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**SAMPLE FRANCHISE OPPORTUNITY REVIEW:**

**Base upon a sanitized version of an actual report prepared for an AAFD member.**

November 9, 2004

Horatio Alger  
1234 Main St  
Any Town, CA

**Privileged and Confidential**  
**By Email Delivery:**

**Re: Initial Franchise Opportunity Analysis – ABC CONSTRUCTION SERVICES**

Dear Mr. Alger,

This correspondence constitutes an evaluation of your franchise opportunity with ABC Construction Services Corporation. This report is made pursuant to guidelines established by the American Association of Franchisees and Dealers for an initial franchise opportunity review.

Pursuant to the AAFD's guidelines I have reviewed the materials you have provided me regarding your franchise opportunity with ABC Construction Services Corporation, including the Uniform Franchise Offering Circular (UFOC), your proposed franchise agreement, and certain ancillary materials you have provided, and the financial statements provided to you by ABC Construction Services.

I have not given detailed review to all ancillary agreements, but have focused on the proposed franchise agreement and the UFOC. Furthermore, I have not had any contact with any representatives of ABC Construction Services, nor have I had an opportunity to review any operating procedures manuals. I have not contacted any existing ABC Construction Services franchisees on your behalf. All of these services are beyond the scope of the guidelines provided by the American Association of Franchisees and Dealers, but may be provided for additional charge.

This report is divided into five sections. The first section includes my general comments about the ABC Construction Services franchise opportunity. The second section of the report compares the ABC Construction Services franchise opportunity to the "Eight Things to Look For in a Franchise" checklist provided by the AAFD. This section of the report evaluates the business aspects of the franchise opportunity.

The third section of the report analyzes the franchise agreement and offering circular in comparison to the *AAFD's Franchisee Bill of Rights*. The AAFD suggests that prospective franchisees use the *Franchisee Bill of Rights* as a negotiating checklist of contractual protections. Ideally, every item in the Franchisee Bill of Rights will be addressed in the franchise agreement in a fashion that accommodates the needs and interests of franchisees.

The fourth section makes specific comments regarding your proposed franchise agreement and disclosures contained in the offering circular. The fifth section of this report is a grading template intended to provide an objective comparison of the ABC Construction Services offering to other franchise opportunities that have been reviewed by the AAFD.

**1. General Comments:**

The ABC Construction Services franchise offering, like most current franchise opportunities, presents a one-sided contract similar to a contract of adhesion. A contract of adhesion is a take it or leave it agreement that purports to be non-negotiable. Generally, contracts of adhesion are enforceable only to the extent that they not unconscionable and otherwise comply with applicable law. *Although one-sided franchise agreements are comparable to contracts of adhesion, be warned that franchise agreements are frequently not treated as contracts of adhesion because the franchisor has been required to make substantial disclosure concerning the franchise document.* **This is one way that the franchise investment laws more protect the franchisor than the prospective investor.** Consequently, the fact that a franchisor provides you a disclosure document can seriously cut against a franchisee, because the existence of the disclosure document tends to validate even the harsh provisions in the franchise agreement.

The ABC Construction Services franchise opportunity, like most current business format franchises, exerts substantial control over the activities of the franchisee, and charges substantial fees with few *promised services* or support beyond training, consultation, and a trademark license. The ABC Construction Services agreement is somewhat more generous in providing affirmative commitments to improve its methods and systems. The company makes important affirmative commitments regarding purchasing, training, continuous improvement of operations, and management of the operating fund. *In practice, other services may be provided that are not promised, but they can be altered or denied at any time in the future in the discretion of ABC Construction Services.*

Nevertheless, franchise opportunities can be valuable if, as a practical matter, the franchisor has an established market value associated with its trademark and trade name, and/or in practice the franchisor provides franchisees with a substantial business system, marketing system, and practical support which has established itself over the course of time.

New franchise opportunities, which have not stood the test of time, and do not have an established trademark or trade name, must be measured in the context of their established market value, levels of promised support, creativity of design, and total franchise fees and royalties to be charged to the franchisee.

