproves, the franchisor cannot offer or sell franchises in the state. Under the FTC Rule and state acts, the franchisor must update the FDD periodically for it to remain effective.[79]

Franchisees' attorneys need to ask clients whether the franchisor has furnished them with an FDD. If not, this failure or refusal is a red flag.[80]

The franchisor's attorney is involved in the main registration and disclosure stepsevaluating the particular federal and state disclosure and registration requirements, preparing the disclosure documents, and ensuring compliance with the requirements. The franchisor's attorney resolves any doubts on whether the system is a franchise in favor of franchise. A franchisee's attorney evaluates whether the franchisor has disclosed all the required documents and information and whether the franchisor has complied with all the rule's form, format, and timeliness requirements.[81]

In registration states, franchisees' attorneys need to check the state registration offices to make sure that the franchisor has registered, and that the registration statement is current. Franchisees' attorneys "should review the FDD carefully to see whether it appears to be accurate and complete." They should research the franchisor and its principals on the Internet for any relevant information. Franchisees' attorneys should review the franchise agreement's provisions carefully and discuss its provisions with their clients carefully. Franchisors' attorneys need to watch for possible personal liability for violating or participating in violating the disclosure rules and laws, just as in the securities law field.[82]

NOTES

1. Gladys Glickman & Phillip S Ashley, 1 *Franchising* (Matthew Bender 2011), Sec 1.01.

2. Thomas S Dicke, *Franchising in America: The Development of a Business Method, 1840-1990* 1 (1992); *Webster's Third New International Dictionary* (Merriam Webster 1993), p 902; *The Origins of Franchising,* (undated), available at http://www.bizymoms.com/franchises/articles/origins.html; Sir William Blackstone, *Commentaries on the Laws of England* 759-760 (William Carey Jones ed 1915).

3. *See, e.g,, Husain v McDonald's Corp,* 205 Cal App 4th 860, 869, 140 Cal Rptr 3d 370 (2012); Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts,* 42 Stanford L Rev 927, 932 (Apr 1990) ("the franchisor typically exercises significant [and] relatively unrestricted decisonmaking authority.") & 934 (In business format franchising, "the distinguishing characteristic is that the franchisee is under the control of the franchisor[,] and thus is instructed how to run her business as an employed manager would be.") (April 1990); Thomas McCarthy, *Trademark Franchising and Antitrust: The Trouble With Tie-Ins,* 58 Cal L Rev 1085, 1090 (1970), Donald Chisum, *State Regulation of Franchising: The Washington Experience,* 48 Wash L Rev 291, 297 (1973).

4. Arturs Kalnins & Kyle J Mayer, *Franchising, Ownership, and Experience: A Study in Pizza Restaurant Survival,* 50 Management Science 1716, reprinted in The Scholarly Commons (December 2004), available at http://scholarship.sha.cornell.edu/cg/viewcontent.cgi?article=1301&context=articles.

5. *Husain,* 205 Cal App 4th 860, 869.

6. SBA Office of Advocacy, *Frequently Asked Questions* (March 2014), available at https://www.sba.gov/sites/default/files/FAQ_March_2014_0.pdf. *Accord,* Scott Shane, *Start Up Failure Rates: The Definitive Numbers,* Small Business Trends (Dec 17, 2012), available at http://www.smallbusinesstrends.com/2012/12/start-up-failure-rates-the-definitive-numbers.html (analyzing several studies and finding: "The typical new business started in the United States is no longer in operation five years after being founded."), Jim Clifton, *American Entrepreneurship: Dead or Alive?,* Business Journal (January 13, 2015), available at http://www.gallup.com/businessjournal/180431/american-entrepreneurship-dead-alive-aspx ("for the first time in 35 years, American business deaths now outnumber business births" by about 70,000 in 2009-2014). *See also,* Susan Ward, *Should You Buy a Franchise* (undated), available at http://www.sbinfocanada.about.com/franchiseinfo/a/buyfranchise.htm (in Canada, franchisees have an 80% survival rate, while nonfranchisees have a 70-80% failure rate).

7. W Michael Garner, 1 *Franchise and Distribution Law* (Thomson Reuters 2014-2015 ed) Sec 1:3.

8. *Id. Accord,* David E Holmes, *The Advantages and Disadvantages of Franchising* (2003), available at http://www.holmeslofstrom.com/z_pdf/articles/franchisors/Fran%20Advantages.pdf (customers are likelier to identify the franchisor's intellectual property with the franchisee and become the franchisee's customers).

9. W Michael Garner, 1 *Franchise and Distribution Law* (Thomson Reuters 2014-2015 ed) Sec 1:3; David E Holmes, *The Advantages and Disadvantages of Franchising* (2003), available at http://www.holmeslofstrom.com/z_pdf/articles/franchisors/Fran%20Advantages.pdf.

