

Franchise Attorneys Speak Out About AAHOA's 12 Points

Point 11: Transferability.

By Richard Saltzman

Many hoteliers fail to realize that AAHOA's Point 11, regarding the transferability of franchise agreements, can have a significant impact on a franchisee's business. Point 11 states that:

"In situations in which a Franchisee seeks to transfer its property to an unrelated third-party, the Franchisor should not delay, withhold its consent, or impose conditions on the transfer in an unreasonable, arbitrary or capricious manner. Transfer fees should be fair and reasonable (i.e., generally no more than \$1,500), and based solely on the estimated administrative costs to process the transfer.

There should be no fees for a Franchisee's transfer to a spouse, child, parent, sibling, niece, nephew, descendant, spouse's descendant or other family member if the transferee is legally competent to assume the Franchisee's obligations under the franchise agreement.

There also should be no transfer fees for a Franchisee's buyout of other shareholders or partners who had an interest in the Facility, or for the addition of any shareholders or partners who will gain an interest in the Facility.

In the event of a requested transfer, Franchisors should not condition the granting of the request on a requirement that the Franchisee or new owner adopt an extensive renovation or modernization plan for the subject property. Any required renovations for the subject property in connection with a transfer should be limited to only those specific items identified in the last two (2) quality assurance (QA) inspection reports for the subject Facility that were issued prior to the requested transfer.

To the extent a Franchisor approves a requested transfer, the Franchisor should neither seek liquidated damages (LDs) from the prior Franchisee nor seek any increased fees from the

new Franchisee owner of the subject Facility because the Franchisee sought to transfer its Facility prior to the scheduled termination date of its franchise agreement.

Within ten (10) days of the completion of an approved transfer of a subject Facility, Franchisors automatically should release the prior Franchisee from any and all obligations it had under the terminated franchise agreement and provide it with a written letter of release in connection therewith.

Besides AAHOA's efforts on behalf of its membership, the most effective way for franchisees to convince their franchisors to modify the standard terms of their franchise agreements is to demand modifications consistently and repeatedly to those agreements consistent with AAHOA's 12 Points of Fair Franchising. There is no better example of this than the issue of transferability clauses contained in the major chains' franchise agreements.

It is important to note that in 10 states it is illegal for a franchisor to refuse to allow a transfer of the franchise without good cause. These states are: Arkansas, California, Hawaii, Indiana, Iowa, Michigan, Minnesota, Nebraska, New Jersey and Washington. Many of these states permit a franchisor to have a right of first refusal to purchase the franchise prior to a transfer.

Consider the hypothetical example of a franchised hotel being sold within 12 months of the initial franchising of the hotel. Some franchisors have made it very clear that they will only charge licensees the actual costs related to processing said transfer, generally \$1,000-2,000, to recover the general costs for administrative support staff processing the agreements, inspecting the site and the like. Other chains make no such commitment and seek full transfer fees in such sit-

uations even though the initial sale of the franchise may have occurred relatively recently. Franchisors should acknowledge the inherent inequity of charging such full fees, which, but for the sale of the franchised property, no "transfer fee" would be payable to the franchisor.

Another critically important aspect of the transferability of a hotel franchise agreement are property improvement plans or "punchlists" many franchisors require to be agreed to as part of the transferee's franchise agreement. Many AAHOA members are only too familiar with such punchlists and their impact on the viability of a sale of their hotels. Failure to include a clause in a purchase agreement making the proposed transfer of a franchised hotel contingent on franchisor approval including the acceptability of the punchlist by all parties can have tremendously negative consequences. More importantly, the expense of a punchlist very often destroys the commercial viability of a proposed sale making it essential that prospective purchasers and sellers address this issue as early as possible in their discussions.

Franchisors certainly need to embrace all aspects of AAHOA Point 11. There needs to be an increased emphasis on being more "franchisee friendly" in this area both from a financial aspect as well as regarding the efficiency with which franchisors process such transfers. The franchisor should never be an impediment to closing on the sale of a hotel. As long as a franchisee is in good standing, they need to hold their franchisors accountable in this area. **ALB**

Richard M. Saltzman is an attorney with Giambrone and Saltzman, LLC in Fairfield, New Jersey. He can be reached at (862) 210-8137 or at rs@giambronesaltzman.com.