Generally speaking, the ABC Construction Services franchise system is a relatively new franchise company. ABC Construction Services Corporation does not appear to have ever been profitable as a company, and cannot claim to have an established market demand for its trademark service. The company incurred a substantial loss during its last two years of operation, even on increasing revenues, and has no track record upon which you can base an economic purchase decision.

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At the same time, the ABC Construction Services franchise agreement, while deficient in many respects as noted herein, is significantly forward thinking in comparison with of typical franchise agreements, including those offered by most established blue chip franchisors. Nevertheless, there are many provisions I find unacceptable unless modified. For example, the company fails to provide any market protection, and claims to own your customer list.

Although the many issues I raise with the ABC Construction Services opportunity are detailed below, let me summarize the issues that need to be addressed in order for me to give a positive recommendation of this “opportunity:”

1. You should have an ownership interest in your customers. You should have an interest in the goodwill of the business.
2. You must have meaningful market protection. The reference to Service Area needs definition, and should provide some market protection.
3. Franchisor should, at a minimum, promise to indemnify and defend your right to use the Marks.
3. Dispute resolution, or at least any mediation, must be local to you, and should not limit or deny you enumerated rights of due process, such as trial by jury, shortened statute of limitations, and reduced remedies that would otherwise be available at law. The proposed agreement requires you to waive many of these important protections.
4. *Minimum royalties* should be deferred for the first 12 months.
5. (Although likely not valid in California for most purposes), there should be no non-compete applicable if you decided to allow your franchise to expire at the end of any term. The non-compete may be applicable if your sell the business to ABC Construction Services, an affiliate, or a third party in a transaction involving the sale of your goodwill in the business.
6. We need clarification of the profitability of ABC Construction Services. If you can determine ABC Construction Services’ gross royalties for the past year, and the number of franchises operating last year, you can get a fair idea of average performance across the system.
7. The cost of additional franchises seems quite high, given that no additional training would be required.
8. There need to be limits on your duties to remodel your premises, or upgrade your business investment requirements.
9. You should have reasonable renewal rights. The agreement provides no clear right of renewal.
10. While the fact that you have rights in the event of the franchisor’s default is admirable, the lack of mutuality is glaring – ABC Construction Services gets a 90-day right to cure, but you must cure defaults within 30 days or less.

**Section 2. Comparison of ABC Construction Services to the "Eight Things to Look for in a Franchise:"**

**1. Select a franchising company that is primarily interested in distributing quality products and services to ultimate consumers.** As a general rule, franchises have proven to be most successful when the franchisor is dependent upon the franchisee network for the purpose of distributing quality, products and services to ultimate consumers. For this reason, product franchises have consistently been the top performing franchise systems. When a manufacturer utilizes a franchise network to distribute its goods and services, the franchisor's primary profit motive is the sale of its goods and services, and a healthy network of franchisees is critical to moving the franchisor's product to its market. Business format franchisors, on the other hand, can lose sight of customer satisfaction, except for the purpose of driving

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volume to increase royalties. When the franchisor does not have an inventory of merchandise that must be moved, franchisors frequently lose sight of the importance of having a healthy (and profitable) franchise network.

It cannot be determined if ABC Construction Services satisfies this very important criteria of franchise selection. ABC Construction Services does not manufacture or distribute private label products. Rather, the company's purpose appears to be in establishing a comprehensive marketing system and network to efficiently provide construction consultation services through a network of franchised locations. *Currently, the company's royalty revenues are wholly insufficient to be profitable, and the company is dependent on new franchise sales – this is a very big red flag.*

Because the company does not have an established trade name, your evaluation of the business opportunity is really an evaluation of the marketing system promised, and the ability of ABC Construction Services to provide and support the marketing system. The services that ABC Construction Services provides to you are critical, and *there must be a binding promise by ABC Construction Services to deliver the services it promises.* In this regard, your purpose must be to insure that ABC Construction Services is only profitable to the extent that you are profitable.