10. W Michael Garner, 1 *Franchise and Distribution Law* (Thomson Reuters 2014-2015 ed) Sec 1:3; Susan Ward, *Should You Buy a Franchise* (Undated), available at http://www.sbinfocanada.about.com/franchiseinfo/a/buyfranchise.htm.

11. Susan Ward, *Should You Buy a Franchise* (Undated), available at http://www.sbinfocanada.about.com/franchiseinfo/a/buyfranchise.htm.

12. Jason Daley, *The Unique Challenges and Benefits of Multi-Unit Franchising,* Entrepreneur (July 19, 2013), available at http://www.entrepreneur.com/article/226763.

13. W Michael Garner, 1 *Franchise and Distribution Law* (Thomson Reuters 2014-2015 ed) Sec 1:3.

14. *Id. Accord, Patterson v Domino's Pizza, LLC,* 60 Cal 4th 474, 490; 177 Cal Rptr 3d 539 (2014); David E Holmes, *The Advantages and Disadvantages of Franchising* (2003), available at http://www.holmeslofstrom.com/z_pdf/articles/franchisors/Fran%20Advantages.pdf; Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts,* 42 Stanford L Rev 927, 931-932 (April 1990).

15. W Michael Garner, 1 *Franchise and Distribution Law* (Thomson Reuters 2014-2015 ed) Sec 1:3, David E Holmes, *The Advantages and Disadvantages of Franchising* (2003), available at http://www.holmeslofstrom.com/z_pdf/articles/franchisors/Fran%20Advantages.pdf.

16. W Michael Garner, 1 *Franchise and Distribution Law* (Thomson Reuters 2014-2015 ed) Sec 1:3.

17. *Id.*

18. *Id. Accord,* David E Holmes, *The Advantages and Disadvantages of Franchising* (2003), available at http://www.holmeslofstrom.com/z_pdf/articles/franchisors/Fran%20Advantages.pdf (franchisee has more stake in the business than a company manager).

19. Arturs Kalins & Francine LaFontaine, *Multi-Unit Ownership in Franchising: Evidence from the Fast-Food Industry in Texas,* Rand J Econ 749 (Winter 2004), available at http://www.scholarship.sha.cornell.edu/cgi/viewcontent.cg?articles=1302&context=articles. *Accord, Patterson,* 60 Cal 4th 474, 490 (2014).

20. Larry Weinberg, *A Canadian Perspective on the Independent Contractor-Employer Issue,* 34 Franchise L J 311, 312 (Winter 2015).

21. David Gurnick, *The Franchising Solution to the Employee-Independent Contractor Problem,* Los Angeles Times (March 17, 2011), p 4, available at http://www.static1.1.sqsspcdn.com; Arthur L Pressman & Greg A Rubenstein, *Are Franchisees Independent Contractors? Not Everyone Agrees,* Franchising World (July 2008), available at http://www.franchise.org; L Seth Stadfeld, *Are Franchisees a Franchisor's Employees Under State Law? The Massachusetts Experience,* 14 The Franchise Lawyer 4 (Fall 2011), available at http://www.americanbar.org/publications/franchise_lawyer/2011/fall_2011/are_franchisees_franchisors_employees_state_law_massachusetts_experience.html; Steven Cohen & William B Eimicke, *Independent Contracting Policy and Management Analysis* (August 2013), pp 12-15, available at http://www.columbia.edu.

22. David Gurnick, *The Franchising Solution to the Employee-Independent Contractor Problem,* Los Angeles Times (Mar 17, 2011), p 4; Steven Cohen & William B Eimicke, *Independent Contracting Policy and Management Analysis* (Aug 2013), pp 12-15, available at http://www.columbia.edu.

23. IHS Economics (prepared for International Franchising Association), *2015 Economic Outlook* (January

2015), p 2, available at http://emarket.franchise.org/FranchiseBizOutlook/2015.pdf.

24. *Id.*

25. *Id.*

26. International Franchising Association, *Franchise Businesses Projected To Again Grow Faster Than The Rest Of The Economy In 2015* (Jan 7, 2015), quoting its President & CEO Steve Caldeira, available at http://www.franchise.org/franchise-businesses-projected-to-again-grow-faster-than-the-rest-of-the-economy-in-2015. *See also, Patterson,* 60 Cal 4th 474, 489 (2014) ("Today, the economic effects of franchising are profound. Annually, this sector of the economy…employs millions of people, carries payrolls in the billions of dollars, and generates trillions of dollars in total sales."); US Census Bureau, *2007 Economic Census Franchise Statistics* (Aug 28, 2014), available at http://www.census.gov/econ/census/pdf/franchise_flyer.pdf; US Census Bureau, *Census Bureau's First Release of Comprehensive Franchise Data* (Sept 14, 2010), available at http://www.census.gov/newsroom/releases/archives/economic_census/cb10.141.html.

