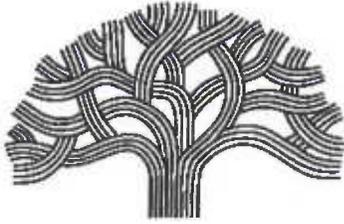


14-1371



**CITY OF OAKLAND**

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Office of the Mayor

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May 19, 2015

Councilmember Curren D. Price, Jr., Chair, Economic Development Committee

200 N Spring Street

Los Angeles, California 90012

Council File: 14-1371, 14-1371-S2

Dear Councilmember Price:

I am submitting this letter to you to comment on the matter of paid sick leave.

In Oakland, we adopted a paid sick leave policy in November 2014 when the minimum wage was raised. Voters approved Measure FF because of a desire to protect families' and the public's health. In particular, it's important to require paid sick leave with regards to food service establishments, childcare, and other businesses that interface with the public. The lack of paid sick leave hurts the health of workers, their families, and customers.

With half of the private sector workers in Los Angeles lacking access to earned sick leave, this puts the most economically vulnerable at great risk. This population, similar to Oakland's, includes many mothers and Latinos and African-Americans and already struggles to make ends meet and can least afford to stay home when they or their children are sick. This disproportionately affects the lower income, with governments and public health programs forced to pick up the cost of inadequate paid sick leave. Aside from worsened health concerns, many sick workers also fear intimidation or losing their wages or employment without clear legal mandates protecting them.

Paid sick leave is a fundamental policy that has been widely adopted by major California cities. Not just in Oakland, but also in San Francisco and San Diego, which helped inform Oakland's eventual policy. These policies demonstrated that minimum wage ordinances can and should include earned sick leave. Policies in those cities provide for earned leave beyond the three days provided in statewide legislation that takes effect in July. (The statewide legislation, while an important first step, ultimately was insufficient for our city's working parents when considering both their and their children's health over the course of a year.)

Los Angeles is the exception to this trend and while we are cognizant of cost concerns by business owners, we think that if implemented thoughtfully, it will greatly benefit the denizens of your city. Firstly, as much of the low wage workforce lacking paid sick leave are working mothers, we believe this will increase the health of the workforce and their children. Their children will maintain greater school attendance and be less likely to spread illness to their peers.

Secondly, there is a significant reduction in costs to emergency care by workers either resting or receiving lower cost preventative treatments for injury or illness. Illnesses or injuries that exacerbate as a result of lack of timely care always cost much more to treat.

Lastly, we believe that earned sick leave policies strengthen the business community. More than two in three businesses in San Francisco supported their city's earned sick day's law with few employers reporting any negative impact on profitability. We believe this will be the case when Oakland's employers are surveyed in the future, as our policy has only recently taken effect. Earned sick days are also expected to help businesses reduce one of their greatest costs, that of staff turnover. Replacing workers typically costs 20 to 200 percent of a worker's annual compensation.

Elected officials and public health agencies alike know the value of earned sick leave. Los Angeles' living wage ordinance should provide for compensated days off as Oakland's does. As you consider raising your minimum wage, I highly suggest that earned sick leave be included in order to adopt the most comprehensive and effective policy.

Thank you for your review and feel free to consult with our office with any questions or concerns on paid sick leave policies.

Sincerely,

Libby Schaaf

Mayor of Oakland

Shereda F. Nosakhare

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Honorable Richard A. Jones

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

INTERNATIONAL FRANCHISE  
ASSOCIATION, INC.; CHARLES  
STEMPLER; KATHERINE LYONS;  
MARK LYONS; MICHAEL PARK; and  
RONALD OH,

Plaintiffs,

v.

CITY OF SEATTLE, a municipal corporation;  
and FRED PODESTA, Director of the  
Department of Finance and Administrative  
Services,

Defendants.

No. 2:14-cv-00848-RAJ

**DECLARATION OF JOHN A. GORDON**

I, John A. Gordon, hereby declare as follows:

1. I am over 18 years of age, am competent to testify about the matters set forth herein, and submit the testimony below based upon personal knowledge and information.

**Professional Background and Qualifications**

2. I am the founder and principal of Pacific Management Consulting Group, a restaurant analysis and advisory consultancy. In addition to my work as a franchise business consultant, my professional background includes extensive franchise operations and financial management experience as a General Manager/Area Supervisor for a quick service restaurant chain, as a Cost Analyst and Financial Analyst for a publicly traded United States chain

1 restaurant corporation, as a Manager of Financial Analysis and Chief Financial Officer/ Director  
2 of Finance for a large international hospitality chain, and as a Senior Associate at a large  
3 management consulting firm. I graduated from Indiana University and obtained my initial  
4 professional restaurant management experience while in high school and college, progressing in  
5 the industry through more senior roles. I am a certified Master Analyst of Financial Forensics  
6 (MAFF) and specialize in complex business analytical projects.

7 3. My analytical roles and engagements have focused on restaurant and related  
8 industry business operations, management systems, and franchisor/franchisee practices. I have  
9 performed these engagements for franchisees, franchisee associations, franchisors, investors,  
10 investment banking firms, consulting firms, and private equity firms. Over the course of my  
11 professional career I have routinely worked with, and consulted for, both franchisors and  
12 franchisees alike.

13 4. I have had extensive experience in franchising, principally but not exclusively  
14 regarding the restaurant industry. My franchising experience includes operational, financial and  
15 business structure assessments of start-ups and existing franchisors, and I have worked with  
16 retail and service sector franchises on issues concerning organization structure, economics,  
17 supply chains, and franchise development system. In my consulting practice I have also worked  
18 with non-franchise small businesses, including independent hotel/casinos, print shops and other  
19 businesses in the service industry.

20 5. My detailed Curriculum Vitae, which includes a summary description of my prior  
21 work as an expert witness, is attached as Exhibit 1.

22 **Franchising Background**

23 6. The term “franchise business model” refers to a long-term business relationship in  
24 which one company (the franchisor) grants other companies (the franchisees) the right to sell  
25 products under its brand, using its business model and intellectual property, generally in  
26 exchange for ongoing royalty payments and other fees. Although the terms of franchise  
27 agreements differ from company to company and industry to industry, this basic model is at the

1 core of every franchise relationship.

2 7. Franchises account for one-third of all retail sales in the United States, totaling  
3 over \$1.5 trillion. There are approximately 750,000 operating franchise units in the country  
4 employing over eight million people. Robert W. Emerson, "Franchise Contract Interpretation: A  
5 Two-Standard Approach," 2013 Mich. St. L. Rev. 641, 642 (2013) ("Emerson").

6 8. I have been retained as an expert to state and explain the basis for my opinion  
7 that, as a general matter, franchisees in a given industry are often better able to absorb  
8 incremental minimum wage increases than independent small businesses in the same industry are  
9 able to absorb such increases. Attached hereto as Exhibit 2 is a list of documents I reviewed in  
10 preparing this declaration.

11 **Summary of Findings**

12 9. Franchisees generally have many advantages provided by the franchise business  
13 model that are not available to independent small businesses. Although the terms of franchise  
14 agreements differ and not every relationship includes each of the following benefits, common  
15 advantages to franchisees include: 1) a strong brand identity that reinforces and strengthens  
16 franchisee location sales, 2) access to detailed operating procedures and best practices  
17 concerning every aspect of the business, 3) economies of scale in purchasing and other costs, 4)  
18 access to relatively sophisticated market research, 5) cooperative marketing activities, sometimes  
19 at the national level, directed by experienced franchisors, 6) access to financing on more  
20 favorable terms than may otherwise be available, 7) training, both pre-opening and ongoing, and  
21 8) a social network that enables franchisees to share best practices and other useful information  
22 more easily. In addition to these factors, franchisors also have the ability to use their greater  
23 financial resources to support the franchise by aiding franchisees during times of business stress.  
24 Because of these advantages, franchisees and franchisors are better able than independent small  
25 businesses to identify and respond to changed business conditions, including regularly scheduled  
26 minimum wage increases.

1  
2 **The Franchise Business Model Provides Many Benefits To Participants, Making Them**  
3 **Better Able To Manage Higher Minimum Wage Rates.**

4 10. Each franchise relationship differs and there is great diversity in the franchise  
5 business model. Although the franchise model provides benefits to all franchisees, it does so in  
6 different proportions and magnitudes. Attached hereto as Exhibit 3 is a publication prepared by  
7 plaintiff International Franchise Association (“IFA”) that describes a broad range of business  
8 benefits that the franchise model provides to franchisees. In this document, the IFA identifies  
9 many of the benefits that I discuss here as advantages of the franchise business model that enable  
10 franchisees and franchisors to more easily absorb or otherwise accommodate scheduled increases  
11 in labor costs.

12 11. ***Strength of Brand:*** Many franchises have established a high level of brand  
13 awareness and a strong brand identity based on the franchisor’s efforts, including advertising and  
14 identification of the franchisor’s trademarks, as well as the operations of the brand’s franchisees.  
15 This means that from the moment a franchisee opens a new store, it is able to sell familiar  
16 products under a recognized brand to an established customer base. Independent small  
17 businesses do not have this platform and must start at ground zero in building their business. For  
18 example, a Subway franchisee operator will enjoy the cumulative benefit of the market identity  
19 of all of the other stores in the brand network, as well as a long-running advertising campaign,  
20 that will often lead to higher revenues than would be immediately available to an independent  
21 sandwich shop. In my experience, this benefit often enables franchised operations to remain in  
22 business in difficult areas and business environments when otherwise similarly situated  
23 independent businesses have been forced to close.  
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1           12.     ***Operational Guidance and Control:*** Many franchisors have an operations  
2 manual that they routinely provide to franchisees. These manuals are created based on the  
3 franchisor's accumulated best practices, operations and management standards, and give  
4 participants in the franchise business model a proven pathway to execute profitably and  
5 efficiently in the competitive marketplace. The typical franchisor's operations manual is  
6 hundreds of pages long and accumulates policies, procedures and plans that are the heart of the  
7 franchise operation. In some franchise relationships, the operational standards outlined by  
8 franchisors are so extensive as to constitute control over the operations of a franchisee's  
9 business. Exhibit 4, attached hereto, is the table of contents from the operations manual  
10 summary from AlphaGraphics, the franchisor of one of the named franchisee plaintiffs in this  
11 action.<sup>1</sup> The table of contents shows a wealth of information on operations, marketing, financial  
12 management, human resources, and information technology "best practices" that have been  
13 developed over time and that enable AlphaGraphics and its franchisees to benefit from efficient  
14 operations based on the accumulated knowledge of the franchisor and its other franchisees.

17           13.     The operations manual typically contains topics associated with most business  
18 practices needed to open and operate the business, including operations, marketing, financial  
19 management, human resource management, and other disciplines. A recent survey of 100  
20 randomly selected fast food franchise agreements showed that 99 referred to a franchisor-issued  
21 operations manual that set forth required procedures or made recommendations about best  
22 practices. Emerson, 2013 Mich. St. L. Rev. at 691. In my experience, having access to such an  
23 operations manual means that a franchisee does not have to learn management basics so more  
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<sup>1</sup> The table of contents is included in the AlphaGraphics franchise disclosure document, which  
some states require be filed with a state agency when a franchisor does business within the state.

1 time can be spent on building business-to-business and client relationships, executing local store  
2 marketing programs, and finding and developing staff.

3 14. The independent small employer usually has no comparable resource. It must  
4 develop standard operating procedures through its own trial-and-error experience over a period  
5 of years. In my experience, independent small businesses are often founder-driven, and those  
6 founders typically have skills in some areas but not across the business discipline spectrum in all  
7 business disciplines in which a large corporate franchisor commonly operates. For example, I  
8 have provided consulting services to an independent pizza operator; his pizza product quality and  
9 creative culinary skills were excellent, but he could not understand menu pricing or accounting  
10 for the small offsite concession he ran, and operating losses in that concession weighed down his  
11 business. He would have benefitted from the type of guidance typically found in franchise  
12 operations manuals.  
13

14 15. In addition to this operational guidance, the franchise business model often  
15 involves extensive ongoing oversight, inspection, and even control over franchisee operations by  
16 franchisors (by contract or as a result of economic pressures, or both), to which independent  
17 small businesses are not subject. Franchisor oversight and control does not end when a new  
18 franchisee location is opened, but continues over the life of the franchisee agreement. Many  
19 franchisors, for example, create elaborate tracking and monitoring programs and employ staff  
20 that serve as franchisee coaches and consultants. The theory is that franchisees will obtain  
21 greater business stability in exchange for sacrificing economic and operational independence.  
22

23 16. *Economies of Scale in Purchasing and Other Costs:* The franchise model can  
24 provide economies of scale in purchasing and other costs, often lowering the cost of goods  
25 purchased, operational supplies, contracted services and construction, information technology,  
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1 equipment, and other capital investment costs that franchisees must pay. Independent small  
2 business owners do not have this advantage, and typically must pay for goods and services at  
3 higher “street account” rates, which are higher than the rates franchisees pay because the  
4 independent cannot command similar volume discounts. My experience is that the vast majority  
5 of independent business entities are charged these higher rates on their goods and supplies from  
6 their vendors, and it weighs down their store profitability accordingly – and their ability to  
7 accommodate scheduled labor cost increases.  
8

9       17. **Access to Market Research:** The franchise business model often provides  
10 franchisees access to relatively sophisticated market research, addressing topics such as customer  
11 brand perceptions, site selection, store layout, product mix, and regional preferences.  
12 Independent small businesses typically do not have access to such sophisticated market research.  
13 Exhibit 3, the IFA’s Introduction to Franchising publication, describes the importance of this  
14 market research. In my experience, such research helps franchisees and franchisors determine  
15 where to open a business and identify prospective customers, allowing for targeted marketing  
16 and, again, greater market stability.  
17

18       18. **Marketing Assistance:** Many franchisees fund and participate in national and  
19 local brand building marketing activities, often at the direction of their franchisors. Under these  
20 programs, the collective action of numerous franchisees benefit each individual franchisee by  
21 creating far larger marketing campaigns than would be possible for each separate franchise  
22 operation acting alone. Having the franchisor direct the national marketing campaign also results  
23 in centralized control. The survey of 100 randomly selected fast food franchise agreements to  
24 which I previously referred showed that in 63, the franchisor committed to run advertisements  
25 concerning the franchisee’s products and services. Emerson, 2013 Mich. St. L. Rev. at 696.  
26  
27

1 Inset One below provides a description of the Bright Star Marketing program from plaintiff  
2 Lyons' franchise agreement. Excerpts of the Bright Star franchise agreement are attached hereto  
3 as Exhibit 5.

4 **Inset One: Bright Star Marketing Excerpt**

5  
6 **8. ADVERTISING AND MARKETING**

7 **8.1 General Marketing Fund.** Franchisor or its designee will create, administer, and  
8 maintain a general marketing fund ("General Marketing Fund"). Franchisor will use General  
9 Marketing Fund contributions to develop, produce and distribute national, regional and/or local  
10 advertising and to create advertising materials and public relations programs which promote, in  
11 Franchisor's sole judgment, the Licensed Marks, any other marks owned by Franchisor or its  
12 affiliates, and/or the products and services offered by System Franchisees. Franchisor has the  
13 sole right to determine contributions and expenditures from the General Marketing Fund, or any  
14 other advertising program, and sole authority to determine, without limitation, the selection of  
15 the advertising materials and programs; provided, however, that Franchisor will make a good

16 faith effort to expend General Marketing Fund contributions in the general best interests of the  
17 System on a national or regional basis. Franchisor may use the General Marketing Fund to  
18 satisfy any and all costs of maintaining, administering, directing, preparing, and producing  
19 advertising, including the cost of preparing and producing Internet (including by using social  
20 media platforms), television, radio, magazine and newspaper advertising campaigns, the cost of  
21 direct mail and outdoor billboard advertising; the cost of public relations activities and  
22 advertising agencies; the cost of developing and maintaining an Internet website; the cost of  
23 developing and maintaining a social media presence; and personnel and other departmental costs  
24 for advertising that Franchisor internally administers or prepares. Franchisor also may use the  
25 General marketing Fund to cover costs and expenses associated with the Annual Conference and  
26 branch leadership conference, including costs related to productions, programs and materials.  
27 Nevertheless, Franchisee acknowledges that not all System Franchisees will benefit directly or  
on a pro rata basis from such expenditures. While Franchisor does not anticipate that any part of  
the General Marketing Fund contributions will be used for advertising which is principally a  
solicitation for franchisees, Franchisor reserves the right to use the General Marketing Fund for  
public relations or recognition of the BrightStar brand, for the creation and maintenance of a web  
site, a portion of which can be used to explain the franchise offering and solicit potential  
franchisees, and to include a notation in any advertisement indicating "Franchises Available."

19. In addition to national marketing, most franchisors provide detailed local store  
marketing programs to their franchisees that serve as guides to business visibility and customer-  
seeking activities. Local store marketing means block-by-block, business-by-business outreach  
to introduce a franchisee's business and services offered. This guidance is available to  
franchisees whether they are in a national advertising market or not. An example of this activity

1 is hotels reaching out to airline offices to book room blocks for flight crews and displaced  
2 passengers. Having a local store marketing plan and a brand name provided by the franchise are  
3 important to securing such contracts.

4 20. Finally, many franchisors – such as Holiday Inn and Choice Hotels – provide their  
5 franchisee brands use of corporate websites and centralized reservation systems. Holiday Inn,  
6 for example, has had its Holidex Reservations System in place for decades, and Choice Hotels  
7 has its choiceADVANTAGE System. Attached as Exhibit 6 are excerpts from Holiday Inn and  
8 Choice Hotels Franchise Disclosure Documents describing these reservation systems. These  
9 reservation systems provide as much as half of a typical hotel’s annual room bookings. *See* HVS  
10 Inc., <http://www.hvs.com/Library/Articles/> and JMBM Global Hospitality Group,  
11 <http://www.hotellawyer.com/resource-center.html>. Many independent hotels lack such an online  
12 reservation system; and even where they exist, they cannot generate web traffic comparable to  
13 that of the website of a large national chain supported by extensive advertising and brand  
14 recognition. This benefit is present in any industry in which a substantial portion of business is  
15 generated through the internet.

16 21. ***Improved Access to Business Financing:*** The franchise model often provides  
17 participants easier access to start-up and expansion financing. The IFA’s Introduction to  
18 Franchising publication, attached as Exhibit 3, notes the importance of this financing support. A  
19 minority of franchisors have in-house lending entities that provide funding or offer loan  
20 guarantees to franchisees. For example, Marco’s Pizza provides in-house financial plans and  
21 guarantee programs to spur franchisee growth and survival. Others provide approved vendor  
22 lists to banks and other lending groups who have developed contacts with the franchise brands  
23 and thus already have more information about the soundness of a franchisee loan applicant than  
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1 an independent business owner who comes to the bank with a new, untested business model.<sup>2</sup> As  
2 a result, franchisees may be able to obtain financing where an independent small business in the  
3 same industry would be unable to do so, or obtain financing on better terms than would  
4 otherwise be available. Easier access to financing is a tremendous advantage the franchisee  
5 group has versus the independent small business group. Inset Two below is an excerpt from the  
6 franchise agreement between Alphagraphics and plaintiff Stempler describing the franchisor's  
7 commitment to help the franchisee obtain financing. Excerpts from the Alphagraphics franchise  
8 agreement are attached hereto as Exhibit 7.  
9

10 **Inset Two: AlphaGraphics Financing**

11  
12 **C. FINANCING.**

13 FRANCHISEE acknowledges and agrees that FRANCHISEE has the sole responsibility  
14 for securing all financing necessary for FRANCHISEE to construct, develop and operate the  
15 PRINTSHOP. COMPANY agrees to suggest sources of financing to FRANCHISEE and, at  
16 FRANCHISEE's request, to assist FRANCHISEE in completing the necessary applications for  
17 such financing.

18  
19 22. Franchisors build relationships with the lending community and share information  
20 with those lenders, as an essential element of their store development projects. For example,  
21 Wendy's began a large refranchising effort in 2013 whereby over 400 company units were sold  
22 to franchisees. Wendy's first priority was to sell to existing franchisees, and its sponsorship  
23 helped secure offers to finance. In addition, Wendy's facilitated a line of credit facility through  
24 GE Capital for franchisees that needed to remodel.<sup>3</sup>

25 <sup>2</sup> Several large franchising industry forums and publications exist to exchange information about  
26 lenders and financing, including the Restaurant Finance and Development Conference and the  
27 Franchise Times publication, among others.

<sup>3</sup> See [http://finance.yahoo.com/news/ge-credit-facility-wendys-rebranding-124004127.html;\\_ylt=A0SO8xW.OSJU.G0AGwNXNyoA;\\_ylu=X3oDMTEza21lZWJ1BHNIYwNzcgRwb3MDNARjb2xvA2dxMQR2dG1kA1ZJUDUyMl8x](http://finance.yahoo.com/news/ge-credit-facility-wendys-rebranding-124004127.html;_ylt=A0SO8xW.OSJU.G0AGwNXNyoA;_ylu=X3oDMTEza21lZWJ1BHNIYwNzcgRwb3MDNARjb2xvA2dxMQR2dG1kA1ZJUDUyMl8x)

1           23.     **Training:** Most franchisors provide orientation instruction to their franchisees,  
 2 including practical on-the-job training and business training on general management skills  
 3 necessary to operate the business. The training is typically multi-week, with potential  
 4 franchisees paying their own way to attend. Independent small businesses generally are not  
 5 provided such specific training before they open; and, even if they were able to locate and pay  
 6 for similar training, it would not be as specific to the business model. Inset Three below is  
 7 language from one of the plaintiffs' franchise agreements describing this initial training. A more  
 8 complete excerpt is included in Exhibit 6.  
 9

10           **Inset Three: AlphaGraphics Initial Training**

11           4.     **TRAINING AND SUPPORT.**

12           A.     **INITIAL TRAINING.**

13           Prior to the opening of the PRINTSHOP, COMPANY agrees to furnish an initial training  
 14 program on the operation of an ALPHAGRAPHICS® Printshop to the Managing Owner, and  
 15 one other employee of FRANCHISEE.

16           Approximately three (3) to four (4) weeks of training will be furnished at one or more of  
 17 COMPANY's designated training centers or an ALPHAGRAPHICS® Printshop owned and  
 18 operated by COMPANY, one of its Affiliates or a designated franchisee. The Managing Owner  
 19 and one other employee of FRANCHISEE will attend and complete all phases of the initial  
 20 training program to COMPANY's satisfaction and participate in all other activities required to  
 21 operate the PRINTSHOP. FRANCHISEE agrees to replace any Managing Owner or employee  
 22 who does not complete the training program to the satisfaction of COMPANY.

23           24.     In addition to initial training, franchisors often provide and/or require ongoing  
 24 training and updates over time, providing an additional benefit and advantage that small  
 25 independent businesses do not have. The Emerson franchise agreement study described above  
 26 showed that every one of the 100 agreements reviewed provided for some form of franchisor  
 27 training, and 94 provided for consulting services provided by the franchisor after initial training.  
 Emerson, 2013 Mich. St. L. Rev. at 691. For example, plaintiff Lyon's BrightStar franchise  
 agreement provides a category of "Ongoing Assistance," including "[r]egular consultation and

1 advice in response to Franchisee's inquiries about specific administrative and operating issues."  
2 Exhibit 5 (IFA-0123).

3           25.     ***Social Network Support:*** The franchise model provides an important social  
4 support structure that benefits franchisees by facilitating sharing of ideas and best practices, and  
5 by creating a networking platform among franchisees who operate similar businesses and are  
6 confronting similar difficulties. In addition to this informal support, some franchisors sponsor  
7 annual update meetings and conventions, where information and new learning is exchanged.<sup>4</sup>  
8 Some franchisees have franchisee associations sponsored by franchisors that convey many of the  
9 benefits described above – such as the Dunkin Donuts Franchisee Association and the Burger  
10 King National Franchise Association. Inset Four below is an excerpt from the Holiday Inn 2014  
11 Franchise Disclosure Document that describes the Holiday Inn Franchisee Owners Association.  
12 A more complete excerpt of the 2014 Holiday Inn Franchise Disclosure Document is attached  
13 hereto as Exhibit 8.  
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16           **Inset Four: Holiday Inn Owners Association**

17           The IHG Owners Association (IHG Owners Association) was created by Holiday's predecessor in  
18 interest in 1956. The IHG Owners Association is endorsed by Holiday and SCH and receives some  
19 sponsorship from SCH. Under the terms of the License, you, other System licensees, and Holiday are  
20 eligible for membership in the IHG Owners Association and are entitled to vote at its meetings on the  
21 basis of one hotel, one vote. The IHG Owners Association represents the franchisee community of  
22 Holiday's various franchise systems and, through a series of committees, give advice and counsel to  
23 Holiday regarding the expenditures for the marketing, reservations and IHG Rewards Club Rewards  
24 funds. Holiday and SCH personnel administer the system funds and report system funds activities to the  
25 IHG Owners Association. The IHG Owners Association also provides educational opportunities to its  
26 members, organizes regular meetings and provides additional membership benefits. The address,  
27

94

24           26.     My experience has been that independent small business groups generally do not  
25 have such well-defined associations providing business training and education, meaning it is up  
26

27 <sup>4</sup> For example, BrightStar notes the potential of both an annual conference and an annual branch  
leadership conference, with mandatory franchisee or staff attendance. Exh 5 (excerpt from  
BrightStar 2014 Franchise Disclosure Document, IFA-0140).

1 to each individual business owner to build or take advantage of such groups. Business network  
2 exchange groups and professional associations exist, of course, but they are not brand-specific,  
3 and they are necessarily more generalized in content. Franchisees and franchisors thus gain  
4 another advantage, because this common knowledge base enables participants to react faster and  
5 in a more unified and organized way than small independent businesses can react to address  
6 common business concerns (such as anticipated increases in labor costs).  
7

8       27. **Franchisor Support:** Another advantage of the franchising model is that  
9 corporate franchisors are often able to assist their franchisees with monetary and non-monetary  
10 assistance and otherwise to enable them with survive periods of business start-up or business  
11 stress, whatever the source. In some instances, franchisors may mandate that franchisees take  
12 certain actions or change business practices in response to changed circumstances or to suit  
13 franchisor purposes. In other cases, franchisors may respond to franchisee requests for  
14 assistance. Examples of the latter include franchisors providing financing for capital  
15 improvements or renovations, or waiving burdensome requirements of franchise agreements for  
16 particular franchisees. Franchisors also have the ability to waive or reduce royalty payments, or  
17 restructure debt obligations, for struggling (or non-struggling) franchisees. Because of the costs  
18 and time required to identify, train and establish new franchisees and the negative reputational  
19 consequences of having franchisees fail, it is not in a franchisor's interest to have a high rate of  
20 turnover among franchisees, much less see franchise locations close. Thus, there are a broad  
21 range of circumstances in which a self-interested franchisor might choose to provide support to a  
22 struggling franchisee, even though such support is rarely if ever guaranteed. Because franchisors  
23 generally do not want to encourage their franchisees to request such assistance or to create any  
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1 sense of disparate treatment, it is generally the case that franchisors that choose to provide  
2 assistance to struggling franchisees also take steps to ensure that the assistance is confidential.

3 28. For this reason, the frequency and extent of franchisor support for franchisees is  
4 impossible to accurately survey and no one can be sure how often it is provided. Nonetheless,  
5 franchisors have been willing to publicize such assistance several instances that are likely  
6 indicative of the type of support available. For instance, attached hereto as Exhibit 9 is a 2013  
7 article describing a \$40 million program by Choice Hotels International, which operates the  
8 Comfort Inn brand under which one of the plaintiffs in this case operates, to renovate Comfort  
9 Inn locations around the country. According to the article, the company intends to “assess  
10 renovation needs at each Comfort property” and “set[] a property improvement plan with which  
11 each property must comply.” The article adds that part of the program is a “\$40 million  
12 incentive program enabl[ing] hotels to fund renovation through promissory notes, which will be  
13 forgiven once work is completed and if hotels then remain in the Comfort system for a set  
14 amount of time.”  
15

16  
17 29. Burger King has also instituted at least one formal program to provide financial  
18 support to struggling franchisees. Attached hereto as Exhibit 10 is an article describing the  
19 “Burger King Franchisee Financial Restructuring Initiative to address the financial challenges of  
20 financially distressed franchisee operations.” According to the article, “[t]he initiative will assist  
21 a number of franchisees as they restructure their business so they can meet their financial  
22 obligations, focus on restaurant operational excellence, reinvest in their business and return to  
23 profitability.” The article reports that the Burger King Corporation has hired a third-party  
24 financial services firm “[t]o help our franchisees bring resolution to these issues – which include  
25 short-term liquidity, the ability to meet franchisee obligations and the need to reinvest in their  
26  
27

1 business.” The CEO of the corporation is quoted as saying “[c]learly one of the most pressing  
2 issues facing the Burger King system today is the financial distress of a number of our  
3 franchisees . . . . Addressing this issue and turning it into an opportunity to recapitalize these  
4 franchisees and enable them to emerge stronger with more robust financial structures will set us  
5 up for success. This is a top priority to enable us to focus on quality and on delivering an  
6 outstanding experience to our customers.”  
7

8 30. Attached hereto as Exhibit 11 is a similar article describing ways in which the  
9 Quiznos franchisor worked to aid franchisees and reduce franchisee costs. According to the  
10 article, in response to complaints from franchisees, the franchisor “has worked to reduce food  
11 costs by as much as 4 percent, open communication channels with franchisees and test new  
12 products.” In addition, “Quiznos has hired a new advertising agency . . . to produce edgier ads,”  
13 and the CEO of the company “has met with franchise owners, delivers a weekly voice mail call  
14 to discuss operating developments, and spends late-night hours answer franchisee e-mails. He  
15 also created a Web site to assist franchisees and plans to give each a free computer to help them  
16 with a new online ordering program.”  
17

18 31. For all of the reasons described above, I believe that franchisees have financial  
19 and other resources not available to independent small businesses in the same industries. These  
20 benefits, including structural benefits inherent to the franchise model, informal benefits of being  
21 associated with an established brand, and the financial resources of the franchisor make  
22 franchisees better able to identify and respond to changed circumstances, such as a scheduled  
23 increase in labor costs.  
24  
25  
26  
27

1 **Multi-Unit Franchising**

2 32. Multi-Unit franchisees – franchisees that own more than one location in a  
3 franchise network – are a fast growing subset of the franchising world and have many  
4 advantages in addition to those described above. Nationally, restaurant, food service, and retail  
5 food franchises represent about 33.0% of all franchise establishments, 56.3% of all individuals  
6 employed by franchises, and 38.4% of the economic output of franchises.<sup>5</sup> Data for Seattle  
7 shows that of the 204 franchised restaurant locations in the City, 136 or 66% are owned by a  
8 franchisee who owns at least two locations within the franchise network in Washington State,  
9 and more than half of Seattle fast food franchises are owned by a franchisee owning at least two  
10 locations within the City of Seattle.<sup>6</sup> Of the franchisees with multiple units in Washington State,  
11 the average number of restaurants operated by a common owner is five. The largest individual  
12 franchisee operates 30 Jack in the Box locations, followed by another that operates 22 Jamba  
13 Juice stores.  
14  
15

16 33. Franchisors tend to favor multi-unit franchisees because they are typically better  
17 run and more established organizations with greater capabilities than single unit franchisees.  
18 Multi-unit franchisees do not have the same need for training and support when they open new  
19 locations because they are already familiar with the brand’s business model and have a  
20 demonstrated ability to operate a franchise. Moreover, because of their track record, multi-unit  
21 franchisees generally have better access to capital and lower cost funding. The ability of multi-  
22 unit to spread overhead expenses among multiple stores also increases their overall profit.  
23  
24

25 <sup>5</sup> IHS Economics, Franchise Business Economic Outlook for 2014, at p. 3 (May 30, 2014),  
26 available at: <http://www.franchise.org/industrysecondary.aspx?id=10152>. Document prepared  
for IFA Education Foundation.