The current franchise agreement charges a substantial up front fee \$25,000, plus an additional \$19,500 per each location you contract to open.

**2. Your franchising company should be dedicated to franchising as its primary mechanism of product and service distribution.** It is clear that ABC Construction Services is dedicated to franchising, but it is unclear to me whether the company continues to provide services directly. I prefer a franchisor have a few company owned offices to provide a benchmark against which franchise operations could be compared. Unless ABC Construction Services is "in the trenches" at the same level as franchisees, it may not be able to appreciate difficulties as you encounter them. I would want a commitment from ABC Construction Services that it will open one or more company owned offices and be held accountable for performance at the same level as ABC Construction Services franchisees. If company owned offices do not perform profitably, justification would exist for modification of the franchise design.

*There is no prohibition against ABC Construction Services selling products through other outlets. You should demand some contractual protection in this regard.*

**3. Your franchising company should produce and market quality goods and services for which there is an established market demand.** I understand that you have evaluated the services offered by ABC Construction Services, and its system of delivering these services, and that you feel this criterion is satisfied.

**4. Select a franchisor with a well-accepted trademark.** Needless to say, ABC Construction Services cannot meet this criterion. ABC Construction Services is a new franchisor and has not yet developed an established track record. The company has never been profitable. New franchise opportunities, which have not stood the test of time and do not have an established trademark or trade name, must be measured in the context of their established market value, levels of promised support, creativity of design, and total franchise fees and royalties to be charged to the franchisee. You should be able to negotiate your franchise price and terms in accordance with the franchisor's relative value. *Do not presume that price is*

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*not negotiable, because the franchisor has not proven its profitability in the market place. You should be able to argue that you are testing the waters as the initial franchisee, and should get some consideration for beta-testing the system.*

ABC Construction Services appears to have established its ability to sell franchises. When a franchisor's revenue is dependent upon the sale of new franchises, there is always a substantial risk the company will be less careful in the selection of franchisees. The franchisor may not be responsive your goal of developing continued growth from the sale of goods and services to ultimate consumers.

One of the biggest problems in franchising results from the franchisor losing its understanding that its franchise system is its distribution system, and that the ultimate consumer is the purchaser of the goods and services which the franchisor is trying to distribute. ABC Construction Services has not yet established a track record of development of ultimate consumers, and ultimate dependence on royalty income versus initial franchise fees. **Until ABC Construction Services demonstrates a primary reliance on its royalty income stream, the franchise opportunity must be considered highly speculative.**

**5. Evaluate your franchisor's business plan and marketing system. A well-established, well-designed marketing system promises substantial and complete training and overall franchisee support.** Because it doesn't have a proven track record, the value of ABC Construction Services must be based on the strength of its business programs, its training, its operational support, and the quality of the products and services that are actually delivered to the general public. From your review and investigation, you have determined that ABC Construction Services has put substantial creativity into its business plan and marketing plan. Unfortunately, the plan is not well tested, and this provides for a very high degree of risk.

**6. Your franchisor should have good relationships with its franchisees.** ABC Construction Services simply does not have a sufficient operating history to have developed a track record regarding franchisee relationships. It cannot be determined if the company has recognized an independent franchisee association or a franchisee advisory council. *ABC Construction Services' commitment to reasonableness in the franchise agreement is most encouraging, and even refreshing.*

You should get a positive indication that your franchisor is amenable to the creation of an independent franchisee association, and it will be willing to negotiate changes in the franchise agreement, and in the franchise relationship, with a franchisee association. If ABC Construction Services fails to indicate in writing its amenability to recognize an ABC Construction Services franchisee association, I cannot recommend your purchasing the franchise opportunity. Strong franchisee associations have proven an effective method to achieve successful and cooperative franchising systems.

