Nutter insights

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Food and Beverage Companies: Get the Dish on Commercial Agreements

Q Food and beverage companies frequently turn to outside partners when launching their brands. Does signing these commercial agreements pose any risks?

Jeremy Halpern: Early stage food and beverage companies often consist of only the founders and one or two key employees. Rather than hiring and doing things in-house, they typically outsource many key functions of the company by working with flavor houses, product development consultants, co-packers, co-manufacturers, brokers, sales management agencies, public relations firms, etc.

But these commercial agreements can be massive traps for the unwary. Companies should think carefully about grants of exclusivity, sales or production minimums, termination fees, non-compete obligations, and retainer obligations, to list a few potential pitfalls. Entrepreneurs should avoid deals that solve problems for the short term but which may inhibit or even prohibit future growth. For example, granting exclusivity to a copacker on the East Coast with attractive pricing might be great today, but may lead to massive shipping costs when the company expands to the opposite coast.

In every case, these deals should support real growth in terms of creating sustainable gross margins for the product, and repeatable sales into a broad customer base. Additionally, these deals should always create alignment in the performance incentives so that both sides have the opportunity to win.

Q When does it make sense to bring on an outside partner?

JH: There is a real danger of paying retainers to too many agencies for too many things too early in the company's launch process. Virtualizing a salesforce or bringing on a broker will reduce a company's human capital overhead, but the company is still effectively committed to spend cash. Those retainers will be particularly painful when the company hasn't yet achieved product-market fit and there is insufficient sales traction to justify the costs. Often these relationships make more sense as an expansion tool when the company is slightly later stage.

That said, retainers may make more sense in the early going when a brand can link up with a top tier service firm, where such firm is in high demand and can afford to be selective in its clients. In that instance, the retainer is effectively the cost of entry for the brand.

Q What are some considerations when selecting a partner?

JH: First, the relationship is everything. Entrepreneurs should find partners that subscribe to the vision for the company, including the pace and method of rollout and expansion. Service providers should have experience working with early stage companies and should be willing to engage on flexible terms.

Second, entrepreneurs should perform due diligence. They should select partners based upon strong references from other brands and should check with other industry players to see how the potential partner is viewed.

Lastly, early stage food and beverage companies should pick firms that understand that things will go wrong—because things always go wrong. Having a smart, flexible, constructive, and proactive extended team ensures that the problems will be fixed quickly and allow the company to reach its full potential.

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Jeremy Halpern is a partner in Nutter's Food and Beverage Group and the Director of Business Development for the firm's Emerging Companies Group. Jeremy's practice focuses on emerging companies, private equity, venture capital and angel financing transactions, mergers and acquisitions, executive and team compensation matters, and general start-up support. Serving as the firm's entrepreneur-in-residence, Jeremy works with companies, investors, and executives in technology, life sciences and the food and beverage industry.

Nutter is a top-tier, Boston-based law firm that provides legal counsel to industry-leading companies, early stage entrepreneurs, institutions, foundations, and families, across the country and around the world. The firm's lawyers are known for their client-centric approach and extensive experience in business and finance, intellectual property, litigation, real estate and land use, labor and employment, tax, and trusts and estates. Co-founded in 1879 by Louis D. Brandeis, who later became a renowned justice of the U.S. Supreme Court, Nutter is dedicated to helping companies prosper in today's fast-paced business environment.

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