27. Rajiv P Dant & Marko Grunhagen, *International Franchising Research: Some Thoughts on the What, Where, When, and How,* 21 Journal of Marketing Channels 124 (July 2, 2014), available at https://www.tandfonline.com/doi/full/10.1080/1046669X.2014.917012. Franchise Directory, *International Franchising Opportunities,* available at http://www.franchise.direct.com/internationalfranchises. Franchise Times, *Franchise Times Top 200,* available at http://www.franchisetimes.com/Resources/Top-200. Illan Alon, *Economic Potential of International Franchising in Emerging Markets,* Franchise Chat, available at http://www.franchise-chat.com/resources/franchising_in_emerging_markets.htm.

28. FTC, *Disclosure Requirements and Prohibitions Concerning Franchising,* 16 CFR Part 436.

29. W Michael Garner, 1 *Franchise and Distribution Law* (Thomson Reuters 2014-2015 ed) Sec 5A:3, Gerald C Wells & Dennis E Wieczorek, *A Road Map to the New FTC Franchise Rule,* 27 Franchise L J 105, 105 (Fall 2007).

30. FTC, *Disclosure Requirements and Prohibitions Concerning Franchising,* 16 CFR Part 436 issued Dec 21, 1978 and effective Oct 21, 1979.

31. FTC, *Disclosure Requirements and Prohibitions Concerning Franchising,* 16 CFR Part 436 issued March 30, 2007 and effective July 1, 2007, Sections 436.2- 436.5. *Accord,* W Michael Garner, 1 *Franchise and Distribution Law* (Thomson Reuters 2014-2015 ed), Sec 5A.1 & Appendix B.

32. FTC, *Statement of Basis and Purpose—2007,* 72 Fed Reg 15,444, 15,445, 15,448 (Mar 30, 2007).

33. 16 CFR 436.4-436.5. *Accord,* W Michael Garner, 1 *Franchise and Distribution Law* (Thomson Reuters 2014-2015 ed) Appendix B; Susan Grueneberg & Ann Hurvitz, eds, *The FTC Franchise Rule* (2d ed ABA 2012), pp 57-58.

34. 16 CFR 436.9(c); Gerald C Wells & Dennis E Wieczorek, *A Road Map to the New FTC Franchise Rule,* 27 Franchise L J 105, 106 (Fall 2007); Susan Grueneberg & Ann Hurvitz, eds, *The FTC Franchise Rule* (2d ed ABA 2012), p 74.

35. 16 CFR 436.9(h); FTC, Future Rule 16 CFR Part 436 Compliance Guide (May 2008), p 20; CCH, *FTC Disclosure Rules for Franchising & Business Opportunities* (Walters Kluwer CCH 2007) p. 45.

36. 16 CFR 436.2(a).

37. 16 CFR 436.9(e); FTC, Future Rule 16 CFR Part 436 Compliance Guide (May 2008), p 20; Robert M Barkoff & Andrew C Seldin, *Fundamentals of Franchising* (3d ed ABA 2008), p 112.

38. 16 CFR 436.6(s)(1)-(2); CCH, *Disclosure Rules for Franchising & Business Opportunities* (Walters Kluwer CCH 2007), p 214; FTC, Future Rule 16 CFR Part 436 Compliance Guide (May 2008), p 86; W Michael Garner, 1 *Franchise and Distribution Law* (Thomson Reuters 2014-2015 ed), Appendix C, p 787 (also quoting prescribed preamble), Robert M Barkoff & Andrew C Seldin, *Fundamentals of Franchising* (3d ed ABA 2008), p 112.

39. 16 CFR 436.3(a).

40. 16 CFR 436.7(a); Gerald C Wells & Dennis E Wieczorek, *A Road Map to the New FTC Franchise Rule,* 27 Franchise L J 105, 110 (Fall 2007).

41. 16 CFR 436.7(b).

42. 16 CFR 436.9(g); Susan Grueneberg & Ann Hurvitz, eds, *The FTC Franchise Rule* (2d ed ABA 2012), p 121.

43. 16 CFR 436.2(b).

44. 16 CFR 436.6(g).

45. 16 CFR 436.6(b).

46. 16 CFR 436.6(d).

47. 16 CFR 436.8(a)(1).

48. 16 CFR 436.1(g), 436.8(a)(2).

49. 16 CFR 436.1(*l*), 436.8(a)(3).

50. 16 CFR 436.8(a)(4).

51. 16 CFR 436.8(a)(5)(i).

52. 16 CFR 436.8(a)(5)(ii).

53. 16 CFR 436.8(a)(6).

54. 16 CFR 436.8(a)(7).