**7. Only deal with franchising companies that provide sales and earnings projections which demonstrate an attractive return on your investment.** ABC Construction Services does not provide data upon which you can make an economic evaluation of your franchise opportunity. Further, it cannot be determined whether existing company owned locations are profitable, **and, equally important, whether the existing locations are burdened by franchise fees, royalties, software license fees and other economic burdens that will impact your operations.**

**8. Select a franchisor that supports the AAFD's Franchisee Bill of Rights and agrees to respect these rights as they apply to your franchise.** In the current market climate, this criterion knocks most franchise systems out of the box. The Franchisee Bill of Rights will only be attained by the concerted effort and organized voice of franchisees coming together. Your participation in the AAFD is an important first step towards earning respect for franchisee rights in a franchise relationship. The third section of this report compares your ABC Construction Services franchise opportunity to the Franchisee Bill of Rights.

**Section Three. Comparison to the AAFD's Franchisee Bill of Rights.<sup>a</sup>**

**1. The right to equity in the franchised business, including the right to meaningful market protection.** The ABC Construction Services agreement gets a poor grade with respect to this very important criterion. ¶2.2 & ¶2.4 deny you any protected territory, or other market protection. *This is a serious deficit.* ¶2.7d denies that you own any good will related to the franchised business. ¶7.10a requires you to turn over all customer lists to the franchisor on termination. These provisions seriously limit your claim to own any good will in the business. It should be noted that ¶7.11 does reserve asset rights to the franchisee.

¶7.10b requires you to relinquish your phone number, and the restrictive covenants (Article VIII) purport to prevent your operation of a competing business within 50 miles of your location (or any other existing location) for three years.<sup>b</sup> Even though these covenants may not be enforceable in California, a three year covenant is greater by 50% than most provisions we see. ABC Construction Services has a very unfair right to assume your business and lease upon termination. §8.2.

Your franchise agreement should be modified to state that you will invest time, energy and effort in the franchise and a part of the going concern value of the business that is developed at your location belongs to the franchisee. You can make this claim without claiming any ownership to the actual trademark. Your right to own equity in the business ties into your right to compete with the franchisor should you ever terminate your trademark license and de-identify from the ABC Construction Services' franchising symbol. Your right to equity in the franchise business will be affected by the degree of respect that is gained for certain other rights as described herein.

§2 provides no market protection. Furthermore, ABC Construction Services reserves rights to market in alternative channels of distribution (Page 1 of the UFOC, although I find no specific authority in the Franchise Agreement). While this may be appropriate, you may desire some contractual protection in this regard.

**2. The right to engage in a trade or business, including a post-termination right to compete.** You will be trained to operate an ABC Construction Services business, and should the franchise end, you should retain the right to stay in the business for which you are trained. This is especially true if ABC

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<sup>a</sup> The AAFD established its Franchisee Bill of Rights in 1993. Since that time, the AAFD has promulgated a far more complete statement of franchise practices, the AAFD's Fair Franchising Standards. Although the AAFD Standards are far more complete, we continue to use the Bill of Rights as a list of contractual protections a franchisee should seek to negotiation.

<sup>b</sup> Post termination restrictive covenants are usually void in California as contrary to strong state public policy.

Construction Services fails to support you in accordance with the standards in their marketing materials, their offering circular and their franchise agreement. This is also especially true if you perform according to your agreement, but then let your agreement end upon expiration. Your franchise agreement, like most franchise agreements, has a strong non-compete covenant that is discussed below. **You should be aware that the state of California does not generally enforce non-compete covenants, but there are exceptions. Consequently you should try to negotiate a fairer provision, or strike the non-compete covenant completely.** You are paying a lot of money to be trained to operate an ABC Construction Services business, and should you find it necessary to terminate your franchise, you should have the right to stay in business unless ABC Construction Services pays for your share of the goodwill and, in effect, pays you for the agreement not to compete.

¶7.6 in this regard is most interesting, but unfortunately the clause is also ambiguous. The clause can be read to give you the right to terminate and stay in business, and can also be read to attempt enforcement of your non-competition covenants. The probable interpretation of the clause is that you have the right to stay in business post-termination or expiration provided you continue to pay royalties until the termination date of your contract. This is probably okay, except in cases where you terminate the agreement “for cause” (due to ABC Construction Services’ material breach of contract). This clause has great potential, but also needs work for clarities sake. Note: The ambiguous nature of the clause could actually help a franchisee, but rarely do I counsel parties intent on having a good marriage to leave an unclear clause to the chance evaluation of a judge.