27 <sup>6</sup> Per FRANdata. FRANdata is a Virginia-based data and consulting company that studies and  
documents the franchising industry.

1 Taking into account administrative expenses, multi-unit franchisees typically have higher store-  
2 level profits.

3 **Franchisor Screening Process Is Intended To Produce Strongest Possible Franchise**  
4 **Operators**

5 34. The franchise industry routinely reports that only a very small proportion of  
6 franchisee applicants are accepted and approved for franchise ownership. Only about 1% of  
7 “leads” make it all the way to franchise opening.<sup>7</sup> As part of the franchise business model,  
8 franchisors typically develop and maintain an extensive screening program, often using  
9 personality and business aptitude tests, to select the most desirable franchisees. In my  
10 experience, franchisors typically require that full business plans be prepared and submitted early  
11 in the franchisee evaluation process. The screening process is usually more rigorous for larger,  
12 well-established national franchises. This screening benefits the franchisor by producing a  
13 stronger, more flexible franchisee population. In turn, the screening benefits franchisees by  
14 ensuring that a viable business plan, screened by an experienced franchisor, is created early on  
15 and can serve as a template for later business opening and expansion. Independent small  
16 businesses do not undergo the same process.  
17

18  
19 35. Due to the rigor of the screening process, the franchise business model is designed  
20 to produce the most qualified group of franchisees possible. Combined with the ongoing nature  
21 of franchisor oversight and support, this has the effect of ensuring that franchisees will  
22 effectively operate their businesses, thereby providing reputation uplift to the franchise network  
23 as a whole and each franchisee separately. Independent small businesses do not have similar  
24

25  
26 <sup>7</sup> Improve Closing Ratios, Award Better Qualified Franchisees, Brian E. Miller, CFE,  
27 Franchising World, 2010, <http://www.franchise.org/Franchise-Industry-News-Detail.aspx?id=52575>.

1 consumer brand reputation uplift except through years of operation and providing good service  
2 on their own.

3 **Business Success Is Driven By Many Factors; the Minimum Wage Rate Is But One Factor**

4 36. I have found that several operational and financial factors drive successful  
5 business economic performance. The strength of the brand reputation, its management systems,  
6 and the quality of the staff providing customer service are clearly vital. From an economic profit  
7 standpoint, the relative sales level per store or location, the average retail ticket paid per  
8 customer, the amount of cost of debt invested in the business, the relative size of the capital  
9 investment, and the free cash flow that the business produces, are the key driving financial  
10 factors.<sup>8</sup> Labor costs are real expenses, but are only one factor.

11  
12 37. With respect to labor cost itself, the starting wage rate is but one input factor, and  
13 not the most important cost driver. In every organization, including franchise operations, labor  
14 costs are the sum of hourly employee costs and salaried management and owner wage costs,  
15 both in terms of direct labor costs (e.g., hourly employee and store management direct wages  
16 paid) and indirect labor costs (e.g., social security, workers compensation, federal and state  
17 unemployment taxes, medical and dental costs, etc.). Labor costs for store management are  
18 typically based on either a higher hourly wage or fixed salary. Ownership takes either a salary or  
19 a draw, a cash payment that comes from accumulated business cash flow.

20 38. The direct hourly employee wage expense is fundamentally the sum of the  
21 average wage times the number of hours worked. Where the franchisor permits its franchisees to  
22 retain a meaningful degree of control over cost and income factors (such as employee staffing  
23  
24

25  
26 <sup>8</sup> Free cash flow is store level profit (earnings before interest, taxes, interest depreciation and  
27 amortization (EBITDA basis) less franchisee overhead, less interest, taxes, franchisee overhead,  
principal and loan corpus amortization, less future years remodel, IT and other business capital  
expenditures.

1 levels and performance standards and product pricing), the franchisee can plan for, and offset,  
 2 the economic impact of upcoming scheduled wage increases by adjusting these other cost and  
 3 income variables – even assuming no increase in productivity resulting from a better paid  
 4 workforce. Moreover, although the starting minimum wage may affect a business's average  
 5 wage rate, other unrelated factors will influence the average wage rate as well, including the mix  
 6 of employees hired, their turnover rate, their productivity, and the nature of their job  
 7 requirements. The wage rate needed to attract and retain high-value employees in a particular  
 8 labor market is an important factor affecting a business's average wage rates as well.

10 39. In the many operational reviews and financial analysis for new and existing  
 11 restaurants and other businesses that I have prepared and reviewed over my career, I cannot  
 12 recall one that listed starting minimum wage as a major financial model calculation input. Of  
 13 course, virtually all have a total labor cost component, typically as a percentage of sales. But  
 14 minimum wage is just one input to wage costs that are also driven by other influences.

16 40. Labor costs will likely rise in Seattle as the minimum wage increases required by  
 17 the ordinance take effect (although some may say that those costs could be counterbalanced, at  
 18 least in part, by increased efficiency or productivity). For the reasons stated above, though,  
 19 franchisees as a group will likely be better able to manage the increased costs because of their  
 20 participation in the franchise business model.

22 **The Independent Small Business Group Must Compete For Employees**

23 41. In the City of Seattle, an estimated 102,177 employees currently earn less than  
 24 \$15/hour.<sup>9</sup> Because the minimum wage will rise across the City, the independent small business

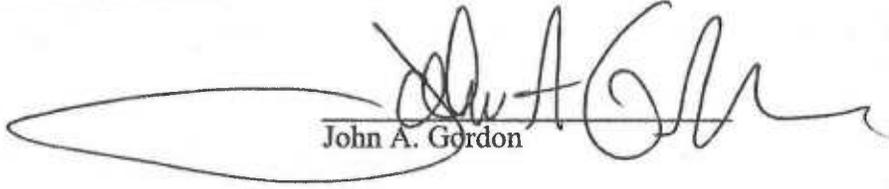
26 <sup>9</sup> Puget Sound Sage Group Study, April 2014. Employment estimates per State of Washington,  
 27 Employment Security Department, available at:  
[http://www.pugetsoundsage.org/downloads/Economic%20and%20Equity%20Outcomes%20of%20a%20\\$15%20Minimum%20Wage%20in%20Seattle\\_1.pdf](http://www.pugetsoundsage.org/downloads/Economic%20and%20Equity%20Outcomes%20of%20a%20$15%20Minimum%20Wage%20in%20Seattle_1.pdf)

1 group will have to compete with employers who are paying increased wages on the more  
2 accelerated minimum wage schedule in order to retain and attract employees. Thus, even if there  
3 is not a perfect linearity between the two groups, many independent small businesses will decide  
4 to raise wages to some extent to remain competitive, even if not required to do so by the  
5 schedule set forth in the Ordinance. Most employees seek improvement of pay and conditions,  
6 and many employees will chase the highest wages.  
7

8 42. This competitive effect will cause the independent small business group to raise  
9 starting and base wages to some extent at the same time that other businesses in the Seattle  
10 market do so. This will have the effect of lowering or eliminating the wage gap that plaintiffs  
11 fear would create significantly higher labor costs for franchisees and result in a need for  
12 franchisees to raise prices and lose market share.  
13

14 I declare under penalty of perjury of the laws of the United States that the foregoing is  
15 true and correct.

16 Executed on 1 October 2014, in San Diego, California.

17  
18   
19 John A. Gordon  
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**LIST OF EXHIBITS**

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1. John A. Gordon CV
2. List of Documents Referenced
3. Introduction to Franchising, IFA Educational Foundation
4. AlphaGraphics Operations Manual Series, 2014 Franchise Disclosure Document
5. Excerpts of BrightStar Franchise Agreement
6. Holiday Inn and Choice Hotels Reservations Systems
7. Excerpts of AlphaGraphics Franchise Agreement
8. Description of Holiday Inn Franchise Council from 2014 Franchise Disclosure Document
9. Article on Choice Hotels Renovation Financing Assistance
10. Article on Burger King Corporation Franchisee Assistance
11. Article on Quiznos Franchisee Assistance

# Exhibit 1

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# **Exhibit 1**

## Pacific Management Consulting Group Chain Restaurant Analysis and Advisory



### **John A. Gordon, MAFF**

Restaurant Subject Matter Expert

5980 Mission Center Road, Unit A, San Diego, CA 92123  
Office, 858 874-6626, Mobile, (619) 379-5561  
Email: [jgordon@pacificmanagementconsultinggroup.com](mailto:jgordon@pacificmanagementconsultinggroup.com)  
Website: [www.pacificmanagementconsultinggroup.com](http://www.pacificmanagementconsultinggroup.com)

### **Curriculum Vitae**

Functional Overview: Restaurant subject matter expert. Restaurant sector operations and financial analysis. Management systems creation, assessment and execution; organizational, and financial management expert.

Typical Project Focus: litigation support, research, equities analysis, earnings analysis, revenue and expense analysis, M&A due diligence, special projects, economic and business feasibility studies, new business start-up, revenue enhancement, cost containment, profitability improvement, and organizational transformation advisory work.

Typical Clients: investors, management consulting firms, attorneys, franchisee associations, franchisees, research firms and start up businesses.

Project and Subject Matter Experience: Quick Service Restaurants, Casual Dining Restaurants, and Fast Casual Restaurant sectors. Business and economics research. Financial and operational analysis, earnings forecasting, planning, operational and capital budgeting, financial and operational reporting. Expert research and consulting litigation support. Operational and management systems assessment, improvement and implementation. Restaurant, hospitality, and foodservice sector organization management systems and procedures development. Balanced scorecard metrics and benchmarking. Business due-diligence and business plan creation. Operational analysis, revenue enhancement and cost containment, strategy creation and execution. Site selection and real estate analysis; marketing, information technology, human resources systems. Management and business improvement.

#### Summary Project Experience:

- Expert Consultant and Expert Witness detailed restaurant business and economics analysis, major deep dive research project actions, projects underway (many separate projects).
- Subject Matter Expert for international strategy consulting firm working major chain restaurant improvement projects (several engagements).

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Email: [jgordon@pacificmanagementconsultinggroup.com](mailto:jgordon@pacificmanagementconsultinggroup.com)

- Restaurant marketing, menu, sales, and earnings forecasting and analysis centered on publicly traded restaurant companies (many engagements).
- Economic and Business feasibility assessments (numerous) for various hospitality and retail sector clients. Teaching and counseling of clients.
- Research: identification of econometric factors by market to create unit growth model, by major market, major QSR operator client.
- Management Systems assessment, conceptualization, planning and implementation for retail/hospitality sector client, via two year long project.
- Business assessment and profit improvement plan creation for service sector (restaurant and retail sector clients, numerous). Focused on operations, financial management, marketing, concept design and human resources issues.
- New business start-up planning, business plan analysis and review, counseling (numerous clients)
- Operational Reporting: assessment of operators' financial and operational systems, creation and refinement of revenue, expense and other balance scorecard like metrics, data collection means created, worked into financial reporting process.
- Reimplementation of Standard food and labor cost system: baselining and assessment of current system, operational gap analysis and assessment, creation of new system standards, selection of new platform, project management, creation of inputs, creation of cost standards, system documentation, training and creation of user guides, travel and implementation to field operators, cost reporting and analysis, system maintenance, continued testing, sampling and refreshment, for employer, \$400M national chain restaurant operator.
- Executive search and business intelligence projects for several chain restaurant operators.
- Small Business Sector consulting: traveled Western United States working with numerous small business sector clients, in general management consulting roles, with diverse client base.

### **Representative Summary Project Engagement Experience**

- Engagement One: Chain Restaurant SEC 10b5 Securities Action: chain restaurant federal securities matter (earnings disclosure) item. Provided company and relevant peer research, intelligence and analysis, input to complaints and answer, etc. Federal 2<sup>nd</sup> and 6<sup>th</sup> Circuit matter. 12-month engagement completed 2008.
- Engagement Two through Four: Chain Restaurant Franchisee v. Franchisor Actions Multiple Federal and State actions. Provided company and relevant sector operations, management, supply chain, financial management research, intelligence and analysis, input to complaints, answers, and pleadings. 18-month engagement, ending November 2009. Engagement Two Outcomes: Settled 2009 with large damages pool liquidating multiple state and federal class actions, in one of the largest settlements ever in the chain restaurant sector. Engagement Three: settled 2011. Engagement Four; settled 2012.
- Engagement Five: Chain Restaurant Menu Labeling Action: provided declaration and deposition, and relevant company intelligence, analysis and research on restaurant menu and sales, product mix and financial returns topics. California Alameda County Superior Court Action, 6-month engagement. Outcome: on Appeal, 2011.
- Engagement Six: Chain Restaurant SEC 10b5 Securities Action: Chain Restaurant Federal securities action, for plaintiffs. Provided company and sector research,

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intelligence and analysis, input to complaints and answer, etc. Federal 8<sup>th</sup> Circuit matter. Settled, 2011.

- Engagement Seven, Eight and Nine: Franchisee Association support: provide research and analysis of financial matters to QSR sector franchisee associations. Ongoing engagements.

#### Other Financial Management Related Projects:

- Financial Management Chair (Elected), and Committee Member (Appointed), Citizens Oversight Committee, for \$2 billion California Schools construction program.
- Chair, Major Municipal Candidate's Fiscal Advisory Team: worked with team of professionals to create actionable business recovery plan for leading San Diego Mayoral candidate.
- Municipal City Charter Review Commission Appointed Member: reviewed assessed and composed recommended changes to City of San Diego Charter (constitution like document).
- Creation and Implementation of Board of Directors Governance System: creation, implementation, participation and recommendation with senior leadership on Hospitality Operator's Board of Directors governance program, creation of financial and operational standards, creation of budget calendar and review process, software modification and coding, training program creation, field training, execution of multi-year operational and capital budgets, including budget formulation, review, approval and execution stages each year, for employer, \$700M hospitality operator.

#### Education and Certifications

- BS, Business, Indiana University, 1982.
- Master Analyst, Financial Forensics, MAFF (original, 2012)

#### Employment Summary

- PRINCIPAL, PACIFIC MANAGEMENT CONSULTING GROUP, 2003 to present  
*Management Consulting Group, 100% focused upon financial analysis and advisory topics for restaurant space clients.*
- SENIOR ASSOCIATE, BOOZ ALLEN HAMILTON, San Diego, CA, 2000 to 2002  
*Worldwide premier Management and Technology Consulting firm, Economic Analysis Group.*
- CHIEF FINANCIAL OFFICER (1996-2000), and earlier, MANAGER OF FINANCIAL ANALYSIS (1989-1995) NAVY MWR (Hospitality) Program, Washington DC.  
*\$700M international restaurant, hospitality and services operator.*
- Earlier: Cost/Financial Analyst, Multi-Unit Supervisor, General Manager  
*Two NYSE listed restaurant concerns, QSR Burger Sector and Family Dining Sector*

### Current and Prior Affiliations

Member of: National Association of Certified Valuators and Analysts, Gerson-Lehrman Group Expert Network, Round Table of Experts, American Association of Franchisees and Dealers, American Association of Budget Analysts and Program Analysts, San Diego Food and Beverage Association, California Restaurant Association..

References: client, business and personal references available upon request.

Publications: Restaurant related professional journals such as Restaurant Research, Restaurant Finance Monitor Franchising Valuation Reporter, and others.

Selected Press Quotes: CBS, CNN, ABC, Wall Street Journal, Bloomberg, National Public Radio, Franchise Times, QSR Magazine, Nations Restaurant News, among many others.

### Overview of Related Expert Consulting/Witness Roles, and Publications

#### Expert and Consulting Expert Engagements, Depositions Taken:

Engagement One: Franchisee v. Franchisor matter, National Franchise Association v. Burger King Corporation, United States District Court, Southern District of Florida, 09-23435, for plaintiff. Chain restaurant franchisee v. franchisor matter provided expert analysis and research on chain restaurant earnings, economics and related business matters. Deposed, November 18, 2010, in San Diego. Status: matter settled, March 2011.

Engagement Two: Chain Restaurant Menu Labeling Action, for plaintiff. Jones v. Applebee's, Superior Court of California, County of Alameda, case number RG08391858. Provided declaration and deposition, and relevant Applebee's and related chain restaurant company intelligence, analysis and research on restaurant menu and sales, product mix, cost and related financial returns topics. Deposed, September 15, 2009 in San Francisco. Status: matter on appeal, 2011.

Engagement Three: Franchisee v. Franchisee Action, for plaintiff, Lake Elsinore Restaurant Corporation v. Highgrove, et al, State of California, Riverside County Superior Court, Case Number, 72-517Y0113309 SIM. Provided expert analysis and research on chain restaurant sales, earnings and economics regarding Denny's and other chain restaurants. Deposed, November 16, 2010 in Temecula, CA. Status: matter settled in November 2010.

Engagement Four: Restaurant Tenant-Landlord Action, for plaintiff. Primo Hospitality Group v Americana at Brand, State of California, Los Angeles County Superior Court, case number BC-432109. Provided deposition on expected and actual restaurant economics. Deposed, April 15, 2012. Status: settled, 2012.

Engagement Five: Restaurant Tenant -Landlord Action, for plaintiff. Hanna v. Ergarian, Fresno County Superior Court, 08CECG02258, deposed September 2012, trial testimony, November 17 2012. Status; ongoing.

Engagement Six: Restaurant Franchisee v. Franchisor Action, for plaintiff. Camille's v. DFO, Los Angeles County Superior Court, BC 466686. Provided deposition on expected and actual restaurant economics. Deposed, Los Angeles, July 20 2012. Outcome: matter settled, 2012.

Engagement Seven: Restaurant Franchisee v. Franchisor Action, for defendant. Keg v. Jones, Maricopa Superior Court for the State of Arizona, CV201-004502. Deposed Phoenix, AZ., November 12 2013. Status: ongoing.

**Other Expert Engagements, Expert Research and Consulting provided:**

Engagement One: Chain Restaurant SEC 10b 5 Securities Action, US District Court, Eastern District of Missouri, Western Washington Laborer-Employers Pension Trust v. Panera Bread, case number 4:08-cv-00120 ERW: chain restaurant federal securities matter, for plaintiff. Provided company and relevant peer research, intelligence and analysis, input to complaints and answer, etc. Outcome: Matter settled, March 2011.

Engagement Two: Chain Restaurant SEC 10b 5 Securities Action, US District Court, Middle District of Florida, Plumbers and Pipefitters Local 51 Pension Fund, v. Darden Restaurants, case number 6:08-CV-00388-PCF-DAB, chain restaurant federal securities matter for plaintiff. Provided company and relevant peer research, intelligence and restaurant earnings and economics analysis. Outcome: Matter dismissed 2009.

Engagement Three: Franchisee v. Franchisor Action, Siemer et al, v. The Quiznos Franchise Company, US District Court, Northern District of Illinois, case number 07-cv-2170, for plaintiffs. Provided Quiznos and restaurant peer company, and overall restaurant sector operations, management, supply chain, financial management research, intelligence and analysis. Outcome: Matter settled 2010.

Engagement Four: Franchisee v. Franchisor Action, Martrano v. Quiznos, et al. U.S. District Federal Court, Western District of PA, case number 2:08-CV-0932. Provided expert report focusing on Quiznos related earnings and economics topics. Matter settled: 2012.

Publications: I comment and opine on non-confidential, chain restaurant earnings, economics, and sales, cost and related business issues as a standard outgrowth of our consulting work, and have done so since 2008. We are extremely aware of and always abide to confidentiality agreements and orders not to disclose.

My articles and press clips are recorded or linked to the website, [www.pacificmanagementconsultinggroup.com](http://www.pacificmanagementconsultinggroup.com), in their entirety. For example, we write on restaurant business related topics, at the Forensic Group expert site, <http://expertwitness.today.com>, with many of the article topics from the noted articles. The link to these articles is on the website.

# Exhibit 2

# **Exhibit 2**

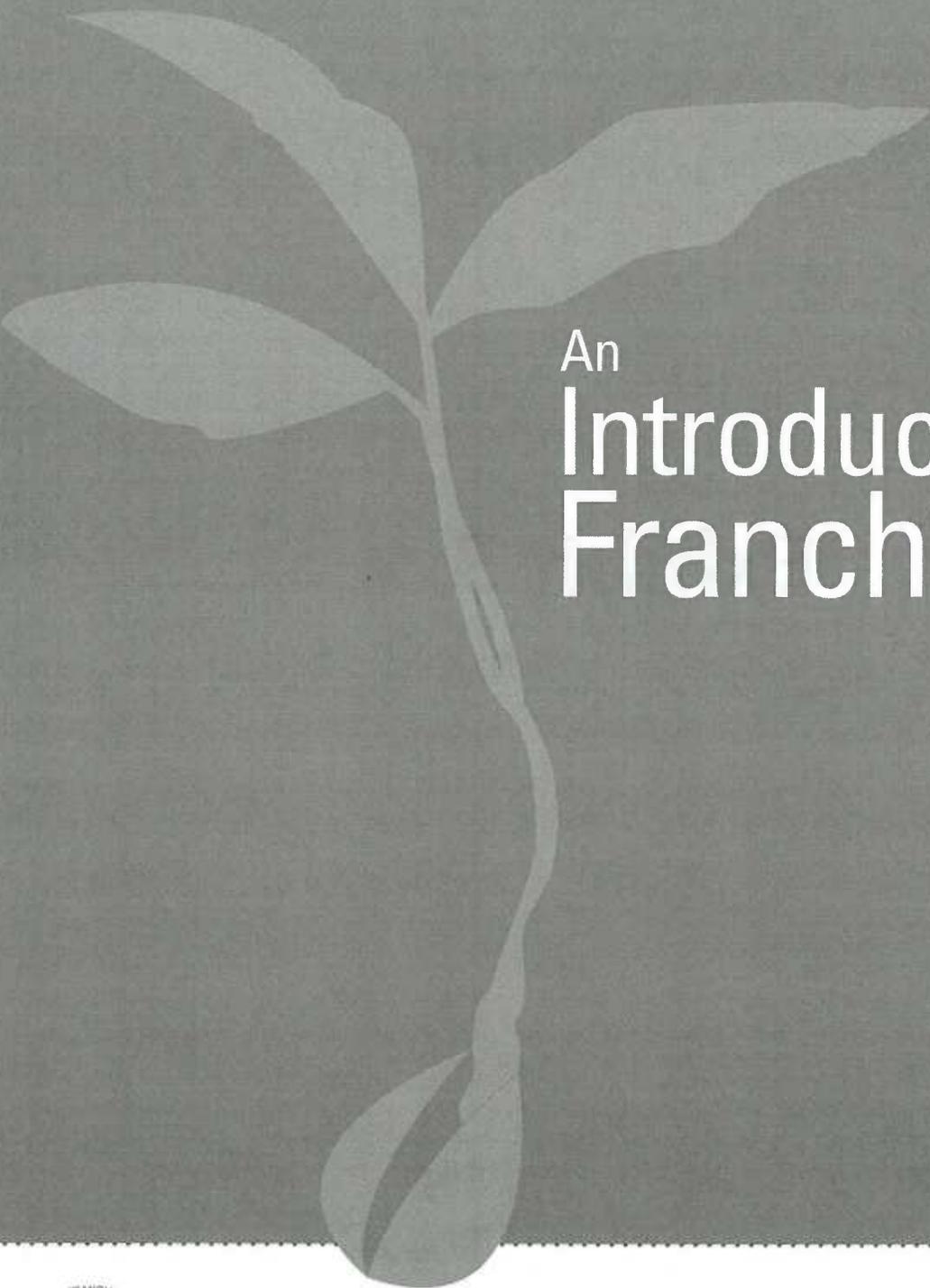
**List of Documents Referenced**  
**IFA, ET; al, v. City of Seattle, et al.**  
**US District Court, Western District of Washington**  
**No. 2:14-cv-00848-RAJ**

<b>Document Type</b>	<b>Description</b>
Initial Complaint, IFA et .al, v. City of Seattle, et. al.	Case 2:14-cv-00848-RAJ, June 11, 2014
Plaintiff's Motion for Limited Preliminary Injunction	August 5, 2014 filing
Plaintiff Charles J. Stempler Declaration	August 5 2014 filing
Plaintiff David Meinert Declaration	August 5, 2014 filing
IFA Plaintiff Dean Heyl Declaration	August 5 2014 filing
Plaintiff Katheryn Lyons Declaration	August 5 2014 filing
Plaintiff Ronald Oh Declaration	August 5 2014 filing
AlpahaGraphics Franchise Disclosure Document, Franchise Agreement	2014 Franchise Disclosure Document
BrightStar Franchise Disclosure Document, Franchise Agreement	2014 Franchise Disclosure Document
Choice Hotels Franchise Disclosure Document, Franchise Agreement	2014 Franchise Disclosure Document
IHG Holiday Inn Franchise Disclosure Document	2014 Franchise Disclosure Document
FRANdata, Seattle Fast Food data	FRANdata database run
<u>Franchise Contract Interpretation</u> , Robert W. Emerson	Michigan State Law review, 2013
<u>Choice Hotels Allots \$40 Million to Jumpstart Comfort Brand Overhaul</u>	Business Travel News, Article, May 15 2013
<u>BK to help Struggling Franchisees</u>	QSR Magazine, article, 2001 date of publication
<u>Quiznos CEO Fills a Tall Order</u>	Associated Press, article, July 18 2007
<u>Introduction to Franchising</u> , publication	IFA Foundation, Beshhel, International Franchise Association
HVS, Inc.	Library of hotel publications and articles
JMBM Global Hospitality Group	Library of hotel presentations and articles
McDonalds Corporation	2014 Franchise Disclosure Document
Burger King Corporation	2014 Franchise Disclosure Document
Dunkin Donuts	2008 Franchise Disclosure Document
IHS Economics, for IFA	Franchise Business Economic outlook for 2014
Pudget Sound Sage Group, City of Seattle Employment Estimates , \$15 Wage Study	Data Per State of WA ESD, April 2014

# Exhibit 3

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# **Exhibit 3**



An  
Introduction to  
Franchising



IFA EDUCATIONAL  
FOUNDATION



Sponsored by:

**PEPSICO**  
FOODSERVICE





# An Introduction to Franchising



IFA EDUCATIONAL FOUNDATION



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FOODSERVICE



By Barbara Beshel



# CHAPTER 1

## An Introduction to Franchising

1. What is a franchise?
2. What are common franchise terms?
3. What are the alternatives to franchising?
4. What are the advantages and disadvantages of owning a franchise?
5. What are the legal issues in franchising?

### WHAT IS A FRANCHISE?

A **franchise** is the agreement or license between two legally independent parties which gives:

- a person or group of people (franchisee) the right to market a product or service using the trademark or trade name of another business (franchisor)
- the franchisee the right to market a product or service using the operating methods of the franchisor
- the franchisee the obligation to pay the franchisor fees for these rights
- the franchisor the obligation to provide rights and support to franchisees

### FRANCHISE AGREEMENT

FRANCHISOR	FRANCHISEE
Owns trademark or trade name	Uses trademark or trade name
Provides support: <ul style="list-style-type: none"><li>• (sometimes) financing</li><li>• advertising and marketing</li><li>• training</li></ul>	Expands business with franchisors support
Receives Fees	Pays Fees

## TYPES OF FRANCHISES

### PRODUCT DISTRIBUTION

Product distribution franchises simply sell the franchisor's products and are supplier-dealer relationships. In product distribution franchising, the franchisor licenses its trademark and logo to the franchisees but typically does not provide them with an entire system for running their business. The industries where you most often find this type of franchising are soft drinks, automobiles and gasoline.

Some familiar product distribution franchises include:

- Coca-Cola
- Goodyear Tires
- Ford Motor Company

Although product distribution franchising represents the largest percentage of total retail sales, most franchises available today are business format opportunities.

### BUSINESS FORMAT FRANCHISE

Business format franchises, on the other hand, not only use a franchisor's product, service and trademark, but also the complete method to conduct the business itself, such as the marketing plan and operations manuals. Business format franchises are the most common type of franchise.

USA Today reported that the 10 most popular franchising opportunities are in these industries:

- |                             |               |
|-----------------------------|---------------|
| • fast food                 | • retail      |
| • service                   | • automotive  |
| • restaurants               | • maintenance |
| • building and construction | • retail—food |
| • business services         | • lodging     |

**Some popular business format franchises include:**

#### **Fast Food**

Wendy's  
McDonald's  
Hardee's

#### **Retail**

Athlete's Foot  
Blockbuster Video  
Play It Again Sports

#### **Lodging**

Comfort Inn  
Embassy Suites  
Quality Inn

#### **Health & Beauty**

Jenny Craig Weight Loss  
Great Clips  
Pearle Vision, Inc.

#### **Business Services**

H & R Block  
Signs By Tomorrow  
UPS Store

#### **Maintenance**

Roto-Rooter  
Stanley Steemer  
ServiceMaster

#### **Auto**

AAMCO  
Midas  
Budget Rent-A-Car

#### **Education**

Sylvan Learning  
Huntington  
New Horizons

#### **Restaurants**

Blimpie  
Dairy Queen  
Outback Steakhouse

## TYPES OF FRANCHISE ARRANGEMENTS

Because so many franchisors, industries and range of investments are possible, there are different types of franchise arrangements available to a business owner.

### SINGLE-UNIT (DIRECT-UNIT) FRANCHISE

A single-unit (direct-unit) franchise is an agreement where the franchisor grants a franchisee the rights to open and operate ONE franchise unit. This is the simplest and most common type of franchise. It is possible, however, for a franchisee to purchase additional single-unit franchises once the original franchise unit begins to prosper. This is then considered a multiple, single-unit relationship.

### MULTI-UNIT FRANCHISE

- area development
- master franchise (sub-franchising)

A multi-unit franchise is an agreement where the franchisor grants a franchisee the rights to open and operate more than one unit.

#### AREA DEVELOPMENT FRANCHISE

Under an area development franchise, a franchisee has the right to open more than one unit during a specific time, within a specified area. For example, a franchisee may agree to open 5 units over a five year period in a specified territory. The franchisor grants the franchisee exclusive rights for the development of that territory.

