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Retool Your Franchise Agreement to Recruit Minorities and Women

By Deven Klein and David Koch

A valuable tool for growing your franchise system in non-traditional communities may be lying right under your nose. Recently, Kumon Math and Reading Centers employed this tool with much success. Yet the tool is so obvious that many franchisors overlook it.

The tool is your own franchise agreement. Yes, your franchise lawyer (as hard as it may be to believe!) can help you grow your system by making your franchise agreement more appealing to potential investors in non-traditional communities.

Kumon's experience is instructive. Kumon has a particular interest in making its franchise opportunity attractive to women, who make up roughly 80% of its current franchisees in the U.S. But Kumon also has a vital interest in making its franchise opportunity attractive to an ethnically diverse range of investors. That's because the population of K-12 children that Kumon seeks to serve is itself diverse. Most Kumon centers serve high proportions of students who are immigrants or children of recent immigrants, especially from Asia. The centers serve both middle-income or suburban areas and lower-income areas where franchisees seek to give disadvantaged students an academic boost. James Boykin, a Kumon franchisee who won the 2000 Minority Business of the Year award from the Urban League of Greater Chattanooga, Tennessee, says that he chose Kumon because it "gives me an opportunity to give disadvantaged kids the same advantages as students in more affluent communities." Currently, about 60% of Kumon's franchisees in the United States are minorities.

The estimated initial investment for a Kumon center is modest (\$2250 to \$7900, March 2000 UFOC), and the typical investor is motivated more by a desire to improve the lives of children than to make his or her first million dollars. Some Kumon Center owners are former teachers, while others are parents who became franchisees after seeing firsthand the benefits of the Kumon Method of learning. Although sophisticated and highly motivated, many potential Kumon franchisees have not previously encountered a franchise agreement or invested in their own business.

Not long ago, Kumon decided that its standard franchise agreement was not as compatible as it could be with the franchise investor profile described above. The franchise agreement contained in Kumon's March 1999 UFOC was a dense, 40-page, single-spaced document written in a legalistic style. There was nothing wrong with the agreement in terms of protecting the interests of the Kumon franchise system and Kumon as franchisor. But Kumon felt that the agreement needed to be simpler, shorter, and more user-friendly -- not only for prospective franchisees, but also for Kumon's field staff who had to understand and apply the agreement.

Kumon committed to an overhaul of the franchise agreement in March 2000. The resulting document is 19 pages long (21 pages shorter than the original), is written mostly in plain English, and has been welcomed by Kumon's franchisees. Kumon believes that the new form of agreement is an important tool in helping it reach out to all potential franchisees, but especially to those in non-traditional communities.

Kumon learned early in the process that revamping the franchise agreement would involve much more than changing "Franchisee" to "you" and "shall" to "must." The process required thoughtful decisions about terms that were truly essential to the company and terms that could be sacrificed. It required assessment of the risks and benefits of shifting certain details from the contract to separate addenda or to Kumon's operating manual. And it offered opportunities to reconsider some of Kumon's existing policies and to experiment with new drafting approaches. In particular, Kumon took a fresh look at its policy on ownership structure, and it adopted a new and more practical set of contract terms to deal with transfers of ownership.

Kumon retained the core principles of its contract provisions – indeed, surrendering critical protections was never on the table. But in many cases, Kumon chose to cut out extra protections at the margins. While acknowledging that the extra language had some potential legal benefits, Kumon's frank assessment was that the marginal protection was not worth the cost, in terms of weighing down the contract and sending the wrong message to prospective franchisees.

The entire process of redrafting took about four weeks of close interaction between in-house and outside counsel. It demanded a significant investment of time and money, but Kumon believes that the return was well worth the investment.

Franchisee reaction. The new form of franchise agreement made its debut in Kumon's March 2000 UFOC. The feedback from existing franchisees was immediate and positive. Cecilia Noblejas, owner of the Spring Lake Kumon Center in New Jersey, recently renewed her franchise, substituting the new agreement for the old one. She says, "[The new agreement] was quite easy to understand because it was in laymen's language with no technical terms. The one previous to that took awhile to understand."

Just as important, Kumon found that the new franchise agreement has made a real difference in marketing its franchise opportunity to women and ethnic minorities. For example, Kumon had realized that many of its non-native English speakers were more comfortable running the Math program, while a native English speaker was more suitable for the Reading program. The new franchise agreement accommodates this preference by allowing the formation of a two-person partnership in which each partner is responsible for the program in which he or she has greater strength. The old agreement did not allow partnerships, and franchisees were restricted to only the math or reading program, but not both.

Field staff endorsement. Kumon staff members, who are spread out in field offices across the U.S., are responsible for providing disclosure to franchise candidates locally. Like franchisees, the staff enthusiastically welcomed the change to a streamlined, plain-English franchise agreement. Rather than struggle with questions about convoluted sentences in the franchise contract, they could devote their energies to thoroughly answering questions about Kumon's business and franchise system. Says Doreen Lawrence, Detroit Branch Manager, "The plain English has taken much of the fear from the legal document both for prospective franchisees and staff members."

Management satisfaction. From Kumon management's point of view, offering a typical "fast-food" style of franchise agreement for a Kumon franchise was cutting against the company's goals. The tone of the old franchise agreement and UFOC sent the wrong message about the company's corporate culture and philosophy. This was troubling to management, because the franchise documents give the potential franchisee one of his or her first impressions about the company.