**3. The right to the franchisor’s loyalty, good faith and fair dealing, and due care in the performance of the franchisor’s duties, and a fiduciary relationship where one has been promised or created by conduct.** This is a sensitive and serious issue in franchising. *The ABC Construction Services agreement gets fairly strong grades for its commitment to reasonableness in exercising discretion, and in making binding commitments to deliver valuable services to franchisees.* Incidentally, courts have routinely upheld the provisions in franchise agreements that deny fiduciary duties owing between franchisors and franchisees.

There is a provision in your franchise agreement that says you indemnify the franchisor for your acts, omissions, debts and other obligations (§5.14), but there is no provision for a cross-indemnity. Indeed, this paragraph adds, “However, Franchisee is not required to indemnify Franchisor for claims resulting from Franchisor’s breach of this Agreement or other wrongs Franchisor commits.”

It is unlikely you will be able to negotiate a fiduciary relationship with your franchisor, but the issue should be raised. It is likely the franchisor will agree to cross-indemnities and to reciprocal application of certain provisions in the franchise agreement.

**4. The right to trademark provision.** ABC Construction Services does not comply with this provision.

**5. The right to full disclosure from the franchisor, including the right to earnings data available to the franchisor which is relevant to the franchisee’s decision to enter or remain in the franchise relationship.** It appears that the franchisor has qualified to sell franchises in the state of California and provided you the requisite FTC disclosure document. However, the disclosure document puts you on notice of defects in the offering, and may well deny you the right to complain of these defects if you encounter difficulties in your business. The company does not provide earnings data of use to you.

**6. The right to initial and ongoing training and support.** Although the quality of ABC Construction Services' training cannot be ascertained, it appears that ABC Construction Services does provide initial and ongoing training, and makes a substantial commitment to your ongoing training and support.

**7. The right to competitive sourcing of inventory, product, service and supplies.** The agreement provides promises of protections in this regard (§3.3). This is one of the areas of greatest abuse in franchise relationships, and this agreement presents fair provisions.

**8. The right to reasonable restraints upon the franchisor's ability to require changes within the franchise system.** The agreement is quite weak in this regard. Few limits are provided on your duty to upgrade.

**9. The right to marketing assistance.** The agreement is strong regarding advertising and marketing assistance, and provides for franchisee input. ABC Construction Services has the right, but no obligation, to create advertising co-ops.

**10. The right to associate with other franchisees.** This is not addressed in the franchise agreement or in the offering circular, except for one vague reference to "franchisee advisory council expenses" in ¶4.3. You should negotiate for the right to associate with other franchisees and make sure that ABC Construction Services is amenable to honoring and dealing with a duly organized franchisee association.

**11. The right to representation and access to the franchisor.** This ties together with your right to create a trade association, and includes communications and grievance procedures. The agreement is unclear in this area, although the reasonableness standards adopted throughout the agreement and the presence of a mandatory mediation clause (§8.4) are both significant pluses. Otherwise, the dispute resolution provisions (Article VIII B) are generally drafted against your interests, and provides for binding arbitration of all disputes, reducing the legal time limits within which you may bring a claim, waiving your rights to punitive or consequential damages, as well as waiving your defenses to object to equitable relief sought by ABC Construction Services against you.

**12. The right to local dispute resolution and protection under the laws and the courts of the franchisee's jurisdiction.** This is denied. However, the application of Washington State law (as it may be modified by California franchise laws that cannot be waived) is acceptable, since Washington State has better franchisee protections than most states.

**13. A reasonable right to renew the franchise.** *Not Provided.* The AAFD encourages the right to continuous renewal as long as you are in compliance with your agreement.