#### MASTER FRANCHISE

A master franchise agreement gives the franchisee more rights than an area development agreement. In addition to having the right and obligation to open and operate a certain number of units in a defined area, the master franchisee also has the right to sell franchises to other people within the territory, known as sub-franchises. Therefore, the master franchisee takes over many of the tasks, duties and benefits of the franchisor, such as providing support and training, as well as receiving fees and royalties.

Another hybrid-type of multi-unit franchise is an area representative franchise. In this model, the area representative buys a territorial franchise to sell and service unit franchisees in the territory. The area representative does not contract with the unit franchisees (who sign agreements directly with the franchisor), but does receive a portion of the initial fees and ongoing fees paid by the unit franchisee to the franchisor.

# COMMON FRANCHISE TERMS

**business format franchise**

this type of franchise includes not only a product, service and trademark, but also the complete method to conduct the business itself, such as the marketing plan and operations manuals

**disclosure statement**

also known as the FDD, or Franchise Disclosure Document, the disclosure document provides information about the franchisor and franchisee system

**FDD**

the Franchise Disclosure Document, FDD, is the format for the disclosure document which provides information about the franchisor and franchisee system to the franchisee

**franchise**

a license that describes the relationship between the franchisor and franchisee including use of trademarks, fees, support and control

**franchise agreement**

the legal, written contract between the franchisor and franchisee which tells each party what each is supposed to do

**franchisee**

the person or company that gets the right from the franchisor to do business under the franchisor's trademark or trade name

**franchising**

a method of business expansion characterized by a trademark license, payment of fees, and significant assistance and/or control

**franchisor**

the person or company that grants the franchisee the right to do business under their trademark or trade name

**product distribution franchisee**

a franchise where the franchisee simply sells the franchisor's products without using the franchisor's method of conducting business

**royalty**

the regular payment made by the franchisee to the franchisor, usually based on a percentage of the franchisee's gross sales

**trademark**

the marks, brand name and logo that identify a franchisor which is licensed to the franchisee

## WHAT ARE THE ALTERNATIVES TO FRANCHISING?

In addition to franchising, there are two other popular methods by which businesses expand their market and distribution channels:

### DISTRIBUTORSHIP

In a distributorship, the distributor usually:

- has a contractual relationship with the supplier
- buys from the supplier in bulk and sells in smaller quantities
- is familiar with local markets and customers
- may do business with many companies, more than just the supplier/producer
- may not receive contractual support and training from the supplier/producer like a franchisee

Some distribution arrangements are similar to franchises, and vice versa. A franchisee with a great deal of leeway in how to run the business may look like an independent distributor. A distributor may be subject to many controls by the supplier/producer and begin to resemble a franchise.

#### **Some popular distributorships include:**

- Amway
- Color Me Beautiful Cosmetics
- Mountain Life Spring Water
- Knorr Soup Vendor
- Campbell's Soup Vending Machines

### LICENSING

Licensing, on the other hand, allows a licensee to pay for the rights to use a particular trademark. Unlike franchises, in which the franchisor exerts significant control over the franchisee's operations, licensors are mainly interested in collecting royalties and supervising the use of the license rather than influencing the operations of the business. Check out [www.licensing.org](http://www.licensing.org).

#### **Some popular licensors include:**

- Netscape Communications
- Apple Computer
- Canon Inc.
- Woolmark

# WHAT ARE THE ADVANTAGES AND DISADVANTAGES OF OWNING A FRANCHISE?

## ADVANTAGES

- ① "Owning a franchise allows you to go into business for yourself, but not by yourself."
- ① A franchise provides franchisees with a certain level of independence where they can operate their business.
- ① A franchise provides an established product or service which may already enjoy widespread brand-name recognition. This gives the franchisee the benefits of a pre-sold customer base which would ordinarily takes years to establish.
- ① A franchise increases your chances of business success because you are associating with proven products and methods.

Franchises may offer consumers the attraction of a certain level of quality and consistency because it is mandated by the franchise agreement.

- ① Franchises offer important pre-opening support:
  - site selection
  - design and construction
  - financing
  - training
  - grand-opening program
- ① Franchises offer ongoing support:
  - training
  - national and regional advertising
  - operating procedures and operational assistance
  - ongoing supervision and management support
  - increased spending power and access to bulk purchasing

## DISADVANTAGES

- ① The franchisee is not completely independent. Franchisees are required to operate their businesses according to the procedures and restrictions set forth by the franchisor in the franchisee agreement. These restrictions usually include the products or services which can be offered, pricing and geographic territory. For some people, this is the most serious disadvantage to becoming a franchisee.
- ① In addition to the initial franchise fee, franchisees must pay ongoing royalties and advertising fees.
- ① Franchisees must be careful to balance restrictions and support provided by the franchisor with their own ability to manage their business.
- ① A damaged, system-wide image can result if other franchisees are performing poorly or the franchisor runs into an unforeseen problem.
- ① The term (duration) of a franchise agreement is usually limited and the franchisee may have little or no say about the terms of a termination.

## WHAT ARE THE LEGAL ISSUES OF FRANCHISING?

A good relationship between the franchisor and franchisee is critical for the success of both parties. Since franchising establishes a business relationship for years, the foundation must be carefully built by having a clear understanding of the franchise program. Unfortunately, understanding the legal language of franchising can be daunting. The advice of an experienced franchise attorney should be sought to help a prospective franchisee understand the legal issues and to protect them from making costly mistakes.

Franchising is governed by federal and state laws that require franchisors to provide prospective franchisees with information that describes the franchisor-franchisee relationship.

The two main franchising legal documents are:

### THE DISCLOSURE DOCUMENT (also known as the FDD)

The purpose of the FDD is to provide prospective franchisees with information about the franchisor, the franchise system and the agreements they will need to sign so that they can make an informed decision.

In addition to the disclosure part of the document, the FDD includes the actual franchise agreement as well as other agreements the franchisee will be required to sign, along with the franchisor's financial statements.

The FDD is designed to give you some of the information you need in order to make an informed decision about investing in a particular franchise.

By law, a franchisor cannot sell a franchise until the franchisor has presented the prospective franchisee with a Disclosure Document. In fact, 14 states require franchisors to register their FDDs with the state or to notify them that they will offer franchises before they begin to conduct any franchising activity in the state.

#### **The FDD includes information about:**

- the franchisor
- the company's key staff
- management's experience in franchise management
- franchisor's bankruptcy and litigation history
- initial and ongoing fees involved in opening and running the franchise
- required investment and purchases
- territory rights
- responsibilities of the franchisor and franchisee
- other franchisees in the system with contact information

## WHAT ARE THE LEGAL ISSUES OF FRANCHISING? (continued)

Receipt of the FDD is governed by the “14-day rule.” This is a cooling-off period in which franchisors must give prospective franchisees 14 days to think about their decision before they are allowed to sign the franchise agreement.

### THE FRANCHISE AGREEMENT

The franchise agreement is more specific than the FDD about the terms of the relationship between the franchisor and franchisee.

#### **The franchise agreement includes information about:**

- the franchise system, such as use of trademarks and products
- territory
- rights and obligations of the parties: standards, procedures, training, assistance, advertising, etc.
- term (duration) of the franchise
- payments made by the franchisee to the franchisor
- termination and/or the right to transfer the franchise

The franchise agreement is the legal, written document that governs the relationship and specifies the terms of the franchise purchase. A prospective franchisee should closely review the franchise agreement and consult with a professional advisor, like an attorney or an accountant, before making a final decision.



# CHAPTER 2

## Beginning Your Search

1. What are your options when you begin your business?
2. How do you investigate your options?
3. How do you investigate a franchise?
4. What are your criteria for selecting a franchise?

### WHAT ARE YOUR OPTIONS WHEN YOU BEGIN YOUR BUSINESS?

Once you make the decision to start your own business, you need to decide whether you want to be an independent business owner or a franchisee.

### STARTING A NEW BUSINESS

Advantages	Disadvantages
<ul style="list-style-type: none"><li>• usually lower start-up cost</li><li>• independence and creative freedom</li><li>• freedom with location and procedures</li><li>• no inherited problems from an existing business</li></ul>	<ul style="list-style-type: none"><li>• requires more time and energy</li><li>• higher risk of failure</li><li>• takes longer to become profitable</li><li>• financing may be more difficult to obtain</li></ul>

## BUYING A NEW FRANCHISE



### Advantages

- reduced risk of failure over an independent business
- proven methods and products
- start-up assistance
- on-going training and support
- local, regional and national advertising
- collective purchasing power
- research and development
- association and synergy with other franchisees
- easier to obtain financing

### Disadvantages

- costs more (fees, royalties, supplies)
- smaller profit margins
- lack of independence and freedom
- difficult to achieve redress if franchisor fails to meet obligations
- a franchisor's problem may become your problem



## BUYING AN EXISTING FRANCHISE

### Advantages

- the business is already up and running
- risk and uncertainty are reduced
- the basic infrastructure is in place:
  - established location
  - existing customers and reputation
  - employees
  - vendors
  - policies and procedures
  - cash flow
  - no start-up period—quicker profitability
  - easier to obtain financing

### Disadvantages

- tangible limitations:
  - design problems
  - location problems
  - merchandise problems
- intangible limitations:
  - customer or employee ill will
  - pricing problems
  - inadequate procedures
  - lease problems
- potentially higher costs to buy
- legal liability in inheriting lawsuits

## HOW DO YOU INVESTIGATE YOUR OPTIONS?

Regardless of whether you choose to remain an independent business owner or become a franchisee, research is the single most important activity in making your decision. Without adequate information, you may end up making the most costly decision of your life.

### STEPS FOR BEGINNING A FRANCHISE

What business?

Is there a market?

Can you afford it?

Can you make enough money to make it worthwhile?

### WHAT BUSINESS SHOULD YOU START?

Sometimes people start a business because they think they'll make a lot of money, only to find out that they do not enjoy the business. The adage, "know thyself" certainly applies here. You should start a business in an industry that you will enjoy for the next 10 to 15 years.

#### Ask yourself:

- What do you like to do? (interest and hobbies)
- What do you know how to do? (experience)
- What do you do well? (special skills and talents)
- Which industry(s) involve your interests and use your skills and talents?  
(For ideas, refer to IFA's *Franchise Opportunities Guide's* listing of industries in the table of contents.)
- What products or services could you sell in this industry(s)?
- Would you rather sell a product or service?
- What products or services would you like to sell the most?

"Find something you love to do and you'll never have to work a day in your life."

-Harvey Mackay

## DETERMINE IF THERE IS A MARKET

All successful businesses must:

satisfy a need or solve a problem or respond to a trend

Before starting any business, determine if there is a market for your product or service.

Conducting market research:

- How many potential customers are in your area?
- Will your product or service sell?
  - What need does it satisfy?
  - What problem does it solve?
  - What trend or fad does it address?
- What should the appropriate pricing be?
- Who are your competitors?
- How many competitors do you have?
- What do they offer?
- How will your product or service be unique?
- What marketing niche can you capture?

## DETERMINE IF YOU CAN AFFORD TO START A BUSINESS

In order to start a business, you have to have money! In order to stay in business, you have to make money!

The single most common reason new businesses fail is that they did not have enough money to begin with! Don't forget the old business adage: *"It takes twice as long and costs twice as much!"*

### Costs to consider:

Estimate your start-up costs:

- location design and construction
- professional fees
- equipment and fixtures
- furniture
- opening inventory and supplies
- insurance
- pre-opening labor
- opening advertising and promotion

Make profit potential your most important consideration.

Estimate how much working capital you will need (the money you will need until the business becomes profitable--include your living expenses, if necessary):

- salaries
- insurance
- utilities
- advertising
- rent
- interest on a loan, if applicable

Brainstorm where you might be able come up with money:

- yourself
- family
- friends
- savings and investments
- a partner
- selling personal assets
- loans

### DETERMINE IF YOU CAN MAKE ENOUGH MONEY TO MAKE THE VENTURE WORTHWHILE

Estimate the profit potential for the business:

- income
- expenses
- profit (income – expenses)

Think about the amount of time and energy it will take to make the business successful.

Make a decision as to whether you think you can make enough money to make the entire venture worth your time and energy.

## HOW DO YOU INVESTIGATE A FRANCHISE?

Like starting any business, buying a franchise involves a risk. Studies show that successful franchisees:

- conduct their own marketing research
- use their own financial and legal advisors
- develop thorough marketing and business plans
- have prior work experience in the industry

Prospective franchisees must devote a vast amount of time researching the franchises available and evaluating the strength of the franchisors.

### FIND OUT WHAT FRANCHISES ARE AVAILABLE

(refer to pages 51 to 55 in *Franchising for Dummies*)

#### Read Directories

- *The Franchise Opportunities Guide*
- *The Executives' Guide to Franchise Opportunities*
- *Bond's Franchise Guide*
- *The Franchise Annual*
- *Franchise Handbook*
- *How Much Can I Make?*

#### Read Articles and Ads in Business Publications

- *Inc.*: [www.inc.com](http://www.inc.com)
- *Entrepreneur*: [www.entrepreneurmag.com](http://www.entrepreneurmag.com)
- *Franchise Times*: [www.franchisetimes.com](http://www.franchisetimes.com)
- *Franchising World*: [www.franchise.org](http://www.franchise.org)
- *Franchise Update*: [www.franchise-update.com](http://www.franchise-update.com)
- *The Wall Street Journal*: [www.wsj.com](http://www.wsj.com)
- *USA Today*: [www.usatoday.com](http://www.usatoday.com)
- *The New York Times*: [www.nytimes.com](http://www.nytimes.com)

## Attend Trade Shows and Expositions

- IFE (International Franchise Expo) is sponsored by the International Franchise Association (IFA: 202-628-8000 or [www.franchise.org](http://www.franchise.org)) and is the world's largest gathering of franchise companies.
- The U.S. Small Business Administration and Small Business Development Centers (SBA: [www.sbaonline.sba.gov/sbdc/](http://www.sbaonline.sba.gov/sbdc/))

## Research the Internet

- [www.franchise.org](http://www.franchise.org)
- [www.franchise.com](http://www.franchise.com)
- [www.franchising.org](http://www.franchising.org)
- [www.aafd.org](http://www.aafd.org)
- [www.franchiseopportunities.com](http://www.franchiseopportunities.com)
- [www.everyfranchise.com](http://www.everyfranchise.com)
- [www.franchiseamerica.com](http://www.franchiseamerica.com)
- [www.franchiseconnections.com](http://www.franchiseconnections.com)
- [www.ownyourownfranchise.com](http://www.ownyourownfranchise.com)
- [www.topfranchises.com](http://www.topfranchises.com)
- [www.worldfranchising.com](http://www.worldfranchising.com)
- [www.franchisedoc.com](http://www.franchisedoc.com)
- [www.franchiseregistry.com](http://www.franchiseregistry.com)
- [startup.wsj.com](http://startup.wsj.com)
- [www.bison.com](http://www.bison.com)

## EVALUATE THE STRENGTH OF THE FRANCHISOR

## Investigate the Franchisor's History

- How long has the franchisor been in business?
- How many current franchisees are there?
- What is the failure rate of the franchisees?
- Are there any pending or past lawsuits and what have they been for?
- Does the franchisor have a reputation for quality products or services?
- What is the franchisor's financial health? (get its Dun & Bradstreet rating)
  - credit rating
  - profitability
  - reputation
- What are the financial performance representations?
  - On what are they based?
  - Are the projections based on franchisor or franchisee-run centers?
  - How long have the centers used for projections been in business?
- What is the background of the principals/management?
  - What is their business experience?
  - Have they personally had any bankruptcies?
  - Have they personally had any recent litigation?

## Obtain Professional Advice Concerning the Franchisor's FDD and Franchise Agreement

Seek the advice of an attorney and accountant who specialize in franchises.

### Paying special attention to:

- costs
- agreement life and renewal provisions and conditions
- termination clauses
- franchise territory (if any)
- procedures and restrictions
- training and assistance
- financial performance potential - gross sales, net profit

### Expansion plans:

- How fast do they plan to grow?
- Where do they plan to grow?
- Do they have a business plan for your area or location?
- What is their analysis of the competition in your area?
- How many units are being planned for your area?
- How much is going to be spent in regional advertising in your area?

## Talk with Existing Franchisees

### Emphasizing the:

- level of training
- quality of products or service
- level and promptness of support
- operations and quality of the operations manuals
- financial performance history/claims
- any problems or difficulties with the franchisor

## Visit with Existing Franchisees

- Visit/talk with franchisees who have left the system and find out why they left.
- Visit the franchisor's headquarters:
  - meet the support team
  - review the operations manuals and see if you can sit in on a training class

## Work in an Existing Franchise

Get to know the system, manuals, training program, support, earning potential, etc.

## WHAT ARE THE CRITERIA FOR SELECTING A FRANCHISE?

Before buying any business, you must carefully consider many factors that are critical to your success:

### COSTS

---

- How much money will this franchise cost before it becomes profitable?
- Can I afford to buy this franchise?
- Can I make enough money to make the investment worth my time and energy?

### DEMAND

---

- Is there enough demand in your area for the franchisor's products or services?
- Is the demand year-long or seasonal?
- Will the demand grow in the future?
- Does the product or service generate repeat business?

### BRAND NAME

---

- How well known is the franchise name?
- Does it have a reputation for quality?
- Have any consumers filed complaints with the local Better Business Bureau?

### FRANCHISOR'S EXPERIENCE

---

- Has the franchisor been in business long enough to have established the type of business strength you are seeking?

### YOUR ABILITIES

---

- Do you have the technical skills or experience to manage the franchise?
- Do you have the business skills to manage the franchise?

### COMPETITION

---

- How much competition do you have, including other franchisees?
- Are the competing companies/franchises well established?
- Do they offer the same products and services at the same or lower prices?
- Is there a specialty or niche you can capture?

### TRAINING & SUPPORT

---

- What kind and how much training and support does the franchisor provide?
- Do existing franchisees find this level of training and support adequate?

### EXPANSION PLANS

---

- Is the franchisor planning to grow at a rate that is sustainable?

# CHAPTER 3

## Navigating the Paper Trail

1. What are the key subjects in the franchise agreement?
2. What information is found in the Disclosure Document (FDD)?
3. What are the key items in the Disclosure Document (FDD)?
4. What do you have to know about financial statements?
5. Where can I get help?

### WHAT ARE THE KEY SUBJECTS IN THE FRANCHISE AGREEMENT?

The franchise agreement is more specific than the FDD about the terms of the relationship between the franchisor and franchisee.

#### USE OF TRADEMARKS

One of the main benefits you receive when purchasing a franchise is the use of well-known trademarks. This section lists the trademarks, service marks or logos the franchisee is entitled to use.

- Has the trademark been in operation for a significant amount of time and is it well known?
- Are there any restrictions on its use by the franchisor or franchisee?

#### LOCATION OF THE FRANCHISE

This section describes the exclusive area or territory granted to the franchisee.

- Do you have exclusive rights in a certain territory?

## TERM OF THE FRANCHISE

- In this section, the duration of the agreement is specified.
- How long does the agreement last?
- Can the franchisor purchase the franchise before the agreement expires?
- Do you have the right to renew the agreement?

## FRANCHISEE'S FEES AND OTHER PAYMENTS

- In this section, all the mandatory fees are described:
- initial fee and what the franchisee receives for that fee
  - royalty payment, what it is based on and when it is due

## OBLIGATIONS AND DUTIES OF THE FRANCHISOR

- This section describes the franchisee's responsibilities:
- requirements for training
  - requirements for participation in the business
  - requirements for keeping and submitting adequate records

## RESTRICTION ON GOODS AND SERVICES OFFERED

- This section describes any restrictions placed on the goods or services offered, including:
- required quality standards
  - approved suppliers
  - approved advertising
  - hours of operation
  - pricing

## RENEWAL, TERMINATION AND TRANSFER OF FRANCHISE AGREEMENT

- This section includes:
- the rights and obligations of a franchisee upon termination
  - descriptions about the transfer of the franchise agreement
  - descriptions about the renewal of the franchise agreement

Make sure you hire an experienced franchise attorney to review the agreement.

## WHAT INFORMATION IS FOUND IN THE FDD?

The purpose of the FDD is to provide prospective franchisees with information about the franchisor, the franchise system and the agreements they will need to sign so that they can make an informed decision. (Refer to pages 83 to 91 in *Franchising for Dummies*.)

### THE DISCLOSURE DOCUMENT (FDD)

- Item 1:** **The franchisor** and any parents, predecessors and affiliates. This section provides a description of the company and its history.
- Item 2:** **Business experience.** This section provides biographical and professional information about the franchisors and its officers, directors and executives.
- Item 3:** **Litigation.** This section provides relevant current and past criminal and civil litigation for the franchisor and its management.
- Item 4:** **Bankruptcy.** This section provides information about the franchisor and any management who have gone through a bankruptcy.
- Item 5:** **Initial fees.** This section provides information about the initial fees and the range and factors that determine the amount of the fees.
- Item 6:** **Other fees.** This item provides a description of all other recurring fees or payments that must be made.
- Item 7:** **Initial investment.** This item is presented in table format and includes all the expenditures required by the franchisee to make to establish the franchise.
- Item 8:** **Restriction on sources of products and services.** This section includes the restrictions that franchisor has established regarding the source of products or services.
- Item 9:** **Franchisee's obligations.** This item provides a reference table that indicates where in the franchise agreement franchisees can find the obligations they have agreed to.
- Item 10:** **Financing.** This item describes the terms and conditions of any financing arrangements offered by the franchisor.
- Item 11:** **Franchisor's Assistance, Advertising, Computer Systems and Training.** This section describes the services that the franchisor will provide to the franchisee.

- Item 12: **Territory.** This section provides the description of any exclusive territory and whether territories will be modified.
- Item 13: **Trademarks.** This section provides information about the franchisor's trademarks, service marks and trade names.
- Item 14: **Patents, copyrights and proprietary information.** This section gives information about how the patents and copyrights can be used by the franchisee.
- Item 15: **Obligation to participate in the actual operation of the franchise business.** This section describes the obligation of the franchisee to participate in the actual operation of the business.
- Item 16: **Restrictions on what the franchisee may sell.** This sections deals with any restrictions on the goods and services that the franchisee may offer its customers.
- Item 17: **Renewal, termination, transfer and dispute resolution.** This section tells you when and whether your franchise can be renewed or terminated and what your rights and restrictions are when you have disagreements with your franchisor.
- Item 18: **Public Figures.** If the franchisor uses public figures (celebrities or public persons), the amount the person is paid is revealed in this section.
- Item 19: **Financial Performance Representations.** Here the franchisor is allowed, but not required, to provide information on unit financial performance.
- Item 20: **Outlets and Franchisee Information.** This section provides locations and contact information of existing franchises.
- Item 21: **Financial statements.** Audited financial statements for the past three years are included in this section.
- Item 22: **Contracts.** This item provides of all the agreements that the franchisee will be required to sign.
- Item 23: **Receipts.** Prospective franchisees are required to sign a receipt that they received the FDD.

## WHAT ARE THE KEY ITEMS IN THE FDD?

**Item 7: Initial investment.** Some of these costs are averages or estimates and may vary in your area.

Talk to other franchisees who have been in the system for a year or more to see:

- how much money they needed in the beginning until they became profitable
- how much they were able to draw from the business to support themselves

**Item 11: Franchisor's obligations.**

Be sure you understand the services you will get before you open:

- site selection
- training
- development assistance

Be sure you know what services you will receive for your grand opening:

- marketing
- advertising
- field support

Be sure you know what services you will receive after you begin operating your business:

- training
- advertising
- operations

Pay particular attention to those services the franchisor is *obligated* to provide and the services they *may* provide.

**Item 17: Renewal, termination, transfer and dispute resolution.**

Take your time to understand what rights you will have and what rights you are giving up.

Pay particular attention to any non-compete provisions and your obligations when the franchise relationship ends.

**Item 19: Financial performance representations.**

Only 30 to 40 percent of all franchisors provide prospective franchisees with information about financial performance. The next best thing to do is to talk to existing franchisees about sales and earnings potential.

Another good source of information is *How Much Can I Make?* by Robert Bond. (800-841-0873 or [www.worldfranchising.com](http://www.worldfranchising.com)).

**Item 20: Outlets and franchisee information.**

Examine how many units the franchisor has taken back and resold. If this number is high, this could indicate churning (when the franchisor takes back failed locations and remarkets them over and over.)

Pay attention to the contact information of the franchisees who have left the system. These are people you definitely want to talk to.

**Item 21: Financial statements.**

Financial statements are the track record of the franchisor. You should be given copies of the franchisor's last three years financial statements. Take them to an accountant who specializes in franchising to evaluate.

Remember that the financial condition of the franchisor not only affects its ability to run a financially successful operation in the future, but it also determines whether it may go under and you will be left "holding the bag."

The two key financial statements to focus on are the balance sheet and the income statement. Make sure they are audited.

**Item 22: Contracts.**

Make sure that all the agreements listed are attached to the FDD—and read every one of them.

## WHAT DO YOU HAVE TO KNOW ABOUT FINANCIAL STATEMENTS?

Financial statements are the track record of the franchise. They are provided for you in the FDD and contain important information about the franchisor's financial status and strength.

The two most important financial statements you need to review:

balance sheet

income statement

### THE BALANCE SHEET

A balance sheet is a snapshot summary of how much a company is worth on any given day. It reports the financial condition (solvency) of the franchisor.

Balance sheet categories include:

- assets – what a company owns: current, fixed and intangible assets
- liabilities – what a company owes: current and long-term debt
- stockholders' equity – the company's net worth; it is the money the company has taken in from the sale of stock plus any accumulated profits:

$$\text{Stockholder's Equity} = \text{Assets} - \text{Liabilities} = \text{Net Worth}$$

Things you want to see on a franchisor's balance sheet:

- increasing assets
- increasing stockholders' equity
- more cash than debt
- amount of current debt < (less than) 1/2 of the total assets
- amount of current debt < 1/3 of the stockholders' equity

Sample Balance Sheet

ABC Sleepwear  
Balance Sheet  
January, 2010

ASSETS

Current Assets

Cash	\$6,900
Accounts Receivable	\$4,900
Inventory	\$8,000
Prepaid Expenses	\$200

Total Current Assets \$20,000

Fixed Assets

Machinery	\$8,500
Computer/Printer	\$1,000
Furniture	\$4,500

Total Fixed Assets \$14,000

**Total Assets \$34,000**

LIABILITIES AND EQUITY

Current Liabilities

Accounts Payable	\$6,500
Current Long-Term Due	\$1,200
Accrued Expenses	\$1,800

Total Current Liabilites \$9,500

Long-Term Liabilities – Note \$12,500

Stockholder's Equity \$12,000

**Total Liabilities and Equity \$34,000**

## THE INCOME STATEMENT

An income statement reports a company's profit or loss. It shows a company's income, expense and net income—also known as the “bottom line” or earnings.

Other names for an income statement include:

- Profit and Loss Statement
- Statement of Income
- Statement of Operation
- Statement of Earnings
- Results of Operations
- Statement of Consolidated Income

Income statement categories include:

- revenues
- costs and expenses: cost of sales, selling, general administrative, interest expenses
- income before taxes
- provision for income taxes
- net income (earnings)
- net income (earnings) per share

Things you want to see on a franchisor's income statement:

- increasing profit
- more revenue derived from royalties and system income than from selling franchises
- increasing revenue trends, usually > 15%
- increasing net income trends, usually > 15%
- increasing net income per share trend, usually > 15%
- a profitable franchisor!

What you should know about these financial statements:

- The financial statements should be audited financial statements.
- The statements should contain three years of financial data (unless the franchisor has less than 3 years of operating history).

You should take these to an accountant experienced in franchising for evaluation.

Sample Income Statement

ABC Sleepwear  
Income Statement  
January, 2010

SALES/REVENUE	\$2,600
COST OF GOODS	\$1,776
Merchandise	\$1,155
Purchases	\$610
Freight	\$11
GROSS PROFIT	\$824
OPERATING COSTS AND EXPENSES	\$544
Fixed	
Insurance	\$26
Rent	\$100
Salaries	\$310
Utilities	\$42
Variable	
Advertising	\$24
Dues	\$4
Telephone	\$24
Office Supplies	\$14
PROFIT (INCOME) BEFORE TAXES	\$280
TAXES (30%)	\$84
<b>NET PROFIT (NET INCOME)</b> ("The Bottom Line")	<b>\$196</b>

## WHERE CAN I GET HELP?

- International Franchise Association (IFA), 202-628-8000, [www.franchise.org](http://www.franchise.org)
- American Bar Association's Forum on Franchising, [www.abanet.org](http://www.abanet.org)
- Directory of Franchise Attorneys, [www.franchise-update.com](http://www.franchise-update.com)
- IFA's Council of Franchise Suppliers (CFS) publishes a list of firms that specialize in franchising law, [www.franchising.org](http://www.franchising.org)
- recommendations from other franchisees



# CHAPTER 4

## Evaluating a Franchise- Interviewing Both Sides

1. What should I ask the franchisor?
2. What should I ask the franchisees?
3. What questions should I ask myself before buying a franchise?
4. What are the keys to franchise success?

### WHAT SHOULD I ASK THE FRANCHISOR?

#### ABOUT THE FRANCHISOR:

- Who owns the trademarks, service marks, etc., and are they federally registered?
- Are there any disputes pending or threatened against the trademarks?
- Has the franchisor complied with the FTC and state disclosure laws?
- Are any senior management or key personnel leaving the system?
- Does this company compete with the franchisees in the marketplace?
- Will the franchisor finance any of the costs?
- Is the franchisor willing to negotiate the terms of the franchise?
- Does the franchisor staff attend seminars on franchising and management?
- Do field consultants offer help and guidance or merely act in a regulatory role?
- How many franchises are expected to be added each year?
- Where will they be located?
- What is the success rate of existing franchises?
- What method is used to protect franchisees from poorly performing franchises?
- Is there a franchise owners association?
- Is there a franchise advisory council?

### ABOUT COSTS:

What is the total investment required to own a franchise?

- franchise fee
- furniture, fixtures and equipment
- leasehold improvements
- lease deposits
- other deposits
- franchise training
- travel expense
- supplies
- advertising and brochures
- grand-opening advertising
- inventory
- pre-opening staff costs
- working capital until breakeven
- working capital – living expenses
- other

What are the continued financial costs, the basis used for calculation, method of payment and frequency of payment?:

- royalties
- advertising

Must the franchisee purchase products or services from the franchisor?:

- Does the franchisor earn income on purchases?
- How much does the franchisor earn?
- How are the products distributed?
- How long does it take for the orders to be filled?
- What other initial or continuing services does the franchisor provide? What do these cost?