For example, many potential franchisees took offense to the waiver of jury trial and New York City forum selection clause in the old franchise agreement. In management's view, the offense given was entirely unnecessary. Kumon, in practice, has hardly ever been involved in litigation with franchisees – so why allow provisions that are unlikely to be invoked to ruin a relationship before it starts? Kumon's low litigation history made these provisions expendable when the company chose to reconfigure the contract. Kumon instead opted for a "defendant home court advantage" venue clause, which entitles the defendant – whether it be Kumon USA or the franchisee -- to litigate the case in its home state.

The table at the end of this article provides a few further examples to illustrate the differences in drafting style between the old and new forms of franchise agreement.

Franchisors who want their franchise agreements to resonate in non-traditional communities may need to undertake a “zero-based” risk/benefit analysis of their contract provisions. If you ask for more contractual protections for the company, you may get them in the form of a bullet-proof, heavy-handed franchise agreement that, paradoxically, begets more law suits because of its heavy-handedness. On the other hand, a sensible balance of protecting the company and creating a plain-English, easy-to-read document may go far toward keeping the franchisor out of lawsuits in the first place.

Other franchisors who hope to recruit women and minority franchisees more effectively may be able to learn from Kumon’ s example. Are your franchise documents unnecessarily discouraging women and minority investors? An inward look at your current documents may unlock an excellent recruiting tool that you didn't know you had.

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Sample provisions:

Old Franchise Agreement

Reports. On or before the day of the month on which such reports are due as provided by the Regulation Book (as such specified day may be modified from time to time by Kumon pursuant to Section 2.3 of this Agreement), Franchisee shall supply to Kumon, at Franchisee's cost and expense, complete statements on the forms supplied by Kumon reflecting the operating results of Franchisee's business as of the day of the preceding month specified by the Regulation Book (as such specified day may be modified from time to time by Kumon pursuant to Section 2.3 of this Agreement) and such other statements and reports as Kumon may from time to time require as set forth in the Regulation Book of otherwise.

Franchisee shall complete and timely submit to Kumon such annual and/or other periodic reports regarding the activities and operations of Franchisee's Kumon Center (including, without limitation, the expenses and revenues of Franchisee's Kumon Center) as Kumon prescribes in its Regulation Book, in its Operations Manual or otherwise due to its expected disclosure obligations under applicable franchise law. Franchisee hereby authorizes Kumon to incorporate in its franchise offering circular and/or promotional literature the information derived from such reports; provided, however, that Kumon shall not identify Franchisee in presenting such data in its franchise offering circular or promotional literature unless required to do so by applicable law or governmental regulation.

Franchisee shall submit a year-end inventory report in the form and at the time specified by Kumon in its Regulation Book or Operations Manual. If Franchisee fails to submit the year-end inventory report to Kumon, Franchisee understands and agrees that such failure shall constitute Franchisee's acknowledgment that Franchisee has a sufficient inventory of worksheets. If Franchisee has not yet submitted its year-end inventory report and requires any further worksheets, Franchisee shall submit its year-end inventory report with any request for further worksheets and if Franchisee fails to do so, Kumon shall not be required to provide any

New Franchise Agreement

Reports. The Operations Manual specifies the monthly reports that you must submit to us and their due dates. You must also submit an Annual Reporting Summary, Worksheet Inventory, and Non-Chargeable Items Inventory, all as described in the Operations Manual. We have the right to withhold worksheet, chargeable, and non-chargeable orders if we do not receive the additional reports by their respective due dates.

further worksheets to Franchisee until Franchisee submits said report.

Old Franchise Agreement

Manner of Operation. Franchisee understands and hereby acknowledge that every component of the Kumon Method is vital to Kumon, to other Kumon franchisees and to the operation of this Kumon Center franchised hereby, and that compliance with that Method is of the essence to this Agreement. Franchisee shall at all times conduct the activities and operations of his or her Kumon Center in compliance with the Kumon Method, including all standards, procedures and policies as Kumon may from time to time establish (in the regulation Book, in Kumon's Operations Manual or otherwise), as though all were specifically set forth in this Agreement.

Old Franchise Agreement

Modification of the Kumon Method. Franchisee understands and agrees that the Kumon Method must not remain static if it is to meet presently unforeseen changes in methodology, competitive circumstances and the needs of students, and to best serve the interests of Kumon, Franchisee and other Kumon franchises. Accordingly, Franchisee expressly understands and agrees that Kumon may from time to time change the components of the Kumon Method, including, but not limited to, altering the programs, services, products, methods, standards, forms, policies and procedures of that Method; adding to, deleting from or modifying those programs, services and products which Franchisee's Center is authorized to offer; and, changing, improving or modifying the Proprietary Marks. Subject to the other provisions of this Agreement, Franchisee expressly agrees to abide by any such modifications, changes, additions, deletions and alterations, provided, however, that such changes do not materially and unreasonably increase Franchisee's obligations hereunder. Pursuant to the foregoing, Kumon may change its Materials or products at any time and from time to time, without notice to Franchisee and without obligation with respect to any such Materials or products that have previously been delivered or shipped to Franchisee.

New Franchise Agreement

Compliance with Kumon Method. You agree that strict compliance with the Kumon Method is essential to this Agreement. Compliance with the Kumon Method means compliance with the standards, procedures and policies contained in this Agreement and in the Operations Manual, as though all were specifically set forth in this Agreement.

New Franchise Agreement

Modification of the Kumon Method. We have the right to change the content of the Kumon Method and the Kumon Materials in our discretion. If we change the Kumon Method or our products, we will notify you and you must implement the changes within a reasonable time that we specify.