55. MCL 445.1501 et seq.

56. MCL 445.1508.

57. MCL 445.1508(1), (2).

58. W Michael Garner, 1 *Franchise and Distribution Law* (Thomson Reuters 2014-2015 ed) Sec 5A:3.

59. W Michael Garner, 1 *Franchise and Distribution Law* (Thomson Reuters 2014-2015 ed) Sec 5A:7; Gerald C Wells & Dennis E Wieczorek, *A Road Map to the New FTC Franchise Rule,* 27 Franchise L J 105, 110 (Fall 2007).

60. 16 CFR 436.1(h).

61. *Id.*; Susan Grueneberg & Ann Hurwitz, eds, *The FTC Franchise Rule* (ABA Forum on Franchising 2008), pp 17-18.

62. FTC, *Franchise Rule 16 CFR Part 436 Compliance Guide* (May 2008), p 1, available at https://www.ftc.gov/system/files/documents/plain-english/bus70-franchise-rule-compliance-guide.pdf; Susan Grueneberg & Ann Hurvitz, eds, *The FTC Franchise Rule* (2d ed ABA 2012), p 18.

63. FTC, *Franchise Rule 16 CFR Part 436 Compliance Guide* (May 2008), p 2, available at https://www.ftc.gov/system/files/documents/plain-english/bus70-franchise-rule-compliance-guide.pdf.

64. *Id.*; Susan Grueneberg & Ann Hurvitz, eds, *The FTC Franchise Rule* (2d ed ABA 2012), pp 19, 52.

65. *Id.*

66. *Id.*

67. FTC, *Franchise Rule 16 CFR Part 436 Compliance Guide* (May 2008), pp 3, 4, available at https://www.ftc.gov/system/files/documents/plain-english/bus70-franchise-rule-compliance-guide.pdf; Susan Grueneberg & Ann Hurvitz, eds, *The FTC Franchise Rule* (2d ed ABA 2012), p 20.

68. *Id.*

69. FTC, *Franchise Rule 16 CFR Part 436 Compliance Guide* (May 2008), p 4, available at https://www.ftc.gov/system/files/documents/plain-english/bus70-franchise-rule-compliance-guide.pdf; Susan Grueneberg & Ann Hurvitz, eds, *The FTC Franchise Rule* (2d ed ABA 2012), pp 20-21.

70. FTC, *Franchise Rule 16 CFR Part 436 Compliance Guide* (May 2008), pp 5, 6, available at https://www.ftc.gov/system/files/documents/plain-english/bus70-franchise-rule-compliance-guide.pdf; Susan Grueneberg & Ann Hurvitz, eds, *The FTC Franchise Rule* (2d ed ABA 2012), pp 21-22.

71. 16 CFR 436.1(i).

72. 16 CFR 436.1(k).

73. 16 CFR 436.1(j).

74. Susan Grueneberg & Ann Hurvitz, eds, *The FTC Franchise Rule* (2d ed ABA 2012), p 44; W Michael Garner, 1 *Franchise and Distribution Law* (Thomson Reuters 2014-2015 ed), Sec 5A:7; Gerald C Wells & Dennis E Wieczorek, *A Road Map to the New FTC Franchise Rule,* 27 Franchise L J 105, 106 (Fall 2007).

75. Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts,* 42 Stanford L Rev 927, 935-936 (April 1990); Jason Daley, *The Unique Challenges and Benefits of Multi-Unit Franchising,* Entrepreneur (July 19, 2013), available at http//www.entrepreneur.com/article/226763; Cory Barber, *5 Major Advantages of Multi-Unit Franchising,* (undated), available at http://www.evancarmichael.com/Franchises/5150/5-major-advantages-of-multiunit-franchising.htm; Arturs Kalins & Francine LaFontaine, *Multi Unit Ownership in Franchising: Evidence from the Fast-Food Industry in Texas,* Rand J Econ 747 (Winter 2004), available at http://www.scholarship.sha.cornell.edu/cgi/reviewcontent.cg?articles=1302&context=articles.

76. Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts,* 42 Stanford L Rev 927, 934 (April 1990).

77. W Michael Garner, 1 *Franchise and Distribution Law* (Thomson Reuters 2014-2015 ed) Sec 1:12.

78. W Michael Garner, 1 *Franchise and Distribution Law* (Thomson Reuters 2014-2015 ed), Sec 1:11.

79. W Michael Garner, 1 *Franchise and Distribution Law* (Thomson Reuters 2014-2015 ed) Sec 5A:1, Sec 5A:34, citing MCL 445.1508(8) and other comparable state laws.

80. W Michael Garner, 1 *Franchise and Distribution Law* (Thomson Reuters 2014-2015 ed) Sec 5A:5.

81. *Id.*

82. *Id.*

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