### ABOUT CONSUMER RESEARCH AND MARKETING:

- What type of consumer research has the company conducted?
- What were the results?
- Has the franchisor conducted any market studies on the territory to ensure that it can support a franchise?
- What are the demographics required to support a franchise?
- What are the traffic counts required to support a franchise?

### ABOUT TRAINING:

- What are the location, duration and additional costs of initial training?
- Who must attend the training?
- What is the cost of additional staff attending training?
- What is the training curriculum?
- Who conducts the training and what are their backgrounds?
- Who pays for transportation, room and living expenses?
- Does the franchisor provide training materials for training new staff in addition to the operations manuals?
- Does the franchisor provide hands-on assistance during the pre-opening, grand opening and initial period? Of what type, duration and cost?

## ABOUT PRODUCTS AND SERVICES:

- Are there any new products or services under consideration for addition to the franchise?
- When are they going to be introduced?
- What is the estimated additional cost for adding the new products or services?
- Are there any restrictions on the distribution or sale of the product?
- Is there a guarantee or warranty program? How is it administered and what is the cost?
- Is there a minimum that must be purchased?

## ABOUT OPERATIONS:

- What are the roles and responsibilities of the field staff?
- How many locations does each franchise consultant work?
- What is the background of the franchise consultant I will be working with? Can I meet that person before purchasing the franchise?
- How often does the field staff visit a franchisee's location?
- What is the additional cost of field services if the franchisee requires it?
- Exactly what kind of assistance is given?
- What kind of supervision or quality control is there?
- What, if any, is the charge for assistance?
- What kind of business management systems are provided to boost sales and profits?

## ABOUT ADVERTISING AND MARKETING:

- What type of consumer advertising does the company recommend?
- What types of cooperative advertising programs are being used?
- What percentage of sales is recommended or required for advertising or marketing?
- How do the franchisees obtain their sales leads or customers?
- What is the franchisor's national/regional advertising program and budget?
- What portion of the national/regional advertising contribution is used for administrative/corporate/agency expenses and fees?
- What are the primary advertising/marketing vehicles?
- What is the grand opening advertising program and cost?

## WHAT SHOULD I ASK THE FRANCHISEES?

### ABOUT THE FRANCHISOR:

- How much support do you get?
- Are you satisfied with the franchisor?
- Is the franchisor fair and easy to work with?
- Does the franchisor listen to your concerns and accept input from the franchisees?
- Have you had any disputes and, if so, were you able to settle them?
- Do you know of any trouble the franchisor has had with other franchises, competitors or the government?
- Has the franchisor kept its promises?

### ABOUT COSTS:

- Is your franchise profitable?
- What are your gross revenues?
- What have your pre-tax profits been for the past three years?
- What is your salary?
- How is your cash flow?
- Were the franchisor's start-up costs and working capital requirements accurate?
- Were the franchisor's profit projections and earnings claims accurate?
- How long did it take you to break-even?
- Have you made the profit you expected to make?

### ABOUT TRAINING:

- Was the training by the franchisor adequate?
- Was the training by the franchisor effective?

### ABOUT PRODUCTS AND SERVICES:

- Is the product or service you sell of good quality?
- Is delivery of goods from the franchisor adequate?
- Are you getting supplies cheaper from the franchisor than you could on your own?
- What does the franchisor supply?

### ABOUT ADVERTISING AND MARKETING:

- How much do you spend on advertising a month?
- How effective is the regional or national advertising?
- Do you think you are getting good value for your advertising dollars?
- Are you satisfied with the marketing and promotional assistance the franchisor has provided?

### ABOUT OPERATIONS

- How effective are the operational procedures?
- Have the operations manuals helped you?
- What do you think of the manuals?
- Are the manuals updated on a regular basis?
- What did you do before you bought the franchise?
- Describe your day.
- How many hours a day do you work?
- How many hours a week do you work?
- How much freedom do you have to make decisions?
- Are you happy with your investment?
- Are you disappointed in any aspect of the business?
- Is there anything about the business you do not like?
- What do you like most about the business?
- What kind of problems do you encounter?
- What do you like least about the business?
- Would you do it again?
- Would you recommend I buy a franchise?

## WHAT QUESTIONS SHOULD I ASK MYSELF BEFORE BUYING A FRANCHISE?

There are three main sets of questions you should ask yourself:

**Do I have what it takes to start my own business/be an entrepreneur?**

**Do I have what it takes to be a franchisee?**

**Do I have all the answers I need about the franchise I am considering buying?**

### DO I HAVE WHAT IT TAKES TO START MY OWN BUSINESS/BE AN ENTREPRENEUR?

So you want to be an entrepreneur? You're not alone! Consider these statistics:

- 55% of all Americans want to be their own boss.
- 37% of all households are involved in small business.
- 70% of all high schools students want to start a business.
- 1 out of every 25 adults is currently starting a business.
- 5 million people started a business in 1995.
- By 2000, there will be 200 million home-based businesses.

An entrepreneur is defined as:

- "One who pursues opportunity beyond the resources currently controlled."
- "A person who sees an opportunity and creates an organization to pursue it."
- "A dreamer who attempts to turn an idea into a profitable reality."
- "Anyone who assumes the risk and responsibility for starting and managing a business."
- "Anyone who takes the risk of starting a business for the purpose of making a profit."

Entrepreneurs have a different way of looking at life:

- |                    |            |                   |
|--------------------|------------|-------------------|
| • Opportunity      | INSTEAD OF | Security          |
| • Results          | INSTEAD OF | Routine           |
| • Profit           | INSTEAD OF | A Paycheck        |
| • Trying New Ideas | INSTEAD OF | Avoiding Mistakes |
| • Vision           | INSTEAD OF | Short-Term Gain   |

The advantages of being an entrepreneur:

- freedom and independence
- control over a major aspect of your life
- an outlet for creativity
- excitement

- satisfaction and sense of achievement
- self-esteem
- status and recognition
- flexibility
- job security—you cannot be fired or laid off
- unlimited income potential
- growth of initial monetary investment

The disadvantages of being an entrepreneur:

- risk
- responsibility and pressure
- fear of failure
- obstacles and frustration
- loneliness
- more work
- longer hours
- less time or energy to spend with friends and family
- less financial security
- fewer job benefits
- risk of losing investment
- income fluctuation
- you are responsible for your own portion of taxes and FICA

**Entrepreneurial self-assessment:**

Starting a successful business takes a tremendous amount of energy and certain personal characteristics. Read each of the characteristics below and circle the number that most accurately describes your entrepreneurial potential on a scale of one to ten. (1 is low, 10 is high)

Characteristic	Description	Your Tendency (low to high)
Motivation	drive, energy to succeed	1 2 3 4 5 6 7 8 9 10
Enthusiasm	excited involvement	1 2 3 4 5 6 7 8 9 10
Risk-taker	willing to take chances	1 2 3 4 5 6 7 8 9 10
Confidence	sure of your own abilities	1 2 3 4 5 6 7 8 9 10
Competitiveness	wanting to win	1 2 3 4 5 6 7 8 9 10
Perseverance	refusal to quit a task	1 2 3 4 5 6 7 8 9 10
Creativity	imaginative thinking	1 2 3 4 5 6 7 8 9 10
Organization	keeping things in order	1 2 3 4 5 6 7 8 9 10
Vision/leadership	knowing where you want to be	1 2 3 4 5 6 7 8 9 10
Persuasiveness	ability to convince others	1 2 3 4 5 6 7 8 9 10
Honesty	truthfulness	1 2 3 4 5 6 7 8 9 10
Adaptability	can handle new situations	1 2 3 4 5 6 7 8 9 10
Understanding	can sense peoples' feelings	1 2 3 4 5 6 7 8 9 10
Self-discipline	sticking to a plan or schedule	1 2 3 4 5 6 7 8 9 10
Independence	belief in oneself	1 2 3 4 5 6 7 8 9 10
Purposefulness	doing things for a reason	1 2 3 4 5 6 7 8 9 10
Goal-oriented	work steadfastly toward a goal	1 2 3 4 5 6 7 8 9 10
Problem-solver	think of solutions to problems	1 2 3 4 5 6 7 8 9 10
Drive	desire to work hard	1 2 3 4 5 6 7 8 9 10
Optimism	positive attitude	1 2 3 4 5 6 7 8 9 10

Date \_\_\_\_\_ Total Score \_\_\_\_\_

Your score is an indication of the extent to which you possess personal characteristics similar to those of successful entrepreneurs.

## **The Probability of Your Entrepreneurial Success**

### **A Score of 160-200**

You possess very strong entrepreneurial characteristics. You will probably find entrepreneurship a very desirable, exciting and fulfilling way of life.

### **A Score of 120-159**

You are mildly entrepreneurial. You may find entrepreneurship desirable and stimulating, but may have to develop your entrepreneurial abilities through training.

### **A Score of 120 and Below**

You will probably find entrepreneurship undesirable and difficult. You will probably be more successful working for someone else, although you can still develop your entrepreneurial abilities. So, if you are determined to start your own business, don't give up!

Making a decision to start your own business isn't just about numbers. It's about you...your lifestyle, family, likes and dislikes, work habits, values, ethics and dreams. You need to honestly define who you are and what you want—your future depends on it!

### **Questions to ask yourself:**

- Do you have the personal drive to be a successful entrepreneur?
- Are you willing to work whatever hours it takes to make your business a success?
- Are you willing to give up the perks of being an employee to invest and run your own business?
- Are you self-reliant?
- Can you work without support?
- Are you healthy?
- Do you have the physical ability to meet the needs of operating on your own?
- Can you handle stress?
- Do you have the mental ability to meet the everyday needs of operating your own business?
- Can you handle crisis situations and deadlines?
- Do you like people?
- Do you listen well?
- Do you have patience when working and interacting with others?
- Do you communicate well?
- Can you be a leader and a trainer for your staff as well as a front person for your business?
- Can you maintain a positive relationship with the people who work for you?
- Can you meet the needs of your customers?
- Do you have the ability to sell—yourself and your products and services?
- Can you afford to start your own business?
- Do you have the support of your family and friends?

## DO I HAVE WHAT IT TAKES TO BE A FRANCHISEE?

Once you have determined that you have the abilities, skills and desire to start your own business, you have to further determine if you have the requisite traits to become a franchisee.

- Can you follow someone else's rules, even when you think you have a better way?
- Are you prepared to accept coaching and advice on how to run your business from a franchisor's field and headquarter's staff?
- If the franchisor turns down your great idea for changing the system, can you live with that?
- Can you trust that a franchisor is working for the benefit of the entire system—even when their decisions do not necessarily go your way?
- Are you willing to share financial information and prepare required reports each month?
- Are you willing, able and eager to learn new skills?
- Can you set aside old habits and beliefs to follow a franchise system?

## DO I HAVE ALL THE ANSWERS I NEED ABOUT THE FRANCHISE I AM CONSIDERING BUYING?

Do you know the franchisor?

Have you spent enough time finding out about the franchisor from:

- other franchisees?
- the International Franchise Association?
- the franchisee's owners association
- the franchise advisory council

Can you afford a franchise?

- How much do you have to invest?
- How much can you risk losing?
- How much do you need to live on?
- What is the total investment required for getting into the franchise?
- What portion of the investment can be financed?
- Can you find anyone willing to invest in you and your future?
- How much can you earn as a franchisee?
- How long will it take to breakeven?
- What return can you get on your investment?
- Can you get a better return from another investment?
- Are the risks equal?
- Is your research thorough? (Have you researched the industry, the franchisor, the disclosure documents, and talked with current and former franchisees?)
- Have you gotten the assistance of professional advisors who are familiar with franchising?
- Have you made a slow and detailed evaluation of the opportunity to determine if it will meet your personal and financial goals?

### Do you understand the terms of the contract?

- Have you thoroughly read the FDD and the franchise agreement?
- Have you had all your questions satisfactorily answered?
- Have the promises which the franchisor made during your discussions been included in the agreement?
- Have you had a qualified, experienced franchise attorney review the documents?
- Have you had a qualified, experienced accountant, familiar with franchising, review the documents?

### Are the other franchisees happy with their investments?

- Have you talked with and visited other franchisees?
- Have you worked at a franchise location to get a better feeling if this is the right decision?
- Have you contacted the franchise owners association and talked with the president?
- Have you talked with the director of the franchise advisory council?

### Does the franchisor have a history of litigation?

- Are other franchisees constantly bringing lawsuits against the franchisor?
- Is there anything about the franchisor's litigation history that causes you concern?
- Have you discussed these concerns with the franchisor's management and the leadership of the franchisee owners association or franchisee advisory council?

### Can you make enough money with this franchise? Ask other franchisees:

- Are you making money with the franchise investment?
- How long did it take you to breakeven?
- How long before you started to make money?
- Was the investment estimate the franchisor gave you accurate? If not, how much more money did you need?
- Was the estimated working capital accurate? How much did you need to have and how long before you could take money out of the business to live on?
- Are there any mistake you made in starting up the franchise that cost you money? How can I avoid the same problem?

### Is the franchisor making money and where is the money coming from?

- If the franchisor has been in business awhile, is their business being supported by continuing royalties or is it coming mostly from initial franchise fees?
- Is the franchisor profitable?
- Is the franchisor on firm financial ground?

### Does the franchisor understand franchising?

- Does the franchisor have adequate staff, resources and trained personnel to meet its commitment to you?
- Do you feel the franchisor has the appropriate temperament to operate a franchise system?
- Does the franchisor staff attend seminars on franchising and management? Do they know about the latest changes in the industry? Are they active in trade associations for their specific industry and are they active in the International Franchise Association?
- Has the franchise been growing? Are new locations being added on a regular basis? How many locations closed in the last year? Why did they close?
- Are the sales within individual stores increasing?
- Does the franchisor have an active research and development department that introduces new products and services?
- Do the field staff act as consultants and advisors or do they act as police personnel (inspecting franchises and writing up violations, but not offering help and guidance?)

### What are the keys to franchise success?

Making any business reach its full potential takes talent. If you've selected your franchise well, your franchisor will be able to help you avoid many of the mistakes new, independent start-up businesses make. Here are some keys for franchisee success.

#### Make sure you have enough money.

- Determine how much you have to invest, how much you're willing to risk and how much you will need to live on for at least 12 months.
- Make sure you understand the initial investment required.
- Make a careful and rational decision about buying the franchise. Listen to your attorney and accountant and do not be pressured by the franchise salesperson.

#### Follow the system.

- Franchisees often get their business up and running and then begin to change, add or modify existing products, advertising, hours, services and even the quality and consistency they are licensed to deliver. This violates the franchise agreement and puts you in jeopardy of having your franchise terminated!
- By following the system, you:
  - preserve the brand
  - protect your investment and that of your fellow franchisees

### **Don't neglect your family and friends.**

- Be prepared to work long hours, but also make sure to budget time for your family and friends.
- Don't forget to acknowledge the sacrifices your family makes.
- Allow your family and friends to share in your new life.

### **Be an enthusiastic franchisee.**

- The success of any business is linked to the level of enthusiasm you bring to the job.
- Enthusiasm brings a level of excitement and energy to the operation that everyone can feel—including your customers and staff.
- Let your staff in on the fun. Acknowledge their good work with recognition or a raise.

### **Recruit the best and treat them with respect.**

- Good help is hard to find—great help is essential.
- To keep the good staff you've hired:
  - Rotate routine and boring jobs.
  - Be fair. Don't show favoritism.
  - Work with your staff to develop the schedule.
  - Treat your employees with respect. Don't allow employees to be disrespectful to any other employee.
  - Keep employees informed of new marketing and other promotions.
  - Remove hassles—ask employees which procedures are working and which aren't.
  - Make their workdays challenging.
  - Provide timely performance reviews and wage or salary increases.

### **Teach your employees.**

- In franchising, training should be continuous. Employees are your front line.
- Training classes are a good way to show your employees that they matter to you.
- Get all the training you can from the franchisor.
- Regularly train and retrain all your employees.
- Hold refresher and advanced classes on a regular basis.
- Alert your franchisor when you need additional training.
- Take advantage of every training opportunity, whether it's offered by the franchisor or by local schools, trade associations and other sources.

### **Give customers great service.**

- The most important thing you can do is to get everyone to smile!
- Let the customer know you're happy they chose your business.

### **Get involved with the community.**

Customers like to shop in places that support them:

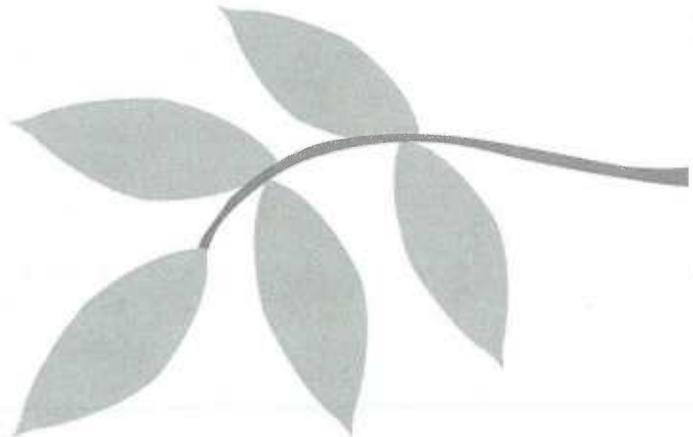
- sponsor Little League team
- support a civic or youth group
- give tours of your business for school groups
- set up a kiosk at community events

### **Stay in touch with your franchisor and other franchisees:**

- Stay in communication with the franchisor: letters, newsletters, emails, phone calls, faxes, training classes, regional meetings, conferences and conventions
- Communicate with other franchisees by participating in the franchise owners association.

### **Watch the details.**

- Success is in the pennies! If you watch your pennies, the dollars will take care of themselves.
- Minimize costs and maximize sales.
- Watch out for shrinkage (merchandise that is missing or unaccounted for).
- Work hard every day. Choose your time away from the franchise wisely.



# Exhibit 4

# **Exhibit 4**

5



500 IDS CENTER  
80 SOUTH EIGHTH STREET  
MINNEAPOLIS, MN 55402-3796  
MAIN: 612.632.3000  
FAX: 612.632.4444

ELIZABETH S. DILLON  
ATTORNEY  
DIRECT DIAL: 612.632.3284  
DIRECT FAX: 612.632.4284  
ELIZABETH.DILLON@GPMLAW.COM

September 27, 2013

Mr. Dan Sexton  
Minnesota Department of Commerce  
85 – 7<sup>th</sup> Place East, Suite 500  
St. Paul, Minnesota 55101-2198

VIA FEDERAL EXPRESS

Re: Franchise Registration Renewal Application for:  
AlphaGraphics, Inc.  
File No. F-2513

Dear Mr. Sexton:

Enclosed please find the following materials in connection with the franchise registration renewal application of the above-referenced franchisor:

1. A check in the amount of \$300.00 for your fees;
2. Uniform Franchise Registration Application;
3. Franchisor's Costs and Sources of Funds;
4. Uniform Franchise Consent to Service of Process;
5. Consent of Accountant;
6. Franchise Seller Disclosure Forms;
7. One red-lined copy of the revised Franchise Disclosure Document on paper; and
8. One red-lined copy of the revised Franchise Disclosure Document on CD-ROM, in PDF format.

If you have any questions or comments regarding this renewal application, please feel free to contact me. Thank you for your cooperation in this matter.

Very truly yours,

Elizabeth S. Dillon

ESD/mdr  
Enclosures  
GP:3473260 v1

**FRANCHISE DISCLOSURE DOCUMENT**

**ALPHAGRAPHS, INC.**

a Delaware corporation

215 South State Street, Suite 320

Salt Lake City, Utah 84111

(800) 955-6246 ~~richardson@alphagraphics.com~~ ~~www.alphagraphics.com~~

~~opportunity@alphagraphics.com~~

~~www.alphagraphics.com~~

The franchise offered is to operate an AlphaGraphics® Business Center, which offers customized marketing solutions to businesses using data driven, multi-channel communications that may require a blend of design, print, web, mobile and social media services.

The estimated total initial investment necessary to begin operation of a new AlphaGraphics® Business Center franchise is ~~\$233,950~~ 247,800 to ~~\$377,400~~ 385,400, excluding real estate costs. This includes ~~\$59,500~~ 67,500 in initial fees that must be paid to the franchisor or an affiliate. The estimated total initial investment necessary to begin operation of an AlphaGraphics® Business Center franchise under our Conversion Pathway is \$69,100 to \$267,800, excluding real estate costs. This includes \$12,500 in initial fees that must be paid to the franchisor or an affiliate. The estimated total initial investment necessary to begin operation of an AlphaGraphics® AGStudio Sales Office franchise is \$49,500 to \$114,500, excluding real estate costs. This includes ~~\$21,500~~ or to \$31,500 in initial fees that must be paid to the franchisor or an affiliate.

This disclosure document summarizes certain provisions of your franchise agreement and other information in plain English. Read this disclosure document and all accompanying agreements carefully. You must receive this disclosure document at least 14 calendar-days before you sign a binding agreement with, or make payment to, the franchisor or an affiliate in connection with the proposed franchise sale. **Note, however, that no governmental agency has verified the information contained in this document.**

You may wish to receive your disclosure document in another format that is more convenient for you. To discuss the availability of disclosures in different formats, contact ~~Chrys Richardson~~ the Franchise Development Sales and Support Manager at 215 South State Street, Suite 320, Salt Lake City, Utah 84111 and (800) 955-6246.

The terms of your contract will govern your franchise relationship. Don't rely on the disclosure document alone to understand your contract. Read all of your contract carefully. Show your contract and this disclosure document to an advisor, like a lawyer or an accountant.

Buying a franchise is a complex investment. The information in this disclosure document can help you make up your mind. More information on franchising, such as "*A Consumer's Guide to Buying a Franchise*," which can help you understand how to use this disclosure document, is available from the Federal Trade Commission (FTC). You can contact the FTC at 1-877-FTC-HELP or by writing to the FTC at 600 Pennsylvania Avenue, NW, Washington D.C. 20580. You can also visit the FTC's home page at ~~www.ftc.gov~~ www.ftc.gov for additional information on franchising.

There may also be laws on franchising in your state. Ask your state agencies about them.

The issuance date of this Disclosure Document is ~~October 15, 2012, as amended December 17, 2012~~ September 27, 2013.

**EXHIBIT E**

**OPERATING MANUALS TABLE OF CONTENTS**

**Sales and Marketing Operations Manual**

Section	Number of Pages	Notes
Introduction	2	Includes introductory statements and the definition of marketing
Begin with Research	16	Includes information regarding AlphaGraphics, Inc. research, competitive analysis and Shopping Techniques and having a fully competitive shop
System Standard Marketing Requirements	24	Includes information regarding AlphaGraphics logo and trademark usage guidelines, message-on-hold, targeted direct marketing, outside sales process, and Global Accounts Program
Implementation of the AIM Program	106	Includes information regarding Encompass Contact Management System, targeted direct mail Marketing tools, targeted inside and outside sales tools and AIM sales and marketing support
New Store Marketing Program	6	Includes information regarding the yellow pages, message-on-hold program, business publications, subscriptions and dues, grand opening celebration, new store marketing budget summary, new store marketing support, marketing materials and new store marketing and budget template with guidelines
Optional Marketing Strategies	16	Includes information regarding the Regional and Multi-Regional Marketing Funds, print advertising, broadcast advertising, outdoor advertising, public relations and open house/anniversary event procedures
An Overview of Sales Management	6	Includes information regarding the job description, qualifications and responsibilities of a sales manager
Lead Generation Systems	6	Includes information regarding cold calling, estimates and referrals
Account Management	6	Includes information regarding new accounts, house accounts, uncertain accounts and account management
Sales Management Skills	36	Includes information regarding hiring sales representatives, training, evaluating performance, coaching your salespeople, running a successful sales meeting, when to hire and promoting sales inside your store
Basic Selling Skills	16	Includes information regarding stating your mission, selling from a buyer's point of view, probing for information, how to handle

Exhibit E

Page 1

Section	Number of Pages	Notes
		objections and how to close a sale
The AlphaGraphics Sales Process and Daily Organization	12	Includes information regarding preparing with Encompass, prospecting, appointments and follow-up
Advanced Sales Skills	12	Includes information regarding how to build and keep a large account, corporate and group presentations and how to prepare an account profile form
Exhibit 1 AIM Program Hardware Minimum Requirements	6	
Exhibit 2 Definition of TargetSmart! View Fields	6	
Exhibit 3 Direct Mail Summary Table	6	
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Exhibit 15 Sample Account Profile Form	2	

### Managing Profitability Operations Manual

Section	Number of Pages	Notes
Introduction	1	
Glossary of Terms	6	
Financial Management	34	Includes information regarding basics of accounting and financial reporting, principal

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Page 2

Section	Number of Pages	Notes
		financial documents, AlphaGraphics accounting procedures, costs, margins and breakeven analysis and forecasting revenues, expenses and cash flows
Credit and Collections	28	Includes information regarding ratios of cash and credit sales, credit applications, assigning and monitoring credit limits, small claims court, collection agencies and sample letters
Cash Management	8	Includes information regarding objective measurements of cash management
Tracking and Reporting	16	Includes a checklist for submitting financial information, and information regarding the royalty reduction program and universal service credits policy
Exhibit 1 A Checklist of Ways to Increase Cash Flow	5	

### Operating Efficiently Operations Manual

Section	Number of Pages	Notes
Introduction	2	
Quality Assurance and Control	6	Includes departmental quality considerations
The Front Counter	32	Includes the customer bill of rights and information regarding selling and organization at the front counter, taking orders, standard turnaround and tips
Production Scheduling	36	Includes the approved supplier/subcontractor list and information regarding department scheduling and maximizing labor
Design Services	34	Includes information regarding file organization, file server implementation, data protection, order taking, proofing, production standards, templates and training
Electronic Printing (B&W/Color) Production	30	Includes information regarding organization and production, preventative maintenance, printing tips, opportunities to maximize revenue
Offset Printing	26	Includes information regarding organizing and managing the press department, digital polyester plate output, printing tips, troubleshooting press problems
Advanced Color Offset Printing Operations	18	Includes information regarding output/imaging, stripping and proofing, making plates and printing
Bindery	10	Includes information regarding organization, safety, drilling, padding and collating

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Page 3

Section	Number of Pages	Notes
Sublet	4	Includes information regarding the HUB Services Program
System Standards	20	Includes information regarding shop appearance, authorized equipment, software, use of logo, staffing levels, hours of operation, financial reporting, credit cards, insurance and compliance with applicable laws

### Team Management Operations Manual

Section	Number of Pages	Notes
Introduction	1	
Recruiting and Hiring	23	Includes information regarding how to put together an effective recruiting program, interviewing, orientation and personnel forms
Job Descriptions	32	Includes descriptions of numerous job categories such as franchisee, store manager, sales manager, key operator, inside sales representative, bookkeeper and training coordinator
Motivation	8	Includes information regarding communication, team meetings, recognition ongoing career guidance, and investments
Payroll	2	
Incentive Compensation Plans	24	Includes information regarding incentives, profit sharing, sales compensation and the owner's bonus
Training	24	Includes information regarding new employee training program, objectives and assessment
Performance Reviews	4	
Personnel Records and Resources	4	

# Exhibit 5

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# Exhibit 5

**BRIGHTSTAR FRANCHISING, LLC  
AGENCY FRANCHISE AGREEMENT**

BrightStar Franchising, LLC FDD 2011  
Agency Franchise Agreement

**IFA-0103**

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towards Franchisor, Franchisor's affiliates and designated suppliers, Franchisee may, at its option, renew this Agreement upon the expiration of the Initial Term for an additional term of ten (10) years. Franchisee must exercise its option to renew by giving Franchisor written notice of Franchisee's election to renew not less than six (6) months nor more than one (1) year prior to the expiration of the Initial Term. As a condition of any renewal, Franchisee must (i) pay to Franchisor a renewal fee in an amount equal to five thousand dollars (\$5,000), (ii) sign Franchisor's then-current form of franchise agreement for renewal franchises, which may include terms and conditions materially different from those in this Agreement, such as different performance standards, fee structures and/or increased fees; (iii) if available, execute a new lease for three years with an option to renew for two years for the Agency premises; (iv) execute a general release in a form satisfactory to Franchisor of any and all claims against Franchisor, its parent, subsidiaries or affiliates (if applicable) and their officers, directors, attorneys, Owners and employees; (v) complete any new training requirements not yet completed; and (vi) at Franchisee's sole expense and if necessary in Franchisor's sole opinion, bring the Agency up to Franchisor's then-current standards for an Agency, including installation or upgrade of computer hardware and software, and the ABS. The first renewal franchise agreement referred to above will include an option for Franchisee to renew that agreement for one additional term of five (5) years on the terms of the second renewal franchise agreement being offered by Franchisor at that time to similarly situated renewing franchisees provided that at the time any such option is to be exercised by Franchisee, Franchisee has met the ten year sales goal agreed upon between Franchisor and Franchisee for the first renewal term and Franchisee is not in default under the first renewal franchise agreement, or any other agreement with Franchisor, at any time during the last six (6) months of the first renewal term.

### **3. OPERATING ASSISTANCE**

**3.1 Assistance Prior to Opening.** Prior to Franchisee's Opening Date, Franchisor will provide Franchisee with the following assistance, on the same basis as it will from time to time make available to other Agency franchisees:

3.1.1 Franchisee will be granted access to the Operations Manual via our intranet. If Franchisee opens multiple Agencies, Franchisee is responsible for making copies of the Operations Manual for use at its additional Agency locations. Franchisor may modify the Operations Manual by written or on-line supplements of which Franchisee will receive copies or receive links to print document.

3.1.2 Make available to Franchisee specifications on the size, layout and floor plan of the Agency office to assist with the purchasing of desks and file cabinets.

3.1.3 Review the proposed Premises and grant approval to the proposed Premises if it meets Franchisor's standards. Franchisor neither offers nor provides any other services in this regard.

3.1.4 Review the proposed lease for Agency Premises to determine that it meets Franchisor's standards for notice of assignment to Franchisor and other requirements included in the Operations Manual.

3.1.5 Assistance in the ordering of business cards, brochures, letterhead, and initial recruiting and marketing materials as listed in the Operations Manual.

3.1.6 A copy of job descriptions for all key positions to assist in hiring.

3.1.7 A checklist of Agency office supplies to be purchased.

3.1.8 Assistance with a forecast to manage business expectations, assistance with the development of a business plan to assist with obtaining financing, and assistance with pay and bill rate development.

3.1.9 Four days of new owner training at the Franchisor's headquarters on the selection of a location, hiring of branch manager/operations manager and registered nurse, licensure, territory zoning, and introduction to sales. The in-class training is supplemented by e-learning through the BrightStar Online Training System. We reserve the right to reduce the number of days at the Franchisor's location through the use of e-learning.

3.1.10 Five days of training at the Franchisor's headquarters for up to three (3) members. On responsibilities and system functionality, including two days of sales training to determine which institutions utilize agencies to help them supplement their staff, and training on staff recruitment. The branch manager/operations manager, director of nursing and Franchisee must attend and satisfactorily complete training. If Franchisee is serving as branch manager/operations manager, Franchisee's sales manager must attend and satisfactorily complete the sales portion of the training.