**14. The reciprocal right to terminate the franchise agreement for reasonable and just cause, and the right not to face termination, unless for cause.** The franchisor's termination rights are mainly acceptable, except that Article VII C is somewhat vague and ambiguous, and your rights to terminate (although admirable because they are granted at all!) lack mutuality. You may have common law rights, or statutory rights, in this regard.

**Section Four. Review of the Offering Circular and Franchise Agreement.**

This last section contains my specific comments with respect to the marketing materials, offering circular and franchise agreement.

**A. Review of Marketing Materials.** None provided.

**B. Review of your Offering Circular:**

1. It is unclear whether ABC Construction Services is actually in the construction consulting business, although it retains the right to do so. Therefore, it cannot be determined whether the company is profitable in this business, and how profitable. This is information that the company should be willing to provide upon direct inquiry. *Unless there is a willingness to provide relevant and available earnings data, I cannot recommend the opportunity.*

2. **Initial Franchise Fee and Start Up Costs.** This franchise is relatively expensive for a start-up. The larger picture, however, is that the company should be willing to work with their new franchisees during the time they are trying to establish a track record. Understand that you will be insulating ABC Construction Services from losses by taking all of the risk for the profitability of your franchised business. In that you are a new franchisee, ABC Construction Services should be willing to forego its profit while you are not profitable. We have been able to negotiate such concessions from franchisors in the past, especially franchisors that are in a start up mode. You should be prepared to pay ABC Construction Services reasonable compensation for the services they provide, as they have to meet their payrolls and operating expenses as well.

3. **Late Fees.** Do not seem excessive.

4. Audits. The audit provision provided in your agreement which shifts the cost of the audit if your records show an under reporting of gross sales of 2% is unreasonable (usually the shift occurs at 3%-5%).

5. I had no problem with the other fees indicated in the offering circular and franchise agreement.

6. Franchisee's Initial Investment. It is difficult to comment on this section, because I have no basis to determine whether or not the numbers provided are correct or not. You should have a conversation with the franchisor relative to what the proforma operations of the franchise should be. If the franchisor refuses to work with you in this regard, you should seriously consider not buying the franchise.

7. The product sourcing provisions of your franchise agreement are positives.

8. Lack of Market Protection. This is the single most objectionable part of the opportunity, and must be addressed. You should receive reasonable market protection so you do not face undue same brand competition. At the same time, you should respect the need for ABC Construction Services to fairly penetrate all markets – that is how brand name recognition builds. Reasonable market demographics can be agreed to, and the company can agree not to over saturate your market.

9. Lack of Trademark Protection. The company does not protect your right to use the marks. What are you renting!

10. Obligations of the Franchisor. This is a strong part of your franchise system, as the agreement provides fairly substantial support.

11. Although some of these things are commented on in other parts of this report, pay careful attention to ABC Construction Services' claim of ownership of the customer lists, databases and mailing lists. *You may be denied any equity ownership in this business.*

### **C. Review of Financial Statements.**

Stated simply, the financial statements provide little or no comfort, since the company does not appear to have been profitable from its franchise operations. It cannot be determined if company owned offices are profitable.