3.1.11 Several sample ads to be run in the newspapers to assist in announcing of office opening and recruiting of staff.

3.1.12 If the Agency operated under this Agreement is Franchisee's first Agency, and is not acquired through a transfer, Franchisee must participate in and comply with all of the requirements of the "BrightStart" Program. The BrightStart program is designed to assist new owners in opening their new business as well as focus on the core competencies of sales and marketing of the BrightStar business.

**3.2 Ongoing Assistance.** After Franchisee's Opening Date, Franchisor or its designee will make the following assistance available to Franchisee:

3.2.1 Regular consultation and advice in response to Franchisee's inquiries about specific administrative and operating issues. Franchisor may decide how best to communicate such consultation and advice to Franchisee, whether by telephone, in writing, electronically or in person. The method chosen by Franchisor may be different than the methods used by Franchisor for other franchisees.

3.2.2 Administer the General Marketing Fund and approve advertising that Franchisee creates for Franchisee's local use.

3.2.3 Make goods and services available to Franchisee either directly or through approved suppliers.

3.2.4 While not currently in place, Franchisor may develop a mandatory advanced training program and require Franchisee's key personnel, as designated by Franchisor, to attend the advanced training which will be held at Franchisor's headquarters or another location designated by Franchisor. Franchisor may charge a fee for this mandatory advanced training, and Franchisee must pay all of its travel expenses (transportation, hotel, meals, etc.) and related salary expenses. Except as stated below, Franchisor will not require more than two persons to attend more than three days of additional mandatory advanced training during any running twelve month period. All replacement branch manager/operations managers must meet Franchisor's applicable training requirements at the time of hire. If Franchisor trains any replacement managers, Franchisee will pay Franchisor a fee and pay all travel expenses (transportation, hotel, meals, etc.) and related salary expenses for any replacement manager to attend training.

3.2.5 Maintain the Athena Business System including the website (www.brightstarcare.com) that will support multiple functions (i.e. sales, recruiting, payroll, billing, HR, etc.) and initial assistance with pricing of service for the Agency.

3.2.6 Periodically revise the Operations Manual to incorporate new developments and changes in the BrightStar Agency Program and franchise and provide Franchisee with electronic access to all updates.

3.2.7 Provide suggestions on staffing matters, including recommended organizational charts for different levels of revenue; detailed position descriptions for all office and field positions with interview guides for all positions.

3.2.8 Provide information on improvements and developments in the BrightStar Agency Program in the form of regular announcements via main menu page of website or email bulletins.

3.2.9 Additional optional training is available on an as-needed basis for an additional fee of \$500 per day per trainer plus travel, room and board expenses for each trainer.

**3.3 Referral Fee.** If Franchisee or Franchisee's employee refers a prospective franchisee directly to Franchisor and the prospective franchisee signs a franchise agreement with Franchisor, Franchisor will pay the referring party, upon receipt of the initial franchise fee from the referred franchisee or franchisee's employee, a referral fee in an amount of \$5,000. Additionally, Franchisor may provide incentives and/or other benefits to franchisees who refer employees or clients to a BrightStar agency as further described in the Operations Manual.

#### **4. FEES AND OTHER PAYMENTS**

##### **4.1 Initial Franchise Fee.**



used by Franchisor and designated for confidential use within the BrightStar Agency Program and the information contained therein as confidential and limit access to employees of Franchisee on a need-to-know basis. Franchisee acknowledges that the unauthorized use or disclosure of Franchisor's confidential information or trade secrets will cause irreparable injury to Franchisor and that damages are not an adequate remedy. Franchisee accordingly covenants that it will not at any time, without Franchisor's prior written consent, disclose, use, permit the use thereof (except as may be required by applicable law or authorized by this Agreement), copy, duplicate, record, transfer, transmit, allow access to or otherwise reproduce such information, in any form or by any means, in whole or in part, or otherwise make the same available to any unauthorized person or source. Any and all information, knowledge and know-how not known about the BrightStar Agency Program and Franchisor's products, services, standards, procedures, techniques and such other information or material as Franchisor may designate as confidential will be deemed confidential for purposes of this Agreement.

**7.3 Revisions.** Franchisee understands and acknowledges that Franchisor may, from time to time, revise the contents of the Operations Manual to implement new or different requirements for the operation of the Agency, and Franchisee expressly agrees to comply with all such changed requirements which are by their terms mandatory, provided that such requirements will also be applied in a reasonably nondiscriminatory manner to comparable businesses operated under the BrightStar Agency Program by other Franchisees. Franchisee acknowledges that Franchisor may provide updates to the Operations Manual electronically over its intranet website. Franchisee agrees, therefore, to periodically check Franchisor's intranet website, at least twice per week, for such updates. The implementation of such requirements may require the expenditure of reasonable sums of money by Franchisee. If Franchisor elects to provide Franchisee with a hard copy of the Operations Manual, Franchisee must at all times ensure that its copy of the Operations Manual is kept on the Agency Premises and kept current and up to date. In the event of any dispute as to the contents thereof, the terms and dates of the master copy thereof maintained by Franchisor at its principal place of business will be controlling.

**7.4 Replacement Fee.** If Franchisor provides Franchisee with a hard copy version of the Operations Manual, rather than an electronic or online version, and Franchisee loses any portion of the Operations Manual, Franchisee must pay Franchisor a fee of \$1,000, plus all shipping expenses, or such lesser amount as Franchisor may charge. If the loss, in Franchisor's opinion, is attributable to Franchisee's breach of the Franchise Agreement Franchisor may also elect to terminate the Franchise Agreement.

## **8. ADVERTISING AND MARKETING**

**8.1 General Marketing Fund.** Franchisor or its designee will create, administer, and maintain a general marketing fund ("General Marketing Fund"). Franchisor will use General Marketing Fund contributions to develop, produce and distribute national, regional and/or local advertising and to create advertising materials and public relations programs which promote, in Franchisor's sole judgment, the Licensed Marks, any other marks owned by Franchisor or its affiliates, and/or the products and services offered by System Franchisees. Franchisor has the sole right to determine contributions and expenditures from the General Marketing Fund, or any other advertising program, and sole authority to determine, without limitation, the selection of the advertising materials and programs; provided, however, that Franchisor will make a good

faith effort to expend General Marketing Fund contributions in the general best interests of the System on a national or regional basis. Franchisor may use the General Marketing Fund to satisfy any and all costs of maintaining, administering, directing, preparing, and producing advertising, including the cost of preparing and producing Internet (including by using social media platforms), television, radio, magazine and newspaper advertising campaigns, the cost of direct mail and outdoor billboard advertising; the cost of public relations activities and advertising agencies; the cost of developing and maintaining an Internet website; the cost of developing and maintaining a social media presence; and personnel and other departmental costs for advertising that Franchisor internally administers or prepares. Franchisor also may use the General marketing Fund to cover costs and expenses associated with the Annual Conference and branch leadership conference, including costs related to productions, programs and materials. Nevertheless, Franchisee acknowledges that not all System Franchisees will benefit directly or on a pro rata basis from such expenditures. While Franchisor does not anticipate that any part of the General Marketing Fund contributions will be used for advertising which is principally a solicitation for franchisees, Franchisor reserves the right to use the General Marketing Fund for public relations or recognition of the BrightStar brand, for the creation and maintenance of a web site, a portion of which can be used to explain the franchise offering and solicit potential franchisees, and to include a notation in any advertisement indicating "Franchises Available."

8.1.1 Franchisor may periodically assist franchisees to maintain high quality standards through customer surveys, customer interviews, and other similar initiatives ("Surveys"). The cost of such programs can be paid by the General Marketing Fund. The cost of these programs may be charged directly to Franchisee if Franchisee's results from a Survey fall below System established minimum standards for such Surveys. Any such fees charged will be contributed to the General Marketing Fund.

8.1.2 Franchisor has the right to reimburse itself from the General Marketing Fund contributions for such reasonable costs and overhead, if any, as Franchisor may incur in activities reasonably related to the direction and implementation of the General Marketing Fund.

8.1.3 Franchisee agrees that the General Marketing Fund may otherwise be used to meet any and all costs incident to such General Marketing, including joint or collective advertising campaigns of Franchisor's direct or indirect parent corporations or subsidiaries thereof or affiliated companies, if any, using the BrightStar Agency Program.

8.1.4 Franchisor may terminate, and resume, the General Marketing Fund periodically during the term of this Agreement, however, any decision to terminate or resume the General Marketing Fund will apply to all franchisees and Franchisor-owned locations equally. Franchisor will not terminate the General Marketing Fund before making arrangements to spend or rebate any balance in the General Marketing Fund after payment of all expenses. If Franchisor resumes the General Marketing Fund, Franchisor will give Franchisee at least 30 days written notice before General Marketing Fees become due again, and will collect General Marketing Fees at the original rate in this Agreement.

**8.2 Accounting for General Marketing Fund.** Franchisor will administratively segregate all contributions to the Fund on its books and records. All such contributions to the Fund may be deposited in Franchisor's general operating account and may be commingled with

Franchisor's general operating funds. Contributions to the Fund are neither held in a "trust" nor does Franchisor hold them as a fiduciary or in a similar special capacity or relationship. Upon written request Franchisor will furnish Franchisee an unaudited report in a form determined by Franchisor no later than 120 days after the close of Franchisor's fiscal year on each Fund to which Franchisee contributed during the preceding year. Franchisor may elect to accumulate monies in the Fund for such periods of time as it deems necessary or appropriate, with no obligation to expend all monies received in any fiscal year during such fiscal year. In the event Franchisor's expenditures for General Marketing in any one fiscal year exceed the total amount contributed to the applicable Fund during such fiscal year, Franchisor will have the right to be reimbursed to the extent of such excess contributions from any amounts subsequently contributed to the applicable Fund or to use such excess as a credit against its future contributions.

**8.3 Cooperative Advertising and/or other Marketing Programs.** Franchisee must participate in all cooperative advertising and/or marketing programs as are from time to time prescribed by Franchisor. The terms and conditions required for participation in any such co-op advertising program or programs will be as specified in the Operations Manual.

**8.4 Local Advertising.** Beginning on the Opening Date of Franchisee's Agency and for the first 24 full months thereafter, Franchisee must expend the greater of (i) 1.5% of its monthly Net Billings or (ii) \$1,000 per month for the purposes of local advertising. Such requirement will be appropriately adjusted by Franchisor if the Agency's Opening Date is on a date other than the first of the month. Thereafter, Franchisee must expend the greater of (i) 1% of its monthly Net Billings or (ii) \$1,000 per month for the purposes of local advertising. Fifty percent of these expenditures must be spent for recruiting. All local advertising (including advertising on social media platforms) by Franchisee must be in such media and of such type and format as Franchisor may approve, must be conducted in a dignified manner and must conform to such standards and requirements as Franchisor may specify. Franchisee may not use any advertising or promotional plans or materials unless and until Franchisee has received written approval from Franchisor, pursuant to the procedures and terms set forth in Section 8.6 hereof.

**8.5 Grand Opening Advertising.** In addition to the local advertising requirements under Section 8.4 above, Franchisee agrees to expend an additional amount of at least Fifteen Hundred Dollars (\$1,500) on promotion and advertising of the Agency beginning the month of Agency's Opening Date and ending sixty (60) days following the Opening Date ("Grand Opening Advertising").

**8.6 Advertising Generally.** With regard to advertising generally for the Agency, Franchisee must place or display at the Agency location (interior and exterior) only such signs, emblems, lettering, logos and displays and advertising materials as Franchisor approves in writing from time to time. Franchisee must submit to Franchisor, at least fifteen (15) days prior to publication or use, samples of all sales promotional and advertising materials Franchisee desires to use, including, but not limited to, print, radio and television advertising, signage, and supplies which Franchisor has not previously approved. Such submission will not affect Franchisee's right to determine the prices at which Franchisee sells Franchisee's services. Within ten (10) business days of Franchisor's receipt of any sample sales promotional material or advertising materials from Franchisee, Franchisor will notify Franchisee in writing of

Franchisor's approval or disapproval of the materials. Franchisee may not use any advertising or promotional materials for which Franchisor has not given Franchisor's prior written approval. All advertising must prominently display the Licensed Marks and must comply with any standards for use of the Licensed Marks Franchisor establishes as set forth in the Operations Manual or otherwise in writing. Franchisor may require Franchisee to discontinue the use of any advertising or marketing material, within time frames prescribed by Franchisor, at Franchisee's sole cost and expense.

**8.7 Website Matters.** Except as expressly permitted by Franchisor, Franchisee may not maintain a Web Site, as defined below, or otherwise maintain a presence or advertise using any public computer other than on the Web Site hosted by Franchisor pursuant to the ABS. "Web Site" means any part of the Internet (including social media) used as a commercial computer Agency by the public, and any successor technology, whether now existing or developed after the date of this Agreement, that enables the public to purchase services or goods by means of electronic commerce. Franchisor may establish a website that provides information about the System and Franchisor's products and services. Franchisor may use part of the monies from the General Marketing Fund that Franchisor collects under this Agreement to pay or reimburse the costs associated with the development, maintenance and update of such web site. Franchisor will be the web master, either directly or through a third party, and have the right to control such website.

**8.7.1** Franchisor may design and provide to Franchisee a web page for the promotion of Franchisee's Agency on Franchisor's website. In such case, Franchisor will be the web master, either directly or through a third party, and have sole control over such web page. Franchisee will review and execute, subject to Franchisor's approval, requested changes to Franchisee's web page. Franchisee is not permitted to maintain an individual website related to the Agency, or to establish a URL incorporating any variation of the "BrightStar" name or the Licensed Marks, without Franchisor's prior written approval. Franchisee will not violate Franchisor's privacy policies as posted on the website. Franchisor may use part of the monies from the Funds that Franchisor collects under this Agreement to pay or reimburse the costs associated with the development, maintenance and update of the website. Franchisee must also participate in any System-wide area computer Agency, intranet system, or extranet implemented by Franchisor as described above.

**8.7.2** Franchisee acknowledges that Franchisor is the lawful, rightful and sole owner of the Internet domain names [www.brightstarhealthcare.com](http://www.brightstarhealthcare.com), [www.brightstarcare.com](http://www.brightstarcare.com) and [www.247brightstar.com](http://www.247brightstar.com), and any other Internet domain names registered by Franchisor, and unconditionally disclaims any ownership interest in those or any similar Internet domain name. Franchisee agrees not to register any Internet domain name in any class or category that contains words used in or similar to any brand name owned by Franchisor or Franchisor's affiliates or any abbreviation, acronym, phonetic variation or visual variation of those words.

**8.8 Yellow Pages Advertising.** In addition to the advertising obligations described above, as soon as possible (based on publication deadlines) after signing this Agreement, Franchisee must place an advertisement for the franchised business in the local "Yellow Pages" (or its functional equivalent) serving Franchisee's Protected Territory. The advertisement must conform to Franchisor's standards and specifications and Franchisee must place the

advertisement under the heading(s) Franchisor designates in the Operations Manual or otherwise in writing. If Franchisee's telephone directory extends beyond Franchisee's Protected Territory, Franchisor has the right to require Franchisee to advertise as a pro rata participant in a group display advertisement. Franchisee may advertise either as a single franchisee or, if the telephone directory encompassing Franchisee's Protected Territory includes another System franchisee's protected territory, Franchisee may advertise as a pro rata participant in a common group advertisement. While not presently in force, Franchisor may use funds from the General Marketing Fund to cover or supplement Franchisee's costs associated with its Yellow Pages advertising.

## **9. MODIFICATIONS.**

**9.1 Modifications to the BrightStar Agency Program.** The business environment affecting the Franchisor's franchise program, including Agencies, is continually changing. Franchisor may develop other business activities or modify existing business activities in response to changes in the business environment, including those resulting from technological advances, e-commerce, expansion into new markets and other factors that may not presently be anticipated. Franchisor reserves the right to change or modify the Licensed Marks, the Agency concept, the Operations Manual, and any proprietary software Franchisor requires Franchisee to use. Franchisor may adopt and use new or modified trade names, trademarks, service marks, logos, equipment, software, products, techniques or concepts. Franchisor may add new and different services and products and withdraw services or products or change their names or image; redesign the trade dress, software programs and equipment or fixture standards; or discontinue them as Franchisor considers appropriate. Franchisee must accept and use the changes as if they were part of this Agreement. If changes are related to the Licensed Marks, then Franchisee will have one hundred twenty (120) days from the date of notice to implement any such changes under this Section 9.1.

**9.2 Modifications not Requiring Significant Changes in Fixtures or Equipment.** If any changes or modifications involving services or products would not require the installation of new fixtures or equipment, Franchisor may instruct Franchisee to begin offering the new services or products on a date specified in a supplement to the Operations Manual or other notice. Likewise, if the withdrawal of a service or product would not require the removal of fixtures or equipment, Franchisor may direct Franchisee to stop offering the service or product on a date specified in a supplement to the Operations Manual or other notice. Franchisee agrees to comply with these instructions and directions.

**9.3 Modifications Requiring Significant Changes in Fixtures or Equipment.** If any changes or modifications involving new trademarks, concepts, services or products or items necessitate the addition or removal of fixtures, equipment or signs, Franchisor may instruct Franchisee to adapt the Agency to the change through a supplement to the Operations Manual. In consultation with Franchisor's franchisees, Franchisor will establish a schedule for Franchisee to implement the change, which will depend, among other factors, on the amount Franchisee has spent in recent periods on any other changes to the BrightStar Agency Program. Franchisee will have one hundred twenty (120) days from the date of notice to implement any such changes under this Section 9.3.

# Exhibit 6

# **Exhibit 6**

**FRANCHISE DISCLOSURE DOCUMENT**  
**HOLIDAY HOSPITALITY FRANCHISING, LLC**  
**A Delaware Limited Liability Company**  
**Three Ravinia Drive, Suite 100**  
**Atlanta, Georgia 30346**  
**(770) 604-2000**  
**www.holidayinn.com/development**  
**www.hiexpress.com/development**  
**americas.development@ihg.com**



The franchisee will establish and operate a hotel under the Holiday Inn®, Holiday Inn® & Suites, Holiday Inn Express®, Holiday Inn Express® & Suites or Holiday Inn® Resort brand.

The total investment necessary to begin operation of a typical 143-room Holiday Inn or Holiday Inn & Suites hotel, excluding land costs and other matters, ranges from \$12,710,770 to \$17,300,935 (\$88,887 to \$120,986 per guest room) or more (see Item 7), including between \$127,520 and \$153,935 or more that must be paid to the franchisor or affiliate (see Item 5). The total investment necessary to begin operation of a typical 93-room Holiday Inn Express or Holiday Inn Express & Suites hotel, excluding land costs and other matters, ranges from \$7,200,120 to \$10,014,535 (\$77,421 to \$107,683 per guest room) or more (see Item 7), including between \$136,870 and \$164,035 or more that must be paid to the franchisor or affiliate (see Item 5). The total investment necessary to begin operation of a typical 180-room Holiday Inn Resort hotel, excluding land costs and other matters, ranges from \$17,381,020 to \$23,695,935 (\$96,561 to \$131,644 per guest room) or more (see Item 7), including between \$227,520 and \$298,935 or more that must be paid to the franchisor or affiliate (see Item 5).

This disclosure document summarizes certain provisions of your franchise agreement and other information in plain English. Read this disclosure document and all accompanying agreements carefully. You must receive this disclosure document at least 14 calendar days before you sign a binding agreement with, or make any payment to, the franchisor or an affiliate in connection with the proposed franchise sale. **Note, however, that no government agency has verified the information contained in this document.**

You may wish to receive your disclosure document in another format that is more convenient for you. To discuss the availability of disclosures in different formats, contact Patricia Womack, Franchise Sales at Holiday Hospitality Franchising, LLC, at Three Ravinia Drive, Suite 100, Atlanta, Georgia 30346 and (770) 604-2912.

The terms of your contract will govern your franchise relationship. Don't rely on the disclosure document alone to understand your contract. Read all of your contract carefully. Show your contract and this disclosure document to an advisor, like a lawyer or an accountant.

Buying a franchise is a complex investment. The information in this disclosure document can help you make up your mind. More information on franchising, such as "A Consumer's Guide to Buying a Franchise," which can help you understand how to use this disclosure document is available from the Federal Trade Commission. You can contact the FTC at 1-877-FTC-HELP or by writing to the FTC at 600 Pennsylvania Avenue, NW, Washington, DC 20580. You can also visit the FTC's home page at [www.ftc.gov](http://www.ftc.gov) for additional information. Call your state agency or visit your public library for other sources of information on franchising.

There may also be laws on franchising in your state. Ask your state agencies about them.

Issuance Date: April 3, 2014

and operated Inter-Continental Hotels since 1949. IHC offered franchises for Inter-Continental Hotels & Resorts branded hotels outside the United States from the late 1960s until November 2010, when those license agreements were assigned to the regional entities mentioned in the previous paragraph. These companies now offer InterContinental Hotels & Resorts franchises on a regional basis, outside of the Americas. Holiday began offering InterContinental Hotel & Resort franchises in the United States in December, 2003. As of the date of this disclosure document, IHC has 41 franchised InterContinental Hotels & Resorts hotels in Europe, the United States, Mexico, Latin America and the Asia/Pacific region, of which 9 hotels are co-branded under licensing agreements in Mexico (with "Grupo Presidente") and 2 are co-branded in Central America with Real Hotels & Resorts. IHC's address is Three Ravinia Drive, Suite 100, Atlanta, GA 30346.

Six Continents PLC, formerly the ultimate parent of Holiday and predecessor in interest of InterContinental Hotels Group PLC, directly or through a subsidiary, owned and operated 60 hotels in Europe known as Crest Hotels, and also operated, in Europe, 44 Toby Hotels. During 1990 and 1991, Six Continents PLC disposed of its interests in the Crest and Toby hotel brands.

Effective December 31, 2003, pursuant to an agreement with guest lodging franchisor Candlewood Hotel Company, Inc. and Candlewood Hotel Company, L.L.C., SCH acquired all rights to the "Candlewood Suites" extended-stay hotel brand; all existing Candlewood Suites franchise agreements; and, the right to grant all Candlewood Suites franchise agreements in the future (including any franchise applications that were in process as of December 31, 2003). SCH then assigned all Candlewood Suites franchise agreements to Holiday, effective December 31, 2003. Holiday is now the franchisor for the Candlewood Suites hotel brand.

Neither Holiday nor any of its affiliates has offered franchises for any other line of business.

Holiday's affiliate, IHG ECS (Barbados) SaRL operates the IHG Commission Services<sup>SM</sup> program, and its address is c/o Holiday Hospitality Franchising, Inc., Three Ravinia Drive, Suite 100, Atlanta, GA 30346 (see Item 6, note 8).

#### **PROPERTY MANAGEMENT & RESERVATION SYSTEM:**

SCH owns or licenses (in the case of certain software) and administers a computerized reservation network the "Reservations System". Components of the Reservations System operate under various names, such as "HOLIDEX<sup>®</sup> Plus" and PERFORM<sup>™</sup> ("PERFORM"). All hotels must be linked to the SCH central reservation system (currently HOLIDEX<sup>®</sup> Plus), including all system enhancements and upgrades such as the PERFORM<sup>™</sup> Revenue Management System (RMS) or such successor systems as SCH may designate. Hardware and software systems required to connect to the Reservations System must be fully operational when the hotel opens, with appropriate management and staff trained and competent to operate the system at all times.

SCH requires each Hotel to obtain and install an approved Property Management System ("PMS"). As of the date of this disclosure document, the MICROS Opera or Micros Opera Xpress solutions are the only approved PMS. FastConnect Plus is also part of the PMS solution. (see Items 8 and 11 of this disclosure document for a detailed description of the systems).

You must enter into the Master Technology Agreement ("MTA") with SCH (Exhibit C) that provides for the procurement, installation, training, use and maintenance of PMS equipment and software in order to access and communicate with the Reservations System. The Opera or Opera Xpress PMS Software are supplied by MICROS Systems, Inc. ("MICROS"). You must sign an Opera license agreement with MICROS. The Opera license or hosting agreements, which provide for the software, installation, training, use and maintenance of the PMS software, are available upon request. AT&T is the provider for FastConnect Plus. You will be required to sign a contract with AT&T for FastConnect Plus.

In October 2012, SCH entered into an Equipment Refresh and Integration Services Agreement with Hewlett-Packard Company ("HP") for deployment and procurement services for the hotel property management system. Pursuant to that agreement, HP will provide PMS hardware, software and deployment services at your Hotel. You must enter into a HP Joinder Agreement in order to obtain the PMS hardware, software and deployment services at your Hotel. A copy of the HP Joinder Agreement can be found within Exhibit C to this disclosure document.

The Reservation System will provide room availability and rate data on all hotels that Holiday franchises. You must also participate in Holiday's reservation and referral system. This system will facilitate communication of reservations to you from Holiday and from other hotels that Holiday franchises on a reservation referral basis.

SCH may install one or more "private network" connecting services, or another solution as specified, for use in communicating with the Reservations System.

### **CONDOMINIUM AND TIMESHARING PROJECTS:**

Holiday may consider granting a franchise in connection with a condominium or timesharing hotel development project. Because such projects are complex and unique, each project must be considered by Holiday individually. Holiday will determine, according to the unique facts of each proposed development, to what extent variations and additions to the License terms and provisions, including without limitation additional royalties and other fees, are warranted. Therefore, it is probable that Holiday will vary materially License terms and provisions for condominium or timesharing hotel developments, but at this time there is no formal program or guidelines with general applicability.

In September 2008, Holiday entered into license agreements and other agreements with Orange Lake Country Club, Inc. and certain of its affiliates (collectively, "OLCC"). Among other things, the agreements provide for OLCC's use of the Holiday Inn Club Vacations® brand in connection with the branding of certain timeshare resorts developed and/or operated by OLCC and the sales and marketing of timeshare interests in such resorts, and the agreements permit OLCC to use the Holiday Inn Club™ service mark in connection with the branding and operation of OLCC's timeshare exchange program. The licensing arrangement grants OLCC certain exclusive rights to use the Holiday Inn Club Vacations® and Holiday Inn Club® service marks (the "Service Marks") within the United States and certain other territories and prohibits Holiday from franchising the Holiday Inn Club Vacations® brand or allowing third parties to use the Service Marks while OLCC's exclusivity rights are in effect, subject to the conditions of the licensing arrangement. Accordingly, Holiday does not offer franchises involving timeshare properties. As of the date hereof, OLCC's exclusivity rights were in effect and Holiday and OLCC had entered into license agreements for the branding by OLCC of ten timeshare resorts located within the United States. All of those resorts were developed and/or are operated by OLCC.

### **THE MARKET:**

The market for hotel services is highly developed. The lodging industry is very competitive. You will compete with a wide range of facilities offering various types of lodging and related services (including other hotel brands that Holiday or its affiliates franchises or manages). These facilities include various other types of operations, some of which belong to large national and international companies. You will offer services to a broad range of the traveling public, which will vary based on your choice of Hotel brand. Your ability to compete in your market will depend upon factors such as your geographic area, specific site location, general economic conditions and the capabilities of your management and service team.

## FRANCHISE DISCLOSURE DOCUMENT

Choice Hotels International, Inc.

a Delaware corporation

1 Choice Hotels Circle, Suite 400

Rockville, Maryland 20850

(301) 592-5000

e-mail: [franchise\\_sales@choicehotels.com](mailto:franchise_sales@choicehotels.com)

[www.choicehotelsfranchise.com](http://www.choicehotelsfranchise.com)



The franchise offered in this disclosure document is for the rights to own and/or operate a COMFORT INN®, COMFORT SUITES® or COMFORT INN & SUITES® (“COMFORT”) hotel business.

The total investment necessary to convert an existing hotel and begin operation of an 80-room COMFORT INN, COMFORT INN & SUITES, or COMFORT SUITES hotel franchise is between \$297,750 and ~~\$2,087,599~~1,687,599. The total investment necessary to begin operation of a newly constructed 8788-room COMFORT INN or COMFORT INN & SUITES hotel franchise is between ~~\$4,145,482~~4,070,426 and ~~\$6,900,975~~6,799,783 and the total investment necessary to begin operation of a newly constructed 8586-room COMFORT SUITES hotel franchise is between ~~\$4,558,702~~4,595,850 and ~~\$7,573,912~~7,632,825. This includes an affiliation fee of \$500 per room (\$50,000 minimum); a property management system software license and systems training fee of between \$10,250 and \$14,250; and orientation and hospitality training fees of between \$0 and \$2,349 per person, all of which must be paid to the Franchisor or its affiliates. These sums do not include the cost of purchasing or leasing land or any real estate taxes.

This disclosure document summarizes certain provisions of your franchise agreement and other information in plain English. Read this disclosure document and all agreements carefully. You must receive this disclosure document at least 14 calendar days before you sign a binding agreement with, or make any payment to us or our affiliates in connection with the proposed franchise sale or grant. **Note, however, that no governmental agency has verified the information contained in this document.**

You may wish to receive your disclosure document in another format that is more convenient for you. To discuss the availability of disclosures in different formats, contact Amish Naik, Vice President, Global Development Operations & Planning at (301) 592-6194, 1 Choice Hotels Circle, Suite 400, Rockville, Maryland 20850.

The terms of your franchise agreement will govern your franchise relationship. Do not rely on the disclosure document alone to understand your franchise agreement. Read all of your franchise agreement carefully. Show your franchise agreement and this disclosure document to an advisor, like a lawyer or an accountant.

Buying a franchise is a complex investment. The information in this disclosure document can help you make up your mind. More information on franchising, such as “A Consumer’s Guide to Buying a Franchise,” which can help you understand how to use this disclosure document, is available from the Federal Trade Commission. You can contact the FTC at 1-877-FTC-HELP or by writing to the FTC at 600 Pennsylvania Avenue, NW, Washington, D.C. 20580. You can also visit the FTC’s home page at [www.ftc.gov](http://www.ftc.gov) for additional information. Call your state agency or visit your public library for other sources of information on franchising.

There may also be laws on franchising in your state. Ask your state agencies about them.

Issuance Date: April 1, 2014~~3~~

#### ITEM 4

##### BANKRUPTCY

No bankruptcy information is required to be disclosed in this Item.

#### ITEM 5

##### INITIAL FEES

###### AFFILIATION FEE

You must pay us, for the rights granted to you in the COMFORT INN, COMFORT INN & SUITES or COMFORT SUITES franchise agreement, an affiliation fee of \$500 per room, with a \$50,000 minimum. The entire affiliation fee is due no later than at the time you sign the franchise agreement and is non-refundable following our signing of the franchise agreement. If for any reason we do not grant you a franchise, or a franchise agreement is not counter signed by us, the affiliation fee, less a ~~\$2,500 application fee~~ \$5,000, will be refunded to you. Financing information is in Item 10. In the past, we have agreed to reduce the affiliation fee in certain instances for multiple unit franchisees, franchisees with larger properties, franchisees with whom we have previously dealt, franchisees that are departing other hotel chains or franchised systems and joining our system, and franchisees in other special circumstances. However, we do not always negotiate the affiliation fee even for franchisees possessing these characteristics, and we may freely choose not to negotiate with you, even if you possess some or all of these characteristics. During the 12 months ending December 31, 2013~~2~~, the affiliation fees ranged from \$0 to ~~\$70,000~~ 80,000 for new COMFORT INN and COMFORT INN & SUITES franchise agreements and the affiliation fees ranged from \$2,500 to ~~\$50,000~~ 62,000 for new COMFORT SUITES franchise agreements.

###### EXTENSION FEE

If you do not begin construction within 12 months after both you and we sign the franchise agreement or if you do not complete renovations to an existing franchised hotel within the time required under your franchise agreement, you may apply for an additional 3 months in which to begin construction or complete renovations. If we agree to grant an extension, you must pay us an additional \$5,000 per extension. In special circumstances we may waive the extension fee, but we are not obligated to, and any decision to waive an extension fee will be determined solely by us.

###### PROPERTY MANAGEMENT SYSTEM

You are required to install, maintain, and use full functionality of the choiceADVANTAGE® property management and reservation system as specified by us. You must purchase from us, an initial software license to use choiceADVANTAGE. The software license includes up to three interfaces to choiceADVANTAGE and you may install additional optional interfaces to choiceADVANTAGE for an additional fee. You will receive training in choiceADVANTAGE at your hotel and your General Manager, sales, marketing and front office staff must attend this training. The fees for the software license and the choiceADVANTAGE systems training and project management is between \$10,250 and \$14,250 depending on the size of the hotel and whether you install additional optional interfaces to choiceADVANTAGE. The initial software license and training fees do not include the monthly choiceADVANTAGE support fee to cover ongoing remote software support (see Item 6). There will be a rescheduling fee of between \$500 and \$2,100 if you need to reschedule training or if training is not completed due to circumstances that are within your control.

When a franchised hotel undergoes a 50% or greater change in its ownership and the new owners sign a franchise agreement with Choice (known as a “re-licensing”), the hotel is also required to have a customized remote, webinar training session with a Choice trainer. The fee for the re-licensing training is \$500. For re-licensed hotels that prefer a Choice trainer on-site, a 2 day option is available for an additional \$2,1002,600.

**ORIENTATION / HOSPITALITY TRAINING**

We provide required training programs that you, your General Manager, or other key employees must complete before opening your hotel in the Choice franchise system. The total training fees you must pay for orientation and hospitality training is between \$0 and \$2,349 per person, plus travel, lodging and meals for you and your General Manager. Training consists of a 5 day Choice orientation program at our headquarters in Maryland, as well as an online and 3.5 day hospitality training program at regional locations across the United States. Some or all of the training may not be required if you have previously owned a Choice branded hotel, obtained Choice Hotels training certification for another existing hotel and/or the General Manager has earned a Certified Hotel Administrator (“CHA”) or Certified Lodging

Manager (“CLM”) designation from the American Hotel & Lodging Educational Institute; or if you are the General Manager and have a Certified Hotel Owner (“CHO”) designation from the Asian American Hotel Owners Association. You or your General Manager may also have an opportunity to test out of some of the training.

For new owners that have minimal experience in hospitality and franchise based businesses, we may require that you participate in an additional customized 5 day on-site Performance Engagement Training visit from a Choice Senior Trainer. The owner, the General Manager, and various members of the hotel staff may be required to attend this additional training requirement and the Performance Engagement Training Fee is \$4,500.

Attendance is mandatory at the training programs identified in this Item 5. Failure to attend within the prescribed time frame may result in formal default, and failure to cure the default could result in the termination of your franchise agreement. For more detailed information on each training program, see Item 11.

\* \* \*

Except as identified in this Item 5, the affiliation fee, extension fee, property management system fees and training fees are uniform, are fully earned by us when paid by you, and we have no obligation to refund these fees. Except as set forth in Item 10, we do not offer financing for any part of the affiliation fee, and we do not offer financing for any other initial fees paid to us.

**ITEM 6**

**OTHER FEES**

TYPE OF FEE	AMOUNT (Note 1)	DUE DATE	REMARKS
<b>GENERAL</b>			
Royalty Fee	5.65% of the preceding month’s Gross Room Revenues (“GRR”) (Note 2).	Payable monthly.	

# Exhibit 7

# **Exhibit 7**

**ALPHAGRAPHERICS® PRINTSHOPS  
FRANCHISE AGREEMENT**

Charles J. Stempler  
FRANCHISEE

MAY 1, 2001  
DATE OF AGREEMENT

ADDRESS OF PRINTSHOP

AlphaGraphics Printshops Of The Future No. 297  
402 Cedar Street  
Seattle, Washington 98121

9/00 UFOC

09.15.00

© AlphaGraphics, Inc., 2000  
ALL RIGHTS RESERVED

**IFA-0006**

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FRANCHISEE will have ninety (90) days within which to accept or reject any of the above-described offers from COMPANY. If FRANCHISEE rejects or fails to timely accept COMPANY's offer to sell any such part of the Printing Business located within the Protected Area to FRANCHISEE, COMPANY may convert such part of the Printing Business to an ALPHAGRAPHICS® Printshop to be operated by COMPANY, one of its Affiliates or another franchisee of COMPANY.

Notwithstanding anything to the contrary contained in this Section 1.I., FRANCHISEE acknowledges and agrees that COMPANY is not obligated to make any of the above described options or offers available to FRANCHISEE if FRANCHISEE is not in substantial compliance with the terms of this Agreement or any other ALPHAGRAPHICS® Printshop franchise agreement to which FRANCHISEE is a party.

2. ACQUISITION OF SITE AND DEVELOPMENT OF PRINTSHOP.

A. ACQUISITION OF SITE.

FRANCHISEE acknowledges and agrees that FRANCHISEE is responsible for obtaining a site for the PRINTSHOP acceptable to COMPANY. If FRANCHISEE has not located and COMPANY has not approved a site for the PRINTSHOP as of the date of execution of this Agreement, FRANCHISEE agrees that, within ninety (90) days of the date of execution of this Agreement, it will select a site to be approved by COMPANY and obtain lawful possession of the Site, through lease or purchase, within the general territory described in Exhibit C attached hereto (the "General Territory"). Upon approval of the site of the PRINTSHOP, COMPANY will, in accordance with its standard practices, determine FRANCHISEE's Protected Area and complete Exhibit A to this Agreement, describing the location of the Site and the boundaries of the Protected Area. FRANCHISEE acknowledges that the General Territory may be different from the Protected Area granted to FRANCHISEE.

COMPANY will provide FRANCHISEE with certain site selection assistance, including providing FRANCHISEE with general demographic information with respect to the proposed site(s) at which FRANCHISEE desires to operate the PRINTSHOP, and general site selection guidelines and site selection criteria. FRANCHISEE agrees to submit complete site report information to COMPANY on the site selected by FRANCHISEE within ninety (90) days of the date of execution of his Agreement, as described above. Within thirty (30) days after COMPANY receives the complete site report information and other materials it requests, COMPANY will, by delivery of written notice to FRANCHISEE, approve or disapprove a location FRANCHISEE proposes for the PRINTSHOP. If FRANCHISEE is unable to locate a Site acceptable to COMPANY within the time specified above, COMPANY may terminate this Agreement at any time thereafter. FRANCHISEE understands and agrees that if COMPANY terminates this Agreement as provided herein, the Initial Payment (defined below) is not refundable under any circumstances.

**B. PRINTSHOP LEASE PROVISIONS.**

If FRANCHISEE is leasing the Site or the PRINTSHOP, FRANCHISEE agrees that the lease, in form satisfactory to COMPANY, will:

- (1) provide for notice to COMPANY of, and COMPANY's right to cure, FRANCHISEE's default under said lease;
- (2) provide for FRANCHISEE's right to assign his interest under said lease to COMPANY without the lessor's consent;
- (3) authorize and require the lessor to disclose to COMPANY, upon COMPANY's request, any information pertaining to the PRINTSHOP or the Site furnished to the lessor by FRANCHISEE;
- (4) provide that, upon termination of this Agreement, COMPANY will have the right to assume said lease (provided that COMPANY agrees to exercise such right to assume said lease only if COMPANY has the right to acquire the PRINTSHOP in accordance with Section 17.E.); and
- (5) provide that the lessor has consented to FRANCHISEE's use of COMPANY's required signage for ALPHAGRAPHICS® Printshops.

If FRANCHISEE leases the Site, FRANCHISEE agrees to deliver a true and complete copy of the signed lease to COMPANY within three (3) business days after the date of execution of the lease for the Site. FRANCHISEE may not execute or agree to any modification of the lease without the prior written approval of COMPANY.

If FRANCHISEE purchases an existing ALPHAGRAPHICS® Printshop owned and operated by COMPANY or its Affiliate or franchisee, or converts an existing Printing Business to a franchised ALPHAGRAPHICS® Printshop, FRANCHISEE agrees that any new, amended or restated lease for the Site of the PRINTSHOP will include the terms and conditions required to be included in a lease for a new PRINTSHOP, as described in this Section 2.B.

**C. FINANCING.**

FRANCHISEE acknowledges and agrees that FRANCHISEE has the sole responsibility for securing all financing necessary for FRANCHISEE to construct, develop and operate the PRINTSHOP. COMPANY agrees to suggest sources of financing to FRANCHISEE and, at FRANCHISEE's request, to assist FRANCHISEE in completing the necessary applications for such financing.

**D. PRINTSHOP DEVELOPMENT.**

FRANCHISEE agrees to be responsible for constructing and developing the PRINTSHOP. COMPANY will furnish to FRANCHISEE mandatory and suggested plans and specifications for an ALPHAGRAPHICS® Printshop, including requirements for dimensions, design, image, interior and exterior layout, building materials, decor, equipment, signs, fixtures, furnishings and color scheme. FRANCHISEE agrees that it is his responsibility to have prepared all required construction plans and specifications and to insure that such plans and specifications comply with applicable ordinances, building codes and permit requirements.

FRANCHISEE agrees, at his sole expense, to do or cause to be done the following with respect to constructing and developing the PRINTSHOP at the Site:

- (1) obtain all required permits, licenses and approvals for construction, development and operation of the PRINTSHOP;
- (2) construct, develop and decorate the PRINTSHOP in compliance with plans and specifications approved by COMPANY;
- (3) purchase and install all equipment, fixtures, furnishings and signs required for the PRINTSHOP; and
- (4) purchase all products, materials and supplies required for the operation of the PRINTSHOP.

If FRANCHISEE purchases a Printing Business currently operating as an ALPHAGRAPHICS® Printshop, or FRANCHISEE converts an existing Printing Business to an ALPHAGRAPHICS® Printshop, FRANCHISEE agrees to make any and all necessary repairs or improvements to the Site and the Printing Business to conform to COMPANY's then-current standards for franchised ALPHAGRAPHICS® Printshops.

**E. PRINTSHOP OPENING.**

FRANCHISEE agrees not to open the PRINTSHOP for business until:

- (1) COMPANY has approved the PRINTSHOP;
- (2) pre-opening training of the Managing Owner has been completed to COMPANY's satisfaction;
- (3) COMPANY has been furnished with copies of all insurance policies required by this Agreement, or such other evidence of insurance coverage and payment of premiums as COMPANY requests; and

(4) FRANCHISEE has paid to COMPANY all amounts advanced to or on behalf of FRANCHISEE for equipment, fixtures, furnishings and supplies for the PRINTSHOP, plus any other amounts due and owing COMPANY.

FRANCHISEE agrees to comply with these conditions and to be prepared to open the PRINTSHOP for business within one hundred fifty (150) days after the date of this Agreement, or within one hundred fifty (150) days after the date of execution of the lease for the Site if a site has not been approved by COMPANY prior to or concurrently with the execution of this Agreement. FRANCHISEE further agrees to open the PRINTSHOP for business within five (5) days after COMPANY notifies FRANCHISEE that the conditions set forth in this Paragraph have been satisfied.

3. LICENSE OF SOFTWARE.

FRANCHISEE shall, throughout the term of this Agreement, license from the COMPANY the PrintSmith™ Software Program or a successor program designated by the Company in writing. In connection therewith, FRANCHISEE shall execute a separate license agreement with the COMPANY. A copy of the PrintSmith™ License Agreement is attached hereto as Exhibit D.

4. TRAINING AND SUPPORT.

A. INITIAL TRAINING.

Prior to the opening of the PRINTSHOP, COMPANY agrees to furnish an initial training program on the operation of an ALPHAGRAPHICS® Printshop to the Managing Owner, and one other employee of FRANCHISEE.

Approximately three (3) to four (4) weeks of training will be furnished at one or more of COMPANY's designated training centers or an ALPHAGRAPHICS® Printshop owned and operated by COMPANY, one of its Affiliates or a designated franchisee. The Managing Owner and one other employee of FRANCHISEE will attend and complete all phases of the initial training program to COMPANY's satisfaction and participate in all other activities required to operate the PRINTSHOP. FRANCHISEE agrees to replace any Managing Owner or employee who does not complete the training program to the satisfaction of COMPANY.

FRANCHISEE acknowledges and agrees that:

- (a) the Managing Owner (or any replacement Managing Owner) must successfully complete the initial training program prior to the opening of the PRINTSHOP; and
- (b) the employee (or any replacement employee) designated by FRANCHISEE to attend the initial training program must successfully complete the training program within one hundred eighty (180) days after the opening of the PRINTSHOP.

If COMPANY determines that the Managing Owner (or any replacement Managing Owner) or such designated employee (or any replacement employee) has not successfully completed the initial training program, COMPANY will have the right to terminate this Agreement and retain the Initial Franchise Fee (defined below).

COMPANY agrees to reimburse FRANCHISEE for all reasonable travel, living and related expenses in accordance with COMPANY's reimbursement policy that the Managing Owner and one other employee incur in connection with the initial training program. COMPANY will have the right to charge fees for training replacement Managing Owners, replacement employees and other employees designated by FRANCHISEE from time to time.

**B. BASE LEVEL SUPPORT.**

During the term of this Agreement, COMPANY agrees to furnish support to FRANCHISEE in connection with:

- (1) methods, standards and operating procedures utilized by ALPHAGRAPHICS® Printshops;
- (2) purchasing required equipment, fixtures, furnishings, products, signs, materials and supplies;
- (3) marketing programs;
- (4) administrative, bookkeeping, accounting, inventory control, and general operating and management procedures; and
- (5) developing annual profit plans for the PRINTSHOP.

Such support will be furnished in the form of:

- (1) COMPANY's operating manuals ("Operating Manuals");
- (2) bulletins;
- (3) electronic transmission; and
- (4) consultation by telephone or in person at COMPANY's offices, at the PRINTSHOP or other agreed upon location.

COMPANY agrees to provide FRANCHISEE, during each year of the term of this Agreement, a minimum of forty-eight (48) hours of support in the form of consultation by telephone or in person at COMPANY's offices, at the PRINTSHOP or other agreed upon location, and meetings and seminars.

**C. SPECIAL TRAINING AND OTHER OPTIONAL SERVICES.**

If special training of PRINTSHOP personnel or other assistance in operating the PRINTSHOP is requested by FRANCHISEE and must take place at the PRINTSHOP, FRANCHISEE agrees to pay COMPANY's per diem charges for such training or assistance, and travel and living expenses of COMPANY personnel. COMPANY may also from time to time offer programs relating to specific elements of the operation of ALPHAGRAPHICS® Printshops, which will be offered at a per diem charge plus expenses. Such training and assistance ("**Optional Services**") will be available to FRANCHISEE at his option. A description of Optional Services offered by COMPANY will be published from time to time in the Operating Manuals. As described in Section 4.D., FRANCHISEE may use Universal Service Credits (defined below) to purchase Optional Services. COMPANY reserves the right to periodically modify the Optional Services available to FRANCHISEE under this program.

**D. UNIVERSAL SERVICE CREDITS.**

**1. Right to Earn Universal Service Credits.**

Subject to the terms and conditions of this Agreement, FRANCHISEE will be able to earn up to twenty-five (25%) of FRANCHISEE's Royalties (defined below) ("Universal Service Credits") timely paid by FRANCHISEE. Universal Service Credits may be earned by FRANCHISEE provided FRANCHISEE:

- (a) is current in payment of Royalties and all other amounts due COMPANY and its Affiliates;
- (b) is current on submission of all financial reports due COMPANY; and
- (c) is in substantial compliance with the terms and conditions of this Agreement.

If FRANCHISEE receives a notice of default under this Agreement as provided in Section 16.B., FRANCHISEE will not be entitled to use his Universal Service Credits or convert them to cash until such default is cured to COMPANY's satisfaction.

**2. Use of Universal Service Credits.**

Subject to the terms and conditions of this Agreement, FRANCHISEE may use Universal Service Credits:

- (a) to pay for Optional Services;
- (b) to pay for local marketing brochures, pamphlets and other materials prepared by COMPANY for use by FRANCHISEE in connection with a COMPANY approved marketing program; and

# Exhibit 8

# Exhibit 8

**FRANCHISE DISCLOSURE DOCUMENT**  
**HOLIDAY HOSPITALITY FRANCHISING, LLC**  
A Delaware Limited Liability Company  
Three Ravinia Drive, Suite 100  
Atlanta, Georgia 30346  
(770) 604-2000  
[www.holidayinn.com/development](http://www.holidayinn.com/development)  
[www.hiexpress.com/development](http://www.hiexpress.com/development)  
[americas.development@ihg.com](mailto:americas.development@ihg.com)



The franchisee will establish and operate a hotel under the Holiday Inn®, Holiday Inn® & Suites, Holiday Inn Express®, Holiday Inn Express® & Suites or Holiday Inn® Resort brand.

The total investment necessary to begin operation of a typical 143-room Holiday Inn or Holiday Inn & Suites hotel, excluding land costs and other matters, ranges from \$12,710,770 to \$17,300,935 (\$88,887 to \$120,986 per guest room) or more (see Item 7), including between \$127,520 and \$153,935 or more that must be paid to the franchisor or affiliate (see Item 5). The total investment necessary to begin operation of a typical 93-room Holiday Inn Express or Holiday Inn Express & Suites hotel, excluding land costs and other matters, ranges from \$7,200,120 to \$10,014,535 (\$77,421 to \$107,683 per guest room) or more (see Item 7), including between \$136,870 and \$164,035 or more that must be paid to the franchisor or affiliate (see Item 5). The total investment necessary to begin operation of a typical 180-room Holiday Inn Resort hotel, excluding land costs and other matters, ranges from \$17,381,020 to \$23,695,935 (\$96,561 to \$131,644 per guest room) or more (see Item 7), including between \$227,520 and \$298,935 or more that must be paid to the franchisor or affiliate (see Item 5).

This disclosure document summarizes certain provisions of your franchise agreement and other information in plain English. Read this disclosure document and all accompanying agreements carefully. You must receive this disclosure document at least 14 calendar days before you sign a binding agreement with, or make any payment to, the franchisor or an affiliate in connection with the proposed franchise sale. **Note, however, that no government agency has verified the information contained in this document.**

You may wish to receive your disclosure document in another format that is more convenient for you. To discuss the availability of disclosures in different formats, contact Patricia Womack, Franchise Sales at Holiday Hospitality Franchising, LLC, at Three Ravinia Drive, Suite 100, Atlanta, Georgia 30346 and (770) 604-2912.

The terms of your contract will govern your franchise relationship. Don't rely on the disclosure document alone to understand your contract. Read all of your contract carefully. Show your contract and this disclosure document to an advisor, like a lawyer or an accountant.

Buying a franchise is a complex investment. The information in this disclosure document can help you make up your mind. More information on franchising, such as "A Consumer's Guide to Buying a Franchise," which can help you understand how to use this disclosure document is available from the Federal Trade Commission. You can contact the FTC at 1-877-FTC-HELP or by writing to the FTC at 600 Pennsylvania Avenue, NW, Washington, DC 20580. You can also visit the FTC's home page at [www.ftc.gov](http://www.ftc.gov) for additional information. Call your state agency or visit your public library for other sources of information on franchising.

There may also be laws on franchising in your state. Ask your state agencies about them.

Issuance Date: April 3, 2014

Column 1	Column 2	Column 3	Column 4
State	Franchise Agreements Signed But Outlet Not Opened	Projected New Franchised Outlet in the Next Fiscal Year	Projected New Company-Owned Outlet in the Next Fiscal Year
Minnesota	4	1	0
Mississippi	11	3	0
Missouri	12	6	0
Montana	3	1	0
Nebraska	6	2	0
Nevada	2	0	0
New Jersey	7	1	0
New Mexico	2	0	0
New York	20	9	0
North Carolina	13	7	0
North Dakota	3	2	0
Ohio	18	7	0
Oklahoma	13	5	0
Oregon	1	0	0
Pennsylvania	27	9	0
South Carolina	5	3	0
Tennessee	13	4	0
Texas	64	22	0
Utah	5	2	0
Virginia	5	5	0
Washington	3	3	0
West Virginia	1	0	0
Wisconsin	2	0	0
All Other States	0	0	0
Total	419	169	0

Attached as Exhibit F-1 is a list of the names of all operational Holiday Inn and Holiday Inn Express licensees under a License Agreement with Holiday as of March 1, 2014, and the addresses and telephone numbers of their units.

The name, city, state, current business telephone number or, if not available, the last known home telephone number, and principal correspondent of the franchisee or the franchisee's corporation of each franchisee that has had an outlet terminated, canceled, not renewed or otherwise voluntarily or involuntarily ceased to do business under the License as of March 1, 2014, or that has not communicated with Holiday within 10 weeks of the application date are listed on Exhibit F-2 of this disclosure document.

If you buy this franchise, your contact information may be disclosed to other buyers when you leave the franchise system.

The IHG Owners Association (IHG Owners Association) was created by Holiday's predecessor in interest in 1956. The IHG Owners Association is endorsed by Holiday and SCH and receives some sponsorship from SCH. Under the terms of the License, you, other System licensees, and Holiday are eligible for membership in the IHG Owners Association and are entitled to vote at its meetings on the basis of one hotel, one vote. The IHG Owners Association represents the franchisee community of Holiday's various franchise systems and, through a series of committees, give advice and counsel to Holiday regarding the expenditures for the marketing, reservations and IHG Rewards Club Rewards funds. Holiday and SCH personnel administer the system funds and report system funds activities to the IHG Owners Association. The IHG Owners Association also provides educational opportunities to its members, organizes regular meetings and provides additional membership benefits. The address,

telephone number, and web address of the IHG Owners Association are Three Ravinia Drive, Suite 100, Atlanta, Georgia 30346, (770) 604-5555 (or toll free 1-866-826-5808), and [www.owners.org](http://www.owners.org).

## **ITEM 21**

### **FINANCIAL STATEMENTS**

Exhibit G-1 to this disclosure document includes Holiday's audited Financial Statements for the fiscal years ended December 31, 2013, December 31, 2012 and December 31, 2011.

Our parent, SCH, commits to perform certain post-sale obligations for us. Exhibit G-2 includes SCH's audited Financial Statements for the fiscal years ended December 31, 2013, December 31, 2012 and December 31, 2011.

## **ITEM 22**

### **CONTRACTS**

The following copies of all proposed agreements regarding the franchise offering are attached and made a part of this disclosure document:

Exhibit A	Application Letter Form
Exhibit B	License Agreement & State Addenda
Exhibit C	Master Technology Agreement & Joinder Agreement
Exhibit H	IHG Merlin Terms and Conditions
Exhibit I	Ancillary Agreements
I-1	IHG Voice Reservation Service Agreement
I-2	Revenue Management for Hire Agreement
I-3	Sporting News Grill Agreement
I-4	Coca-Cola Participation Agreement

## **ITEM 23**

### **RECEIPTS**

Exhibit K contains two copies of a detachable receipt.

# Exhibit 9

# **Exhibit 9**

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## Choice Hotels Allots \$40 Million To Jumpstart Comfort Brand Overhaul

May 15, 2013 - 12:35 PM ET

By **Michael B. Baker**

Choice Hotels International is putting up \$40 million to accelerate renovations across its Comfort Inn and Comfort Suites brands, the company announced on Tuesday.

Choice last year launched its Comfort Re-Imagined strategy, a four-year renovation program in which the chain assesses renovation needs at each Comfort property—possibly including new carpeting, furniture or mattresses—and sets a property improvement plan with which each property must comply. The company in 2012 also increased qualitative guest-satisfaction survey score thresholds required for Comfort properties and became more aggressive in removing hotels that were not meeting brand standards, according to Choice senior vice president of brand strategy and marketing Alexandra Jaritz.

Brand requirements include bedding, Comfort's breakfast program, flat-screen televisions and, for Comfort Suites properties, fitness and business centers.

"This is not a program designed to make every Comfort Inn look exactly the same," Jaritz said. "It's ultimately to get everyone to the same level of consistency."

The newly announced \$40 million incentive program enables hotels to fund renovation through promissory notes, which will be forgiven once work is completed and if hotels then remain in the Comfort system for a set amount of time, said Comfort domestic head of brand management Mike Varner. Any hotel wishing to tap into the \$40 million must meet its property improvement plan's deadline, the latest of which will be Sept. 30, 2014, for hotels using the funding, he said.

More than 2,500 properties worldwide are branded as Comfort Inn or Comfort Suites, according to Choice.

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# Exhibit 10

# **Exhibit 10**



Limited-Service, Unlimited Possibilities

Published on *QSR magazine* (<http://www.qsrmagazine.com>)

[Home](#) > BK to Help Struggling Franchisees

## **BK to Help Struggling Franchisees** <sup>(1)</sup>

Burger King Corporation today announced the launch of the Burger King Franchisee Financial Restructuring Initiative to address the financial challenges of financially distressed franchisee operations. The initiative will assist a number of franchisees as they restructure their business so they can meet their financial obligations, focus on restaurant operational excellence, reinvest in their business and return to profitability.

"Clearly one of the most pressing issues facing the Burger King system today is the financial distress of a number of our franchisees," said Brad Blum, chief executive officer, Burger King Corporation. "Addressing this issue and turning it into an opportunity to recapitalize these franchisees and enable them to emerge stronger with more robust financial structures will set us up for success. This is a top priority to enable us to focus on quality and on delivering an outstanding experience to our customers."

To accelerate this process, the company has hired Trinity Capital, LLC, to work with BK franchisees, their creditors, and Burger King Corporation.

"To help our franchisees bring resolution to these issues -- which include short-term liquidity, the ability to meet franchisee obligations and the need to reinvest in their business -- we have hired Trinity Capital, whose expertise in these areas is widely recognized," Blum said. He added that Burger King Corporation is working in cooperation with BK's franchisee association, called the National Franchise Association, on the initiative.

Trinity will act as a neutral third party and negotiate the quickest possible resolution among the franchisees, lenders, and Burger King Corporation. Burger King Corporation is paying the professional and administrative fees for Trinity's services.

Blum stressed that the implementation of this program is an important first step in enabling the company's franchisees to meet their financial and capital spending obligations and focus on delivering operational excellence to the consumer.

"Franchisees must reinvest in their restaurants to keep them fresh and relevant for our customers," he said. "We must significantly improve the quality and the consistency of what we offer the consumer, as well as upgrade the appearance of our restaurants in order to be successful. The aim of this program is to help franchisees with financial restructuring so they can meet their obligations and become profitable again."

"We welcome this timely initiative to further strengthen our franchisee operations," said Julian Josephson, chairman of the National Franchise Association. "This is a significant step for the future of the Burger King brand, and a win-win opportunity for everyone involved."

Trinity Capital is a Los Angeles-based financial services firm that specializes in restructuring financially troubled franchise companies. Trinity Capital has helped restructure more than 3,000 restaurants and approximately \$2.5 billion of franchise-related obligations for other companies.

**Source URL:** <http://www.qsrmagazine.com/news/bk-help-struggling-franchisees>

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# Exhibit 11

# **Exhibit 11**

**tampabay.com** Know it now.

## Quiznos' CEO fills a tall order

**After turning around Continental Airlines and Burger King, Greg Brenneman takes on disgruntled franchisees.**

By ASSOCIATED PRESS

Published July 18, 2007

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DENVER - Greg Brenneman, who relishes a challenge, is applying his turnaround expertise - first with Continental Airlines and then Burger King - to the troubled sandwich chain Quiznos, whose dissatisfied franchise owners have complained about low profits, company operating requirements and franchisee recruiting.

Since jumping into the fray as CEO in January, Brenneman has worked to reduce food costs by as much as 4 percent, open communication channels with franchisees and test new products, like a Quiznos taco, to boost profits.

"In these situations, the biggest challenge is always identifying what the few things you can do to really improve profitability for the franchise owners are and then doing them quickly," Brenneman said.

Some owners are pleased with the changes, especially the lower food costs. Others remain skeptical.

Through a roller-coaster ownership ride, the chain expanded quickly, to at least 5,000 stores. But Quiznos' success has come with growing pains.

Lawsuits filed by attorney Justin M. Klein, representing franchise owners in Illinois, Michigan and Wisconsin, allege the company draws in prospective owners, who pay \$25,000 for a franchise, but doesn't give them complete facts about restaurant locations and business operations.

Klein contends many franchisees sign contracts, only to wait a year or more for the company to build a restaurant. The suits accuse the company of requiring franchise owners to buy all supplies from Quiznos at higher prices than if they bought locally.

"It's common in the industry to have restrictions on certain suppliers, mandated suppliers, but it has to relate to quality standards," said Klein of Red Bank, N.J. "When it doesn't relate to quality standards it's merely an abuse."

The company denies the allegations and filed motions to dismiss the suits.

Brenneman, meanwhile, has reached out to franchisees and targeted their food and other costs. If he can cut food costs by 3 percent and coupon discount offers by 4 percent, Brenneman thinks he can add \$25,000 to \$30,000 in profits for franchisees.

Quiznos has hired a new advertising agency, Cliff Freeman and Partners, to produce edgier ads that showcase upscale food at a lower cost. Its marketing budget is about \$80-million a year, Provost said, targeting adults looking for a step up from traditional fast food and young adults who have "gotten bored with chicken strips."

Brenneman has met with franchise owners, delivers a weekly voice mail call to discuss operating developments, and spends late-night hours answering franchisee e-mails. He also created a Web site to assist franchisees and plans to give each a free computer to help them with a new online ordering program.

"There's unbelievable enthusiasm coming back into the system," Brenneman said.

### Fast Facts:

#### About Quiznos

Founded: In 1981 in Denver. Its mission was to set itself apart from other sub shops with a made-to-order, warm sandwich.