### **D. Review of the Franchise Agreement. (Other than discussed above).**

1. The agreement lacks recitals of why the parties are entering the relationship. Often these recitals are the strongest portion of the agreement, providing a recital by ABC Construction Services claims to own a valuable system, and reciting your intent to invest in the recited value, and your intent to receive assistance from the company.
2. ¶2.1 notes that ABC Construction Services can own units, and that it will contribute to the Marketing Fund for company owned units on a "pro rata" basis. This is not clear. It should say that company owned units would contribute to the Marketing Fund on the same basis as franchised units.
3. As noted above, ¶¶2.3 and 2.4 cause serious concern for lack of market protection. You are limited to serving clients in your "Service Area," but this term is not defined. I suggest that you should negotiate you Service Area as an exhibit to the agreement, and the franchisor should agree to limit the number of franchises it will sell in your Service Area to protect against over saturation and encroachment of your business.
4. ¶2.7c. Franchisor is not obligated to protect your right to use the Trademarks and may direct you to change the marks at your own expense. Again, what are you renting?
5. Training seems to be substantial.
6. ¶2.7d. Franchisor agrees not to modify the system in a manner that will change your fundamental status or rights under the franchise agreement. This is a significant plus.
7. ¶2.11. Franchisor claims to own your phone number, and Exhibit I purports to assign your phone number. You should strongly object to this provision.
8. ¶3.1. A positive commitment of ABC Construction Services to continue its efforts to improve upon Methods of Operations. *Note: there is no commitment to share reported data among franchisees for the good of the system.*
9. Compare ¶2.10 and 3.2. It cannot be determined whether your location (and trade dress for that matter) is important to your business. Do clients come to you, or you to them? Do you have some kind of showroom? This determination has an impact on the concerns you may have about remodeling requirements. For example, Merry Maids provides for an unlimited requirement for franchisees to maintain trade dress, but as a practical matter this only applies to uniforms and truck decals.
10. No compensation to franchisees for improvements to the system.

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11. Provisions regarding product sourcing are admirable. ¶3.3.
12. Article IV. C deals with advertising. The provisions seem to have an enlightened goal, but the drafting is somewhat vague and could be improved. The existence and authority of an ad council should be spelled out. Contribution levels appear to be appropriate.
13. Object to ¶4.7 giving franchisor the right to set maximum prices, except in specific circumstances consistent with AAFD Standards.
14. ¶5.11. What is the customer guarantee program? What are you committing to? Also, ¶6.5 allows the franchisor to provide refunds or satisfaction to any customer in its total discretion, and simply bill you. This should have some protections built in. What if your “error” was simply the result of following the manual?
15. Your renewal rights (¶7.2 through ¶7.5) are unclear. ¶7.4 makes reference to your “renewal right,” but you are not given an affirmative right to renew. On the other hand, the stated conditions are fair, and there is no requirement that you provide a general release of claims as a condition of renewal. This is a plus. Generally, we object to the requirement of giving releases, but if they are given they should be mutual. The better practice is to reserve or settle any disputes, and releases should be supported by fair consideration.
16. ¶7.10f, providing the franchisor the right of first refusal to buy the business on termination or expiration is flawed. The provision fails to establish a procedure to set a price (although the goal of a bona fide value is good), because it is based upon the transfer procedures in ¶7.15 (providing that the franchisor will meet any good faith offer). However, ¶7.10f does not involve a situation in which there is an offer to meet, and we are left with no process to complete the transfer. The AAFD proposes a concept called Right of First Purchase, that may work (in both situations).
17. *Note ¶7.10h, which, perhaps inadvertently, limits your exposure to post-termination royalties only so long as you continue to use the marks, even though your term may not have expired.*
18. *¶17.11 reserves rights to you, and is admirable.*
19. *¶17.12 prohibits “involuntary” transfers, which is a non sequitur. The result is probably okay.*
20. *¶17.13 – you should be able to transfer your existing contract. Or if a new contract is required, your transferee should at least receive a full term. A general release is required as a condition of transfer, and this is objectionable.*
21. *¶7.23 preserves the protections of California local law, effectively amending the agreement to comply. This could have a major positive impact, including shifting the venue of all disputes, and affecting your termination and post-termination rights.*
22. Article VIII, dealing with Non-competition clauses. *Note: although these clauses are generally void under California law upon expiration or termination, the law can change and there are exceptions.* This clause provides unacceptable time and distance requirements of 3 years and a fifty mile radius from your business, and all other franchised businesses, and further prohibits you from serving “any customer” whom you served while a franchisee. On the other hand, ¶8.2 recognizes the applicability of local (California) law to knock out the provision, and provides that ABC Construction Services can purchase your business (a right already reserved in ¶7.10), but ¶8.2 provides a very unfair purchase price of “the lower of the actual cost or the fair market *sic* (value) of the tangible assets of the business. Again, this conflicts with the provisions of ¶7.10, although that paragraph was also unclear.
23. Although the agreement specifically references the Franchise Offering Circular (¶8.24), ¶8.12 should also reference the UFOC, and this also applies to ¶8.22 (which attempts to indemnify ABC Construction Services from misrepresentations it makes to you).
24. Schedule 1 – Territory. Needs to define Service Area as noted above.