Ownership: In 1991, franchise owner Rick Schaden and his father, Dick Schaden, bought the company and its 18 restaurants. They took it public but converted it to a private operation in 2001. Last year, JPMorgan Partners LLC became an ownership partner and Greg Brenneman later became a partner through his company, TurnWorks Inc.

CEO: Greg Brenneman, 45, was named CEO, president and partner in January, and remains in charge of his Houston private equity firm. Last year, he stepped down as CEO of Burger King after leading its revitalization. He previously helped Continental Airlines turn profitable after 16 consecutive years of losses, including two bankruptcies.

Sales: Technomic, an industry consulting firm, ranks Quiznos third behind Subway and Arby's. Quiznos has average sales of about \$425,000 a year per store where Subway has average sales of about \$375,000 per store.

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Honorable Richard A. Jones

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

INTERNATIONAL FRANCHISE )  
ASSOCIATION, INC.; CHARLES )  
STEMPLER; KATHERINE LYONS; )  
MARK LYONS; MICHAEL PARK; and )  
RONALD OH, )

No. 14-cv-00848RAJ

**DECLARATION OF SCOTT SHANE**

Plaintiffs,

vs.

THE CITY OF SEATTLE, a municipal )  
corporation; and FRED PODESTA, )  
Director of the Department of Finance and )  
Administrative Services, )

Defendants.

I, Scott Shane, declare as follows:

1. I am over 18 years of age, am competent to testify about matters set forth herein,  
and submit the testimony below based on personal knowledge and information.

2. I am the A. Malachi Mixon III Professor of Entrepreneurial Studies, in the  
Department of Economics, Weatherhead School of Management, at Case Western Reserve  
University, where I conduct research and teach on economics and entrepreneurship, including  
franchising. Prior to coming to Case Western Reserve University in 2003, I was associate

1 professor of entrepreneurship and professor of entrepreneurship at the Robert Smith School of  
2 Business at the University of Maryland from 1999 to 2003, assistant professor of  
3 entrepreneurship at the Sloan School of Management at Massachusetts Institute of Technology  
4 from 1996 to 1999, and assistant professor of entrepreneurship at the School of Management of  
5 Georgia Institute of Technology.

6 3. I received my Ph.D. in Applied Economics from the Wharton School of the  
7 University of Pennsylvania in 1992. I also hold a Master's Degree in Management from the  
8 Wharton School of the University of Pennsylvania, a Master's Degree in Foreign Service from  
9 Georgetown University and a Bachelor's Degree in History from Brown University.

10 4. I have written or edited 15 books, 85 scholarly articles, 9 book chapters, 17  
11 conference proceedings, and 18 commentaries, editor's notes, or dialogues.

12 5. I have written regular columns on entrepreneurship for the online editions of The  
13 New York Times, Bloomberg Business Week, U.S. News and World Report, and Small  
14 Business Trends, and occasional columns for the print edition of the Wall Street Journal.

15 6. I am the author of nine scholarly articles on business format franchising, and a  
16 book entitled From Ice Cream to the Internet: Using Franchising to Drive the Growth and  
17 Profits of Your Company (Financial Times Press 2005).

18 7. I also write a regular monthly column on business format franchising for  
19 Franchisegrade.com, a website devoted to the franchise industry, and have provided consulting  
20 services to several companies seeking to franchise their businesses.

21 8. I have been retained by the City of Seattle to offer expert testimony in this case.  
22 In preparation for drafting this declaration, I have reviewed the theoretical and academic  
23 literature on franchising; databases of franchise documents and statistics; the plaintiffs'

1 preliminary injunction motion and the declarations of Charles J. Stempler, David Meinert,  
2 Dean Heyl, John Reynolds, Katherine Lyons, and Ronald Oh; and the franchise agreements and  
3 other documents produced by plaintiffs.

4 9. The plaintiffs have claimed that “small franchise businesses are like other small  
5 businesses.” Plaintiffs’ Motion for Preliminary Injunction, p. 4; Reynolds Declaration, ¶ 25. I  
6 disagree with this claim for a number of reasons. As discussed below, there are a number of  
7 fundamental economic and structural differences between operating as a franchise and  
8 operating as an independent business. Participation in a franchise system often affords  
9 franchisees more profit than they would earn as individual business owners. As Roger Blair  
10 and Francine Lafontaine write in The Economics of Franchising (Cambridge University Press  
11 2005), “individuals eager to develop a small local business, benefit from the interconnection  
12 that franchising affords them. Franchisors and their franchisees thus cooperate with one another  
13 in a kind of partnership. In many regards, the interests of the franchisor and its franchisees are  
14 mutually compatible. Their cooperation increases value for both parties: both earn more profit  
15 than they would absent this cooperation.”<sup>1</sup>

16 10. Franchisees derive significant economic benefits from participation in a franchise  
17 system that provides advantages that are not available to small independent businesses. While  
18 the specific benefits depend on the type of business and the terms of the franchise agreement,  
19 these benefits typically include access to numerous things not available to independent  
20 businesses, such as access to brand valuable names, advertising, trade secrets, software, volume  
21 purchasing, site selection assistance, financing, operational training, human resource guidance  
22 and assistance, human resource policies and handbooks, ongoing training and operational

23 <sup>1</sup> Blair and Lafontaine, p. 2.

1 assistance, member rewards programs that increase the customer base, legal and accounting  
2 updates, and access to franchise associations that provide forums for exchanging ideas.

3 11. Purchasing a franchise allows a business owner to operate under a brand name  
4 that will attract customers that they otherwise would not attract to their business establishments.  
5 That access can be very valuable. The experiences of franchisees that have left the  
6 McDonald's franchise system illustrate the value of access to a franchisor's brand name. For  
7 example, in *Canterbury et al. v. Commissioner of Internal Revenue*, 99 T.C. 223 (1992), the  
8 United States Tax Court looked at evidence of sales of fast food establishments that were once  
9 part of the McDonald's franchise system but later operated in the same location in the same  
10 manner by the same owners after exiting from the McDonald's system. Despite being operated  
11 in the same place, in the same way, by the same people, sales at the businesses tended to  
12 decline substantially and the companies tended to go out of business after the outlets exited the  
13 McDonald's system. The Tax Court concluded that the ability to operate under the  
14 McDonald's brand name accounted for all of the goodwill in the businesses.

15 12. Purchasing a franchise can provide access to trade secrets that allow business  
16 owners to provide a product or service that they otherwise could not provide. For example, the  
17 business owners who purchase a KFC franchise get access to a recipe for fried chicken that  
18 they could not otherwise access.

19 13. Purchasing a franchise can also provide the franchisee with assistance in finding  
20 the best location for a business. For example, according to its website, Dunkin Donuts offers  
21 franchisees "real estate and construction experts" to assist when franchisees are seeking to  
22 "identify and develop [a] restaurant's physical space."<sup>2</sup>

23  

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<sup>2</sup> <http://www.dunkinfranchising.com/franchisee/en/process.html>

1 14. Purchasing a franchise often provides the franchisee with access to financing  
2 from the franchisor or third-party lenders. Lenders find it easier to assess credit risk with  
3 franchised outlets than with independent businesses, because the franchise systems have  
4 information that makes assessing the credit risk easier.

5 15. Purchasing a franchise can also allow the franchisee to obtain raw materials at a  
6 lower cost through the franchisor's volume purchasing. As Pizza Ranch explains on its  
7 website, "successful (and growing) franchises like Pizza Ranch are in a unique position to  
8 negotiate major contracts with vendors based on volume usage. Although we are still  
9 considered a mid-scale chain, our growth rates have put us on the radar with major distributors  
10 in the restaurant supply industry and larger demand often ensures a more competitive cost of  
11 goods. Pizza Ranch negotiates directly with suppliers of major approved products and  
12 equipment in order to provide franchisees with competitively priced cost-of-goods – just  
13 another advantage of franchising with Pizza Ranch."<sup>3</sup>

14 16. Purchasing a franchise can allow the franchisee to obtain access to management  
15 training that he or she could otherwise not obtain. For instance, AlphaGraphics Print Shop  
16 owners receive three to four weeks of training from the franchisor prior to the opening of their  
17 business, something that is not provided to independent print shop owners.<sup>4</sup>

18 17. Because of the economic benefits of franchising, franchisors are able to demand,  
19 and franchisees are willing to pay to the franchisor, a franchise fee and an ongoing royalty  
20 (usually calculated as a percentage of the outlet's gross sales revenue) for participation in the  
21 system. Franchisees are willing to make those payments because they receive value for them.

22 \_\_\_\_\_  
23 <sup>3</sup> <http://www.pizzaranchfranchise.com/purchasing-power.html>

<sup>4</sup> AlphaGraphics Printshops Franchise Agreement (IFA-0006 through IFA-0102), Section 4.

1 The claim in Mr. Reynolds's declaration (at ¶ 26) that franchisees make the same types of  
2 payments as any small business owner is therefore not accurate.

3 18. The economic benefits of franchising also explain why franchisees seek  
4 renewable franchise agreements and choose to renew their contracts when they expire. As  
5 explained in a document titled "Expanding a Business by Franchising" produced by the  
6 International Franchise Association: "From the perspective of a franchisee, a long term,  
7 renewal rights and reasonable transfer rights make the franchise more valuable.... Renewal  
8 rights, even when subject to preconditions, enhance the value of a franchise to the franchisee  
9 and the marketability of the franchise."<sup>5</sup> The fact that the option to renew a franchise  
10 agreement is valuable to franchisees indicates that participation in the system also must be  
11 valuable to franchisees.

12 19. "Conversion franchising" is based explicitly on the notion that being part of a  
13 system is more valuable to a business than operating as an independent business. Conversion  
14 franchises are franchise systems that seek to convince already existing independent businesses  
15 to join their chains. The Best Western hotel chain, for example, tries to persuade independent  
16 hotels to buy a Best Western franchise. The fact that independent hotels join franchise systems  
17 is evidence that hotel owners believe that being a small franchise business is not like being an  
18 independent small business.

19 20. Moreover, the fact that existing independent businesses join franchise systems  
20 through conversion franchises means that the owners of those businesses believe that the  
21 benefits of joining a franchise system exceed the cost of the franchise fees and royalties that  
22 they pay to join the system.

23 <sup>5</sup> IFA-0610 through IFA-0797, at pp. 51-52.

1           21. In his declaration (at ¶ 27), Mr. Reynolds says that “franchisees are merely  
2 licensees of franchisors’ brands and methods of doing business and that is their sole difference  
3 from other independently owned small businesses.” In fact, there are many other differences  
4 that Mr. Reynolds does not mention.

5           22. Franchisors exert significant influence over franchisees in ways that no third  
6 party does for independent small businesses. As Blair and Lafontaine explain, franchise  
7 contracts “include statements about how the franchisee is expected to run the franchise,  
8 whether or not the franchisee has an exclusive territory, who owns or leases the property, the  
9 duration of the agreement and the circumstances under which the franchisor or franchisee may  
10 terminate it, when and where the franchisee may open another business, and so on.” The  
11 Economics of Franchising, p. 79. These types of provisions are found in the franchise  
12 agreements produced by plaintiffs in this case. Independent small businesses are not required  
13 to adhere to these types of provisions.

14           23. Franchisors may assure quality of their products by requiring franchisees to  
15 purchase certain inputs from them. For instance, Baskin Robbins franchisees are required to  
16 purchase their ice cream from the franchisor or approved suppliers,<sup>6</sup> while an independent ice  
17 cream shop can purchase its ice cream from any source. Such requirements aim to protect the  
18 consistency of the product. A consistent product protects the reputation of the brand, which, in  
19 turn, engenders customer loyalty. A loyal customer base is one of the ways the franchise model  
20 benefits the franchisee.

21           24. Franchisors may assure investment in the development of the business’s brand  
22 name by requiring the franchisees to advertise. As Blair and Lafontaine explain (at p. 69),

23 <sup>6</sup> <http://www.sec.gov/Archives/edgar/data/1357204/000119312511172042/dex1030.htm>

1 “many franchisors also stipulate in their contracts that the franchisee must make contributions  
2 to support national, regional, and/or local advertising.” These types of provisions are found in  
3 the franchise agreements produced by some of the plaintiffs in this case. Independent  
4 businesses are not required to make contributions to support national, regional or local  
5 advertising. The fees a franchisee pays to a collective advertising pool provide that franchisee  
6 with more buying power than an independent business, because the economies of scale in  
7 advertising would permit it to advertise at a lower per-customer cost than its non-franchise  
8 competitors. For example, the national television and Internet advertising conducted by  
9 Holiday Inn is likely conducted at a much lower per-hotel guest cost than any national  
10 television and Internet advertising conducted by an independent hotel in Seattle.

11 25. Franchisors may also take steps to assure the quality of operations at a  
12 franchisee. For example, McDonald’s says, “The franchisee assumes the responsibility of  
13 operating their restaurant in accordance with McDonald’s standards of quality, service and  
14 cleanliness. As part of the agreement, McDonald’s regularly checks the quality of each  
15 franchise’s output, and failure to maintain standards could threaten the franchisee’s license.”<sup>7</sup>  
16 These quality control requirements aim to protect the value of the brand, so that a McDonald’s  
17 has the same experience in Washington, D.C. as in Washington State. The ability to provide a  
18 known, reliable experience helps franchisees attract customers.

19 26. Mr. Reynolds states (at ¶ 28) that franchisees are like independent small  
20 businesses because “franchisors and franchisees are separate business entities.” However, in  
21 the *Canterbury* case cited above, the Tax Court specifically recognized that “franchisees are  
22 part of a larger organization.”

23 <sup>7</sup> [http://www2.mcdonalds.com/static/pdf/aboutus/education/mcd\\_franchising.pdf](http://www2.mcdonalds.com/static/pdf/aboutus/education/mcd_franchising.pdf)

1           27.     Moreover, franchisors influence the behavior of the employees of franchisees in  
2 ways that independent small businesses typically do not. Blair and Lafontaine note (at pp. 129-  
3 30) that most franchise agreements contain clauses that outline acceptable outlet “appearance,  
4 hours of operation, location, and product quality.” The contracts typically allow franchisors to  
5 conduct “inspections, audits, mystery shopper programs, and so on” of the franchisees. This is  
6 not the case with independent businesses.

7           28.     As an example, McDonalds says, “To ensure uniformity throughout the world,  
8 all franchisees must use standardized McDonald’s branding, menus, design layouts and  
9 administration systems. The license agreement also insists the franchisee uses the same  
10 manufacturing or operating methods and maintains the quality of the menu items.”<sup>8</sup>

11           29.     Mr. Reynolds claims in his declaration (at ¶ 25) that franchisees are like  
12 independent small businesses because they “make all of their own human resource decisions.”  
13 However, independent small business owners have greater latitude over their human resource  
14 decisions than franchisees, whose decisions are influenced by the terms of their franchise  
15 agreements. For instance, an independent print shop business owner can decide on the amount  
16 of time that he or she would like to devote to “outside sales calls.” By contrast, the  
17 AlphaGraphics franchise agreement produced by the plaintiffs shows that a franchisee is  
18 required to “spend a minimum of forty (40) hours per week on outside sales calls (i.e., direct  
19 face-face-to-face selling) to new and existing customers.”<sup>9</sup> Moreover, even when franchisors  
20 do not control the human resource decisions of their franchisees, they often provide optional  
21 guidance and assistance. Franchisors may provide recommended staffing models and wage

22 \_\_\_\_\_  
23 <sup>8</sup> [http://www2.mcdonalds.com/static/pdf/aboutus/education/mcd\\_franchising.pdf](http://www2.mcdonalds.com/static/pdf/aboutus/education/mcd_franchising.pdf)

<sup>9</sup> AlphaGraphics Printshops Franchise Agreement (IFA-0006 through IFA-0102), Section 1(E).

1 scales, make available sample employment policies and handbooks, and distribute legal  
2 updates. These are resources that benefit the franchisee and that are not necessarily available to  
3 an independent business.

4 30. In addition, an independent business owner can decide to conduct business at any  
5 location without the permission of another party. That is typically not the case with  
6 franchisees. For example, the AlphaGraphics franchise agreement produced by plaintiffs  
7 restricts the franchisee from conducting business at any location other than the approved site  
8 without the consent of the franchisor.

9 31. Businesses operating under a franchise model are also subject to legal rules and  
10 restrictions that do not apply to independent businesses. Many states have statutes and  
11 administrative rules applicable only to franchisors. For example, in the state of Washington,  
12 franchisors wishing to do business in the state must adhere to the Washington Franchise  
13 Investment Protection Act (RCW 19.100) and rules for franchises (WAC 460-80) and franchise  
14 brokers (WAC 460-82). Businesses not using a franchise system are not subject to these laws  
15 and rules. The existence of these statutes and administrative rules indicates that legislators and  
16 regulators understand that franchisors are able to influence the business operations of  
17 franchisees.

18 32. Mr. Reynolds, citing the declarations submitted by Mr. Stempler, Mr. Oh and  
19 Ms. Lyons, claims (in ¶ 29 of his declaration) that “the ordinance will give a competitive  
20 advantage to their similarly situated non-franchise competitors; increase their labor costs; force  
21 them to raise prices; and cause them to lose customers.” This is speculation. There is no way  
22 to know whether the ordinance will in fact give a competitive advantage to the independent  
23 businesses. The only conceivable short-term competitive advantage that could result from the

1 ordinance is lower cost. (The ordinance would not, for instance, provide a brand-name  
2 advantage to the non-franchise competitors, or provide any of the other franchise benefits  
3 described above.) But the ordinance will not necessarily even give non-franchisees a cost  
4 advantage. The non-franchisee competitors of the plaintiff franchisees may face pressure to  
5 raise their wages to a level comparable to that of the franchisees, in order to attract high quality  
6 workers who would otherwise have an incentive to seek employment with the franchisees. If  
7 the non-franchisees in fact raise wages in response to the higher wages being paid by  
8 franchisees, any wage differential between the two types of companies would be negated.

9 33. There are other reasons that the ordinance may not place franchisees at a  
10 competitive disadvantage. While the circumstances will vary based upon the terms of each  
11 franchise agreement, certainly some franchisees will have lower costs of inputs that come from  
12 their participation in a franchise system that allows access to volume purchasing. Some  
13 franchisees will have lower costs of attracting customers because the economies of scale in  
14 advertising would permit them to advertise at a lower per customer cost than their non-  
15 franchise competitors. Franchisees may therefore have lower costs of operations even during  
16 the phase-in period of the ordinance, keeping the ordinance from giving non-franchisees a cost-  
17 based competitive advantage.

18 34. Moreover, nothing in the ordinance will “force” the plaintiff franchisees “to raise  
19 prices.” The ordinance does not require businesses to do anything other than pay a particular  
20 minimum wage to their employees. Nor does the ordinance compel businesses to maintain  
21 their current profit margins or to refrain from cutting other costs of their operations.  
22 Consequently, there is no evidence that the ordinance will cause franchisees to “lose” price-  
23 sensitive customers.



HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

INTERNATIONAL FRANCHISE  
ASSOCIATION, INC., et al.,

Plaintiffs,

v.

CITY OF SEATTLE, et al.,

Defendants.

CASE NO. C14-848 RAJ

ORDER

**I. INTRODUCTION**

On June 3, 2014, the City of Seattle (“the City” or “Seattle”), enacted Ordinance Number 124490 (“the Ordinance”), which establishes a \$15 minimum hourly wage. In doing so, Seattle joined dozens of other cities nationwide that have increased the minimum wage beyond both federal and state minimums.<sup>1</sup> The City’s stated reason for

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<sup>1</sup> See, e.g., *City Minimum Wage Laws, Recent Trends and Economic Evidence on Local Minimum Wages*, Nat’l Emp. L. Project, 1 (Dec. 2014), <http://www.nelp.org/page/-/rtmw/City-Minimum-Wage-Laws-Recent-Trends-Economic-Evidence.pdf?nocdn=1> (San Jose, \$10.15; Santa Fe, \$10.66; Washington, DC, \$11.50; Oakland \$12.25; Chicago, \$13.00; San Francisco \$15.00).

1 increasing the minimum wage was to reduce income inequality. Additionally, the  
2 increased minimum wage was intended to “promote the general welfare, health, and  
3 prosperity of Seattle by ensuring that workers can better support and care for their  
4 families and fully participate in Seattle’s civic, cultural and economic life.” Ordinance,  
5 WHEREAS clauses 1-12, § 1.

6 The current minimum wage in Seattle is \$9.47.<sup>2</sup> Although the Ordinance goes into  
7 effect on April 1, 2015, the shift to a \$15 minimum wage will not happen overnight.

8 There are two phase-in schedules under the Ordinance: a faster phase-in, applicable to  
9 large businesses and a slower phase-in, applicable to small businesses. Large businesses  
10 will be required to incrementally raise the minimum wage to \$15 in just three years (*i.e.*,  
11 reaching \$15 by January 1, 2017) whereas small businesses will be allowed seven years  
12 (*i.e.*, reaching \$15 by January 1, 2021). Ordinance, § 4. Small businesses were given  
13 this extra time because they lack the same resources as large businesses and will face  
14 particular challenges in implementing the law. Ordinance, § 1, ¶ 9; (Feldstein Decl.) Dkt.  
15 # 63, ¶ 10.<sup>3</sup>

16 Seattle’s power to raise the minimum wage to \$15 is not at issue in this lawsuit.<sup>4</sup>  
17 Indeed, the plaintiffs accept that *eventually* all Seattle employers will be required to pay  
18 their employees at least \$15. The issue the court has been asked to address relates solely  
19 to how fast this increase will happen for employees of a specific type of business model:  
20 franchises (*e.g.*, your local Subways, McDonalds, and Holiday Inns, among many others).

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22 <sup>2</sup> Washington State Department of Labor & Industries, *Minimum Wage*, available  
23 at <http://www.lni.wa.gov/workplacerrights/wages/minimum/> (last visited Mar. 16, 2015).

24 <sup>3</sup> Robert Feldstein is the Director of the Office of Policy and Innovation in the  
25 Mayor’s Office.

26 <sup>4</sup> It is well settled that raising the minimum wage is within the City’s police power.  
27 *See, e.g., RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1150 (9th Cir. 2004)  
(acknowledging that “[t]he power to regulate wages and employment conditions lies  
clearly within a state’s or municipality’s police power”).

1 The crux of this lawsuit is the Ordinance’s categorization of franchisees as large  
2 businesses. Because these businesses are considered large, they will be subject to the  
3 faster three-year phase-in schedule. The plaintiffs object to this categorization. Although  
4 franchisees are connected to large franchisors, they are technically separate entities under  
5 the law. Additionally, individual franchisee outlets often employ only a handful of  
6 workers. According to plaintiffs, this makes them more similar to small businesses and  
7 equally likely to suffer challenges in implementing the new law. (Compl.) Dkt. # 1, ¶¶ 3,  
8 4; (Pls.’ Mot.) Dkt. # 37, p. 18.

9 Plaintiffs are the International Franchise Association (“IFA”), which is an  
10 organization of franchisors, franchisees, and suppliers, and five individual franchisee  
11 owners and/or managers. Together, they are seeking a preliminary injunction compelling  
12 the City to treat franchisees as “small” businesses rather than “large” businesses. They  
13 do not seek to invalidate the entire Ordinance; rather, they ask only that franchisees be  
14 subject to the slower (seven year) phase-in schedule applicable to small businesses.

15 Defendants are the City of Seattle and Fred Podesta, the Director of the  
16 Department of Finance and Administrative Service (“the Department”). The Department  
17 and its Director are responsible for implementing and enforcing the Ordinance.  
18 Defendants will be referred to collectively as “the City” or “Seattle.”

19 For the reasons stated below, the court DENIES plaintiffs’ motion for a  
20 preliminary injunction.<sup>5</sup>

## 21 II. BACKGROUND

### 22 A. History of the Ordinance

23 Shortly after taking office, the Mayor of Seattle assembled an Income Inequality  
24 Advisory Committee (the “Advisory Committee”), which consisted of twenty-four  
25

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26 <sup>5</sup>The court heard oral argument in this matter on March 10, 2015. Neither party  
27 requested an evidentiary hearing.

1 members, including representatives of business interests and labor unions. Ordinance, §  
2 1, ¶ 6. The Mayor formed the Advisory Committee to “address the pressing issue of  
3 income inequality in Seattle” and to seek input regarding a potential increase in the  
4 minimum wage. Ordinance, § 1, ¶¶ 6, 7; (Feldstein Decl.) Dkt. # 63, ¶ 8. The Advisory  
5 Committee reviewed scholarly studies on the impact of minimum wage laws in other  
6 cities and hosted numerous public engagement forums, including industry-specific  
7 forums. Ordinance, § 1, ¶ 8. In May 2014, the Advisory Committee transmitted its  
8 formal recommendation to the Mayor. The recommendation advocated for a phased  
9 increase in the minimum wage and acknowledged that small businesses should be subject  
10 to a slower phase-in schedule. Ordinance, § 1, ¶ 9; (Feldstein Decl.) Dkt. # 63, ¶¶ 10, 11.  
11 The recommendation said nothing specific about the categorization of franchisees.

## 12 **B. The Franchise Business Model**

13 The term “franchise business model” refers to a long-term business relationship in  
14 which one company (the franchisor) grants other companies (the franchisees) the right to  
15 sell products under its brand, using its business model and intellectual property, generally  
16 in exchange for ongoing royalty payments and other fees. (Gordon Decl.) Dkt. # 70-2, ¶  
17 6.<sup>6</sup> Although franchisees are part of the larger organization of the franchisor, they are  
18 legally separate entities. (Shane Dep.) Dkt. # 81-4, p. 9.<sup>7</sup> This business model provides  
19 the franchisor with the benefits of vertical control over retail units without the investment  
20 in assets required by full integration. Mick Carney and Eric Gedajlovic, *Vertical*  
21 *Integration in Franchise Systems: Agency Theory and Resource Explanations*, 12  
22 *Strategic Mgmt. J.* 607 (1991). The employees of a franchisee are not employees of the  
23 franchisor. (Shane Dep.) Dkt. # 81-4, p. 10. Franchisees manage the day-to-day aspects

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24  
25 <sup>6</sup> John A. Gordon is a franchise business consultant and has provided the court  
26 with an expert declaration in support of the amicus brief of OPEIU Local 8 et al.

27 <sup>7</sup> Scott A. Shane is an economics professor and has provided the court with an  
expert declaration in support of the City’s opposition to this motion.

1 of their business, including making decisions regarding which workers to hire, how many  
2 to hire, the benefits they will offer, and how much to pay their employees. *Id.*, p. 19.

3 Despite this legal separateness, however, franchisees are not free to do as they  
4 please. Most franchise agreements heavily regulate the conduct of the franchisee and  
5 include statements about how the franchisee is expected to run the franchise, whether or  
6 not the franchisee has an exclusive territory, and when and where the franchisee may  
7 open another business. (Shane Decl.) Dkt. # 62, ¶ 22. Franchise agreements also contain  
8 clauses that outline acceptable outlet “appearance, hours of operation, location, and  
9 product quality” and typically allow franchisors to conduct “inspections, audits, mystery  
10 shopper programs, and so on” of the franchisees. (Shane Decl.) Dkt. # 62, ¶¶ 22-31.

11 Franchisees accede to the franchisor’s restrictions because being part of a larger  
12 network provides significant benefits. Participation in a franchise system often affords  
13 brand recognition and customer loyalty, as well as access to, advertising, trade secrets,  
14 software, lower material costs, site selection assistance, financing, and extensive  
15 operational support and training. (Shane Decl.) Dkt. # 62, ¶ 10. Participation in this  
16 system also often affords franchisees more profit than they would earn as individual  
17 business owners. (Shane Decl.) Dkt. # 62, ¶ 9. In addition to these factors, franchisors  
18 also have the ability to use their greater financial resources to support the franchise by  
19 aiding franchisees during time of business stress, including identifying and responding to  
20 changed business conditions. (Gordon Decl.) Dkt. # 70-2, ¶ 9.

### 21 **C. Mechanics of the Ordinance**

#### 22 1. The Two Phase-In Tracks: “Large” and “Small” Businesses

23 The Ordinance goes into effect on April 1, 2015. The law provides for two core  
24 tracks leading to the \$15 minimum wage. The first track applies to Schedule One or  
25  
26  
27

1 “large” businesses (defined as those with 500 or more employees nationwide).<sup>8</sup> These  
2 businesses will have three years to implement the new law. Large businesses also have  
3 the opportunity to take advantage of an alternative Schedule One track if they choose to  
4 offer certain health benefits to their employees. If they offer a qualifying health plan,  
5 they will be given four years to implement the new law.

6 The second track applies to Schedule Two or “small” businesses (defined as those  
7 with 500 or fewer employees nationwide).<sup>9</sup> These smaller businesses will have seven  
8 years to implement the new law. The exact incremental increases for each track are set  
9 forth below:

10 Schedule One -- large employers (> 500 employees)

- 11 • April 1, 2015 -- \$11
- 12 • January 1, 2016 -- \$13
- 13 • January 1, 2017 -- \$15

14 Schedule One -- large employers offering health benefits

- 15 • April 1, 2015 -- \$11
- 16 • January 1, 2016 -- \$12.50
- 17 • January 1, 2017 -- \$13.50
- 18 • January 1, 2018 -- \$15

19 Schedule Two -- small employers (≤ 500 employees)

- 20 • April 1, 2015 -- \$10
- 21 • January 1, 2016 -- \$10.50

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22 <sup>8</sup> “‘Schedule 1 Employer’ means all employers that employ more than 500  
23 employees in the United States, regardless of where those employees are employed in the  
24 United States, and all franchisees associated with a franchisor or a network of franchises  
25 with franchisees that employ more than 500 employees in aggregate in the United  
26 States.” Ordinance § 2.

27 <sup>9</sup> “‘Schedule 2 Employer’ means all employers that employ 500 or fewer  
employees regardless of where those employees are employed in the United States.  
Schedule 2 employers do not include franchisees associated with a franchisor or network  
of franchises with franchisees that employ more than 500 employees in aggregate in the  
United States.” Ordinance, § 2.

- January 1, 2017 -- \$11
- January 1, 2018 -- \$11.50
- January 1, 2019 -- \$12
- January 1, 2020 -- \$13.50
- January 1, 2021 -- \$15

Ordinance § 4.

By 2021, all employers will be subject to a minimum wage of at least \$15 per hour.

2. Franchisees and Integrated Enterprises

Under the law, a wholly independent business with more than 500 employees falls into the “large” category and a wholly independent business with 500 or fewer employees falls into the “small” category. Certain types of businesses, however, are not considered independent: franchisees and integrated enterprises.

A franchisee is considered a “large” business if its franchisor and/or its network of franchisees employ more than 500 employees in aggregate in the United States.

Ordinance, § 3. This means that the owner of a Subway outlet with only 10 employees will be considered a “large” employer because of his relationship with the Subway franchisor and other Subway franchisees.