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25. There are several places throughout the agreement wherein ABC Construction Services promises to act reasonably. While this is admirable, in part, it also probably means that ABC Construction Services can exercise sole discretion in other instances. You need to compare each time ABC Construction Services asserts to right to exercise discretion, and determine how you need to be protected.

The foregoing constitutes my written findings and analysis based upon my Initial Franchise Opportunity Review. The Initial Franchise Opportunity Review pursuant to the guidelines established by the American Association of Franchisees and Dealers involves a preliminary analysis of your potential franchise opportunity. I have agreed to limit my research and evaluation to approximately 5 hours of time, and to provide you my written and oral comments with respect to that review. (In fact, I have spent in excess of 10 hours on this project). It is the purpose of the Initial Franchise Opportunity Review to assist you in making an informed decision on whether or not to proceed to acquire an ABC Construction Services franchise, and to establish a course of action and budget to proceed from here. I will be happy to discuss with you providing further services, and assisting in your negotiations with ABC Construction Services, within an agreed upon budget.

Very truly yours,

*Robert L. Purvin, Jr.*

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<b>AAFD Franchise Opportunity Review</b>		
<b>Contract Grading Matrix:</b>		
<b>ABC Construction Services, Inc.</b>		
<b>AAFD's Eight Things to Look for in a Franchise Opportunity</b>	<b>Possible Points</b>	<b>Points Awarded</b>
1. Select a franchising company that is <i>primarily interested</i> in distributing products and services to ultimate consumers.	100	70
2. Your franchising company should be dedicated to franchising as its primary mechanism of product and service distribution.	100	68
3. Your franchising company should produce and market quality goods and services for which there is an established market demand.	100	85
4. Select a franchisor with a well-accepted trademark.	100	65
5. Evaluate your franchisor's business plan and marketing system. A well-established, well-designed marketing system promises substantial and complete training and overall franchisee support.	100	70
6. Your franchisor should have good relationships with its franchisees.	100	65
7. Only deal with franchising companies that provide sales and earnings projections which demonstrate an attractive return on your investment.	100	60
8. Select a franchisor that supports the AAFD's Franchisee Bill of Rights and agrees to respect these rights as they apply to your franchise. <b>The Franchise Bill of Rights are each graded separately, as follows:</b>	NG	NG

<b>The Franchisee Bill of Rights:</b>		
1. The right to equity in the franchised business, including the right to meaningful market protection.	100	30
2. The right to engage in a trade or business, including a post-termination right to compete.	100	60
3. The right to the franchisor's loyalty, good faith and fair dealing, and due care in the performance of the franchisor's duties, and a fiduciary relationship where one has been promised or created by conduct.	100	80
4. The right to trademark protection.	100	60
5. The right to full disclosure from the franchisor, including the right to earnings data available to the franchisor which is relevant to the franchisee's decision to enter or remain in the franchise relationship.	100	70
6. The right to initial and ongoing training and support.	100	85
7. The right to competitive sourcing of inventory, product, service and supplies.	100	85
8. The right to reasonable restraints upon the franchisor's ability to require changes within the franchise system.	100	65
9. The right to marketing assistance.	100	85
10. The right to associate with other franchisees.	100	60
11. The right to representation and access to the franchisor.	100	70
12. The right to local dispute resolution and protection under the laws and the courts of the franchisee's jurisdiction.	100	60
13. A reasonable right to renew the franchise.	100	40
14. The reciprocal right to terminate the franchise agreement for reasonable and just cause, and the right not to face termination, unless for cause.	100	70
<b>Totals:</b>	<b>2100</b>	<b>1403</b>

**Percentage of Total Points Awarded:**

**66.8%**