Additionally, entities that appear separate but in fact form an “integrated enterprise” are also considered “large” businesses under the Ordinance. Separate entities are considered an “integrated enterprise” if there is a significant degree of: (1) interrelation between the operations of the entities, (2) common management, (3) centralized control over labor relations, and (4) common ownership or financial control over the entities. There is a presumption, however, that separate entities are actually separate employers if: (1) the entities operate substantially in separate physical locations from one another, and (2) each entity has partially different ultimate ownership.

Ordinance, § 3. This test applies only to *non-franchise* businesses.

### III. LEGAL STANDARD

1  
2 Plaintiffs seek a preliminary injunction compelling the City to treat franchisees as  
3 small businesses under the new law. “A preliminary injunction is an extraordinary and  
4 drastic remedy; it is never awarded as of right....” *Munaf v. Geren*, 553 U.S. 674, 689  
5 (2008) (citation and internal quotation marks omitted). To obtain a preliminary  
6 injunction, the moving party must establish that: (1) it is likely to succeed on the merits;  
7 (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the  
8 balance of equities tips in its favor; and (4) an injunction is in the public interest. *Winter*  
9 *v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

10 Alternatively, “serious questions going to the merits” and a balance of hardships  
11 that tips sharply towards the plaintiffs can support issuance of a preliminary injunction,  
12 so long as plaintiffs also show that there is a likelihood of irreparable injury and that the  
13 injunction is in the public interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d  
14 1127, 1135 (9th Cir. 2011).

### IV. ANALYSIS

15  
16 Plaintiffs allege a number of claims against the City, including: (1) violation of the  
17 Commerce Clause, (2) violation of the Equal Protection Clause, (3) violation of the First  
18 Amendment, (4) Lanham Act preemption, (5) ERISA preemption, and (6) violation of the  
19 Privileges and Immunities Clause of the Washington State Constitution. The court will  
20 address the merits of each claim below.

#### 21 **A. The Dormant Commerce Clause**

22 The Constitution was framed upon the theory that “the peoples of the several  
23 states must sink or swim together, and that in the long run prosperity and salvation are in  
24 union and not division.” *Baldwin v. G.A.F. Seeling, Inc.*, 294 U.S. 511, 523 (1935).

25 Thus, the Court “has consistently held that the Constitution’s express grant to Congress  
26 of the power to ‘regulate Commerce ... among the several States,’ Art. I, § 8, cl.3,  
27

1 contains, ‘a further, negative command, known as the dormant Commerce Clause ....’ ”  
2 *Am. Trucking Ass’n, Inc. v. Michigan Public Service Comm’n*, 545 U.S. 429, 433 (2005)  
3 (quoting *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 174 (1995)).

4 The dormant Commerce Clause bars state and local governments from erecting  
5 taxes, tariffs, or regulations that favor local businesses at the expense of interstate  
6 commerce. *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980). One of its core  
7 purposes is to prevent states from engaging in economic protectionism -- *i.e.*, shielding  
8 local markets from interstate competition. *Dep’t of Revenue of Ky. v. Davis*, 553 U.S.  
9 328, 337-38 (2008) (citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988)).

10 The dormant Commerce Clause’s two-tiered analytical framework is well settled:  
11 (1) the anti-discrimination test -- which involves heightened scrutiny and (2) the *Pike*  
12 balancing test -- a lower bar. The anti-discrimination test involves a two-step inquiry.  
13 The first step is to ask whether the statute discriminates facially, has a discriminatory  
14 purpose, or has a discriminatory effect against interstate commerce. *Nat’l Ass’n of*  
15 *Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 525 (9th Cir. 2009).  
16 If it does, at the second step, the burden shifts to the state to justify that discrimination by  
17 showing the discrimination is necessary to achieve a legitimate local purpose and that  
18 there is no reasonable non-discriminatory means for accomplishing the same objective.  
19 *See, e.g., Maine v. Taylor*, 477 U.S. 131, 138 (1986).

20 A determination that the law is non-discriminatory under the first tier, however,  
21 does not end the analysis. The court must move on to the second tier and apply the *Pike*  
22 balancing test when the non-discriminatory law nevertheless has some burden on  
23 interstate commerce. *Nat’l Ass’n of Optometrists*, 567 F.3d at 528. Under *Pike*, the law  
24 will only be invalidated if plaintiffs can show that the burden on interstate commerce is  
25  
26  
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1 clearly excessive in relation to the putative local benefits.<sup>10</sup> *Pike v. Bruce Church, Inc.*,  
 2 397 U.S. 137, 142 (1970).

3 1. Tier One: The Anti-Discrimination Test

4 a. *Does the Ordinance discriminate on its face?*

5 To determine which wage schedule applies, the Ordinance counts all employees of  
 6 a particular employer nationwide without regard to geographic location. Indeed, the  
 7 Ordinance's faster phase-in schedule applies to franchises with headquarters here in  
 8 Washington. Accordingly, the language of the Ordinance does not facially discriminate  
 9 against out-of-state entities.

10 b. *Does the Ordinance have a discriminatory purpose?*

11 Discriminatory purpose exists when a state or local statute is "motivated by an  
 12 intent to discriminate against interstate commerce." *Family Winemakers of Cal. v.*  
 13 *Jenkins*, 592 F.3d 1, 13 (1st Cir. 2010). The words of the legislative body itself, written  
 14 contemporaneously with the passage of the law in question, are the most persuasive  
 15 source of legislative purpose. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449  
 16 U.S. 456, 463 n. 7 (1981) ("[T]his Court will assume that the objectives articulated by the  
 17 legislature are actual purposes of the statute, unless examination of the circumstances  
 18 forces us to conclude that they 'could not have been a goal of the legislation.'"). The  
 19

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20 <sup>10</sup> The court notes that the decisions interpreting the dormant Commerce Clause  
 21 appear somewhat difficult to reconcile. *See, W. Lynn Creamery, Inc. v. Healy*, 512 U.S.  
 22 186, 210 (1994) (Scalia, J., concurring) ("[O]nce one gets beyond facial discrimination  
 23 our negative-Commerce-Clause jurisprudence becomes (and long has been) a  
 24 quagmire.") (internal quotation marks omitted); *see also* Brannon P. Denning,  
 25 *Reconstructing the Dormant Commerce Clause Doctrine*, 50 Wm. & Mary L. Rev. 417,  
 26 423 (2008) (noting that "a number of the Court's [ ] cases are, in fact, impossible to  
 27 reconcile...."). Nevertheless, the Court has attempted to apply the framework to serve  
 the purpose of the dormant Commerce Clause --*i.e.*, to prevent barriers to the flow of  
 interstate commerce -- while keeping in mind the "residuum of power" in a municipality  
 to make laws governing matters of local concern. *S. Pac. Co. v. State of Ariz.*, 325 U.S.  
 761, 767 (1945).

1 legislature's stated purpose, however, is not dispositive. Several additional factors have  
2 been recognized as probative of discriminatory intent: (1) evidence of a consistent pattern  
3 of actions by the decision-making body disparately impacting members of a particular  
4 class of persons; (2) historical background of the decision, which may take into account  
5 any history of discrimination by the decision-making body or the jurisdiction it  
6 represents; (3) the specific sequence of events leading up to the particular decision being  
7 challenged, including any significant departures from normal procedures; and (4)  
8 contemporary statements by decision-makers on the record or in minutes of their  
9 meetings. *See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252,  
10 267-68 (1977); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 336 (4th Cir.  
11 2001).

12 Here, the stated legislative purposes for increasing the minimum wage included  
13 reducing income inequality and promoting the general welfare, health, and prosperity of  
14 Seattle by allowing low-wage workers to better support themselves and to participate in  
15 the City's civic and economic activities. Ordinance, WHEREAS clauses 1-12, § 1. The  
16 rationale for differentiating between large and small businesses was the recognition that  
17 "some employers, in particular small businesses and not-for-profit organizations, may  
18 have difficulty in accommodating the increased costs." Ordinance, § 1, ¶ 9.

19 Plaintiffs do not contend that the City has engaged in a consistent pattern of  
20 actions disparately impacting out-of-state franchises, nor do they contend that the City  
21 has a history of discriminating against out-of-state franchises. Rather, to show  
22 discriminatory purpose, they point only to comments from one member of the Advisory  
23 Committee and isolated statements made by three lawmakers.<sup>11</sup>

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25  
26 <sup>11</sup> In the entirety of the legislative history, plaintiffs object to a total of five emails  
27 and five public statements. (Exs. to Groesbeck Decl. iso Pls.' Mot.) Dkt. ## 38-2, 38-3,  
38-10, 38-11, 38-12, 38-15, 38-16, 38-17, 81-1, and 81-2. The court reviewed and

1 Plaintiffs focus mainly on the comments of Nick Hanauer, a private citizen on the  
2 Mayor's Advisory Committee. Mr. Hanauer made statements in email correspondence to  
3 other members of the committee and to the City Council, such as:

4 [F]ranchises like subway and McDonalds really are not very  
5 good for our local economy...A city dominated by  
6 independent, locally owned, unique sandwich and hamburger  
7 restaurants will be more economically, civically and  
8 culturally rich than one dominated by extractive national  
9 chains.

10 Dkt. # 38-2, p. 2.

11 He also stated:

12 ...[F]ranchises dominate their niches, not because they are  
13 intrinsically better, but mostly because they benefit massively  
14 from the scale of their parent operations. Cheaper ingredients.  
15 Cheaper equipment. Better lease terms. Better training. Better  
16 and more advertising. Well known brand. etc, etc, etc....I  
17 have nothing against these companies. They have a right to  
18 operate. But our city has no obligation to continue policies  
19 that so obviously advantage them and disadvantage the local  
20 businesses that benefit our city and it's [*sic*] citizens more.

21 Dkt. # 38-10, p. 2.

22 In response to one of Mr. Hanauer's emails, Robert Feldstein, a member of the  
23 Mayor's staff, wrote in an email:

24 I like the thinking but would love some additional thinking to  
25 help think through how to answer concerns about the effect  
26 on the individual immigrant business owner who decided to  
27 open a Subway rather than a bahn mi shop. I will admit  
upfront that I probably know least about [the] franchise model  
so there might be big gaps that I don't understand. That's  
part of why I'm asking for help in thinking this through....If

28 considered all of the emails and statements identified by the parties, despite not including  
29 a verbatim recitation of each in its opinion.

1 we lose franchises in Seattle, I won't be sad – for the reasons  
2 you say. But are their ways for the cost to be born not on  
3 those franchise owners? Are they simply going to be a  
casualty of this transition? Are they less sympathetic or less at  
financial risk than I am imagining....

4 Dkt. # 38-3, p. 2.<sup>12</sup>

5 Additionally, two City Council members made comments regarding the resources  
6 flowing to franchisees from their “large” and/or “corporate” franchisors. Councilmember  
7 Kshama Sawant stated at a public hearing that:

8  
9 It's important, before we get lost in to this false idea that  
10 franchisees are somehow struggling businesses, we should  
11 look at the evidence here, which compiles McDonald's,  
12 Burger King, and Wendy's owners in Seattle...Just six  
13 companies own every franchised big burger chain in Seattle,  
14 and those six companies own a total of 236 locations all  
15 across the country. These are not small businesses. And a  
16 McDonald's franchise requirement is \$750,000 of personal  
17 wealth, not borrowed money, and [a] \$45,000 franchisee fee,  
18 40% of the total cost to open a new restaurant must be paid in  
cash. Now yes, it's true that the McDonalds headquarters,  
corporate headquarters, takes away the lion's share of the  
profits, but in order to be a franchisee, you have to be very,  
very wealthy. Just a small business person of color from  
Rainier Beach is not going to be able to afford to open a  
franchise outlet.

19 Dkt. # 38-11, p. 4; *see also* Dkt. # 38-12, p. 2 (writing on her official website, she also  
20 stated, “It's clear that the current franchise model is rigged against workers.”); Dkt. # 38-  
21 15, p. 2 (tweeting from her official twitter account, she also stated, “Franchise owners:  
22 enough with the blame game! Organize, go to CorpHQ & renegotiate your rents.”).

23  
24  
25 <sup>12</sup> It is unclear whether Mr. Feldstein actually sent this response to Mr. Hanauer.  
26 Defendants claim it was merely a draft, but Mr. Feldstein's declaration does not confirm  
27 this allegation. (Defs.' Opp.) Dkt. # 61, n. 4; (Feldstein Decl.) Dkt. # 63. The court,  
nevertheless, considered the email as if it was sent.

1 Similarly, Councilmember Mike O'Brien stated the following in response to a  
2 constituent's email objecting to the categorization of franchisees as "large" businesses:

3 I know a lot of franchise owners are struggling to survive  
4 under current minimum wage rules and I have met with a  
5 number of them and am sympathetic to their situation. That  
6 said, their workers are also struggling to survive at the current  
7 minimum wages too. The ones not struggling are the  
8 corporate parents of all these, and we don't have a direct path  
9 to the parent corporations to make them treat both the  
10 employees and the franchise owners fairly. My hope is that  
11 the path we have chosen will force parent companies to treat  
12 franchise owners fairly and allow employees at these  
13 businesses to make closer to a living wage. I don't believe  
14 that the large parent companies of these franchises will allow  
15 their businesses in Seattle to fail and give up the market to the  
16 competition and I expect over time adjustments will need to  
17 be made to accommodate the new minimum wage....Because  
18 workers at fast food franchises make up a large portion of  
19 people in Seattle currently earning minimum wage, this felt  
20 like an appropriate trade off.

21 Dkt. # 81-2, p. 2.

22 Finally, after the Ordinance was enacted, the Mayor issued the following  
23 statement in a press release:

24 Franchises have resources that a small business in the Rainier  
25 Valley or a small sandwich shop on Capitol Hill do not have.  
26 Franchise restaurants have menus that are developed by a  
27 corporate national entity, a food supply and products that are  
provided by a corporate national entity, training provided by a  
corporate national entity, and advertising provided by a  
corporate national entity. They are not the same as a local  
sandwich shop that opens up or a new local restaurant that  
opens up in the city. Our process for reaching \$15 an hour in  
Seattle recognizes that difference.

Dkt. # 38-16, p. 2.

The court finds that these statements are insufficient to show that the law was  
enacted for a discriminatory purpose.

1 First, the court gives little weight to the comments of an Advisory Committee  
2 member. Mr. Hanauer had no part in drafting the Ordinance and, unlike a lawmaker, he  
3 had no responsibility to consider and weigh opposing viewpoints. Because he was not  
4 the ultimate decision-maker, Mr. Hanauer was free to zealously lobby for and advance  
5 his own line of thinking on this issue.<sup>13</sup> The same is true for other private citizens who,  
6 in fact, disagreed with Mr. Hanauer and voiced pro-franchise views. For example, David  
7 Meinert, another Advisory Committee member, stated in an email to the Mayor's staff:  
8 "From breaking franchise agreements to outside 'education' of workers funded by the  
9 city, to getting rid of tips to lack of training wage. I have to speak out against these  
10 things." Dkt. # 38-4, p. 2. MSA Worldwide, a franchise advisory firm, also wrote a  
11 detailed letter to the Mayor arguing that "[b]y its actions, the City of Seattle is statutorily  
12 denying franchisees the right to exist in Seattle..." Dkt. # 38-8, p. 2. Additionally, The  
13 Seattle Times wrote an editorial criticizing the categorization of franchisees as "large"  
14 businesses. *See, Editorial: Redefine franchises under Seattle's minimum-wage proposal*,  
15 The Seattle Times, May 30, 2014 ("[The Ordinance] effectively discriminates against a  
16 business model – franchises – by giving non-franchisees a slower phase-in."). If the  
17 court were to extend its inquiry into every statement made by every Advisory Committee  
18 member or other private person on an issue as politically charged as this one, it would  
19 surely discover a plethora of advocacy by both sides -- e.g., statements at public hearings,  
20 editorials, and letters to lawmakers -- some of which might well be discriminatory.

21 Second, the statements made by lawmakers do not expressly suggest an intent to  
22 discriminate against out-of-state interests. While they refer to the franchisor as the

23 \_\_\_\_\_  
24 <sup>13</sup> The court has reviewed an email sent by Councilmember Tim Burgess to Mr.  
25 Hanauer thanking him for his "leadership on this important issue." Dkt. # 81-1. This  
26 email, when read in context, appears to be a simple acknowledgement of Mr. Hanauer's  
27 efforts to advance one line of thinking on the minimum wage ordinance. There is no  
evidence that Councilmember Burgess or any other Councilmember adopted any of Mr.  
Hanauer's opinions as their own.

1 “corporate headquarters,” the “corporate national entity” and the “parent corporation,”  
2 the statements, when considered in context, are reasonably read to distinguish between  
3 entities with more resources and those with fewer resources. Indeed, each of the  
4 statements refers to the resources of franchisees and their ability to adjust to the increased  
5 minimum wage on an accelerated basis. Councilmember Sawant stated, “[W]e [should  
6 not] get lost into this false idea that franchisees are somehow struggling businesses....  
7 These are not small businesses....” Councilmember O’Brien stated, “The ones not  
8 struggling are the corporate parents of all these, and...I expect over time adjustments will  
9 need to be made to accommodate the new minimum wage.” Finally, the Mayor stated,  
10 “Franchises have resources that a small business in the Rainier Valley or a small  
11 sandwich shop on Capitol Hill do not have...They are not the same as a local sandwich  
12 shop that opens up or a new local restaurant that opens up in the city.” Whether accurate  
13 or not, the statements made by these lawmakers are consistent with the Ordinance’s  
14 stated purpose of differentiating between large and small businesses -- businesses with  
15 more resources can more easily (and more quickly) adjust to the increasing minimum  
16 wage, while small businesses, with fewer resources, may have difficulty in  
17 accommodating the costs.

18 Third, the court notes that the Ordinance passed by unanimous vote and plaintiffs  
19 have identified no objectionable comments made by any other City Council members.  
20 Thus, even if the aforementioned statements could somehow be construed to indicate  
21 some impermissible motivation, isolated and stray comments by two Council members  
22 are insufficient to override the entire City Council’s formal statements of purpose in the  
23 Ordinance itself. *Compare Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 161 (5th Cir. 2007)  
24 (finding stray protectionist remarks of certain legislators were insufficient to condemn  
25 statute under the dormant Commerce Clause where overall legislative record revealed  
26 legitimate, nondiscriminatory purposes), *with Waste Mgmt. Holdings, Inc.*, 252 F.3d at  
27 336-40 (finding discriminatory purpose when comments of lawmakers expressly referred

1 to imposing burdens and restrictions on actors “outside” the state and sequence of events  
2 leading up to enactment of statute clearly established impermissible motive), *and Family*  
3 *Winemakers*, 592 F.3d at 7, 15-17 (finding discriminatory purpose when protectionist  
4 statements by lawmakers caused the state legislature to amend a statute to include a  
5 unique exception that would favor a particular in-state winery).

6 Fourth, and finally, the record does not reveal any significant departures from  
7 normal procedures in enacting the Ordinance. It is no secret that the minimum wage  
8 increase was hotly debated and that interest groups from both sides weighed in on the  
9 issue. These included both labor interests and franchise interests and both represented  
10 Seattle voters. (Exs. to Groesbeck Decl. iso Pls.’ Mot.) Dkt. ## 38-1 to 38-17; (Exs. to  
11 Grosebeck Decl. iso of Pls.’ Reply) Dkt. ## 81-1 to 81-3. Thus, the alleged statements by  
12 some union leaders, for example, indicating a desire to “break the franchise model” do  
13 not surprise the court. (Meinert Decl.) Dkt. # 37-2, ¶ 4. Even if true, such fervent  
14 remarks and lobbying efforts by interest groups cannot be imputed to the City Council.  
15 *See, W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 215 (1994) (Rehnquist, C.J.,  
16 dissenting) (“Analysis of interest group participation in the political process may serve  
17 many useful purposes, but serving as a basis for interpreting the dormant Commerce  
18 Clause is not one of them.”). The City Council likely heard many opposing viewpoints  
19 leading up to the enactment of the Ordinance. In response, the lawmakers asked  
20 questions (for example, Mr. Feldstein requested additional information, stating “I will  
21 admit upfront that I probably know least about [the] franchise model so there might be  
22 big gaps that I don’t understand...Are [franchisees] less sympathetic or less at financial  
23 risk than I am imagining?”) and inquired into the financial risks facing franchisees and  
24 their potential resources. The findings by the Mayor and other lawmakers regarding the  
25 benefits flowing to these entities from their franchisors support the conclusion that  
26  
27

1 franchisees were categorized as “large” employers based upon a determination that they  
2 could handle the faster phase-in schedule, not by any protectionist motive.<sup>14</sup>

3 Accordingly, the court does not find that the categorization of franchisees as large  
4 businesses was motivated by a desire to discriminate against interstate commerce.

5 *c. Does the Ordinance have a discriminatory effect?*

6 To prove discriminatory effect, plaintiffs have the burden of producing substantial  
7 evidence showing that the law discriminates in practice. *Black Star Farms LLC v. Oliver*,  
8 600 F.3d 1225, 1232 (9th Cir. 2010); *Family Winemakers*, 592 F.3d at 11.

9 Discrimination means “differential treatment of in-state and out-of-state economic  
10 interests that benefits the former and burdens the latter.” *Or. Waste Sys., Inc. v. Dep’t of*  
11 *Env’tl. Quality*, 511 U.S. 93, 99 (1994). Of course, the “differential treatment” must be as  
12 between entities that are similarly situated. *See Gen. Motors Corp. v. Tracy*, 519 U.S.  
13 278, 298-99 (1997); *Nat’l Ass’n of Optometrists & Opticians LensCrafters, Inc. v.*  
14 *Brown*, 567 F.3d 521, 527 (9th Cir. 2009).

15 Although the dormant Commerce Clause protects against burdens on interstate  
16 commerce, it also respects federalism by protecting local autonomy. *Nat’l Ass’n of*  
17 *Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012) (citing *Dep’t of*  
18 *Revenue v. Davis*, 553 U.S. 328, 338 (2008)). The Supreme Court has recognized that  
19 “under our constitutional scheme the States retain broad power to legislate protection for  
20 their citizens in matters of local concern” and has held that “not every exercise of local  
21

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22 <sup>14</sup> Additionally, even if the court were to find that the law was motivated by some  
23 discriminatory purpose, that finding alone would be unlikely to violate the Commerce  
24 Clause. *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 36 (1st Cir. 2005) (noting  
25 “[t]here is some reason to question whether a showing of discriminatory purpose alone  
26 will invariably suffice to support a finding of constitutional invalidity under the dormant  
27 Commerce Clause”); *see also* Kathleen M. Sullivan & Gerald Gunther, *Constitutional*  
*Law* 275 (15th ed. 2004) (recognizing the analytical difficulty that arises because “a law  
motivated wholly by protectionist intent might fail to produce significant discriminatory  
effects”).

1 power is invalid merely because it affects in some way the flow of commerce between  
2 the States.” *Id.* (quoting *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371  
3 (1976)); *see also Nat’l Ass’n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148  
4 (9th Cir. 2012) (“A critical requirement for proving a violation of the Commerce Clause  
5 is that there must be a *substantial burden on interstate commerce.*”) (emphasis in  
6 original).

7 Thus, it is plaintiffs’ burden to show that the law causes local goods to constitute a  
8 larger share and goods with an out-of-state source to constitute a smaller share of the  
9 market. *See Black Star Farms*, 600 F.3d at 1232-33; *see also Cherry Hill Vineyard, LLC*  
10 *v. Baldacci*, 505 F.3d 28, 36 (1st Cir. 2007) (plaintiff claiming discriminatory effect must  
11 submit “probative evidence of adverse impact” and where a statutory provision “is  
12 evenhanded on its face and wholesome in its purpose,” a “substantial” evidentiary  
13 showing is required to prove discriminatory effect); *Nat’l Paint & Coatings Ass’n v. City*  
14 *of Chicago*, 45 F.3d 1124, 1132 (7th Cir. 1995) (discriminatory effect was not established  
15 where “plaintiffs did not offer any evidence”). Potential or possible discrimination is not  
16 sufficient, and the court is not permitted to speculate or to infer discriminatory effect  
17 without substantial proof. *Black Star Farms*, 600 F.3d at 1232, 1235. As the Ninth  
18 Circuit has stated, “[P]rove it, or lose it.” *Id.* at 1232.

19 Here, plaintiffs claim that the Ordinance disproportionately impacts out-of-state  
20 franchisors. 623 franchises operate in Seattle; 600 (or 96.3%) of those have out-of-state  
21 franchisors. (Reynolds Decl.) Dkt. # 37-4, ¶ 17.<sup>15</sup> Additionally, all of the 23 in-state  
22 franchisors are associated with franchisees outside of the state of Washington. *Id.* Thus,  
23 plaintiffs argue, the Ordinance overwhelmingly burdens out-of-state entities. Plaintiffs  
24  
25

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26 <sup>15</sup> John R. Reynolds is the President of the IFA Educational Foundation and has  
27 provided the court with a declaration in support of plaintiffs’ motion.

1 also claim that the Ordinance will put franchisees at a competitive disadvantage as  
2 compared to other similarly situated small businesses by increasing their labor costs.

3 As an initial matter, comparing franchisees and independent small businesses is  
4 somewhat difficult; they are not “similarly situated” in all relevant respects. It is true that  
5 they compete in the same markets and it is also true that a franchisee who owns only one  
6 outlet may share some similarities with an independent small business. That said,  
7 franchisees and independent small businesses have different business structures. *See*  
8 *Nat’l Ass’n of Optometrists & Opticians Lenscrafters, Inc. v. Brown*, 567 F.3d 521, 527  
9 (9th Cir. 2009) (“Because states may legitimately distinguish between business structures  
10 in a retail market, a business entity’s structure is a material characteristic for determining  
11 if entities are similarly situated.”). The franchisee has, through his contract with the  
12 franchisor, made a business decision -- *i.e.*, to pay royalties and fees in exchange for use  
13 of a brand name, training, advertising, established customer base, and other benefits --  
14 presumably because he deemed this arrangement profitable. The City, however, has had  
15 no part in creating or defining this structure and has no duty to promote it or protect it.  
16 Increasing costs for a particular type of business model, even one that involves interstate  
17 commerce, does not violate the dormant Commerce Clause without a further showing of  
18 impact on the flow of goods among the states. The Commerce Clause simply does not  
19 protect “the particular structure or methods of operation in a retail market.” *Exxon Corp.*  
20 *v. Governor of Md.*, 437 U.S. 117, 127 (1978). Nor does it “give an interstate business  
21 the right to conduct its business in what it considers the most efficient manner,” for “the  
22 Constitution protects the interstate market, not particular interstate firms, from prohibitive  
23 or burdensome regulations.” *Valley Bank of Nev. v. Plus Sys., Inc.*, 914 F.2d 1186, 1993  
24 (9th Cir. 1990) (citing *Exxon*, 437 U.S. at 127-28).

25 Second, even if the court were to find that franchisees are similarly situated to  
26 independent small businesses, plaintiffs have not produced substantial evidence showing  
27 discriminatory effect. *Black Star Farms*, 600 F.3d at 1232. Pointing to a 96.3%

1 connection to out-of-state entities is insufficient. *See, e.g., Exxon*, 437 U.S. at 125-29  
2 (finding that even when the burden of legislation falls 100% on out-of-state entities, that  
3 fact alone “does not lead, either logically or as a practical matter, to a conclusion that the  
4 State is discriminating against interstate commerce in the retail market”); *Valley Bank*,  
5 914 F.2d at 1193 (“[E]ven a disproportionate effect on out-of-state residents...does not  
6 necessarily violate the commerce clause.”). Instead, plaintiffs must show that the faster  
7 phase-in schedule will cause local goods to constitute a larger share and goods with an  
8 out-of-state source to constitute a smaller share of the market. *Black Star Farms*, 600  
9 F.3d at 1233. While plaintiffs argue that this will necessarily occur, they have not  
10 presented evidence of an actual, rather than potential, impact on interstate commerce.  
11 Identifying a correlation between franchisees and out-of-state business entities, even a  
12 very strong correlation, does not establish the further fact that a burden on franchisees in  
13 Seattle will cause a reduction in the flow of commerce across state lines.

14 Plaintiffs’ cases are not to the contrary. For example, in *Cachia v. Islamorada*,  
15 542 F.3d 839 (11th Cir. 2008), the court considered an ordinance which stated that  
16 “[f]ormula restaurants shall not be permitted in any zoning district of [Islamorada].” 542  
17 F.3d at 841. The court found that the ordinance had a discriminatory effect because it  
18 served as “an explicit barrier to the presence of national chain restaurants, thus preventing  
19 the entry of such businesses into competition with independent local restaurants.” *Id.* at  
20 842 (emphasis added). Thus, the *Cachia* ordinance expressly banned formula restaurants  
21 and erected a figurative wall around the local market.

22 In *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844 (11th Cir. 2008),  
23 another case relied upon by the plaintiffs, the court considered an ordinance that limited  
24 formula retail establishments (*e.g.*, Target or Walmart) to 2,000 square feet of retail space  
25 and 50 feet of frontage. 542 F.3d at 846. The parties had stipulated that this restriction  
26 “effectively prevents the establishment of new retail stores,” and “a facility limited to no  
27 more than 2,000 square feet or 50’ of frontage can not accommodate the minimum

1 requirements of nationally and regionally branded formula retail stores.” *Id.* The court  
2 acknowledged that even when the burden of a regulation falls onto a subset of out-of-  
3 state retailers, that fact “does not, by itself, establish a claim of discrimination against  
4 interstate commerce.” *Id.* (quoting *Exxon*, 437 U.S. at 126). The court found, however,  
5 that the ordinance’s effective elimination of all new interstate retailers had the “practical  
6 effect of...discriminating against” interstate commerce. *Id.* at 847 (emphasis added).  
7 Thus, the playing field was rigged so sharply against interstate retailers, it effectively  
8 eliminated them from the city -- a clear move toward economic isolation.

9       Similarly, in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S.  
10 333 (1977), the Supreme Court found that a North Carolina produce labeling statute had  
11 “a leveling effect which insidiously operate[d] to the advantage of local apple producers.”  
12 432 U.S. at 351. North Carolina had enacted a statute which required all closed  
13 containers of apples shipped into the state to bear “no grade other than the applicable  
14 U.S. grade or standard.” *Id.* at 335. This meant that any individual state’s grading  
15 system could not be used on apple containers shipped into North Carolina. *Id.* At the  
16 time, Washington State was the nation’s largest producer of apples, its crops accounting  
17 for approximately 30% of apples grown domestically and nearly 50% of all apples  
18 shipped in closed containers in interstate commerce. *Id.* at 336. Washington had its own  
19 grading system, which reflected a stringent inspection program that required compliance  
20 with quality standards that were the equivalent of or superior to the standards adopted by  
21 the United States Department of Agriculture. *Id.* Washington’s system had become the  
22 industry standard and Washington apple containers were, of course, labeled with  
23 Washington grades. *Id.* at 351. North Carolina, by contrast, had never established a  
24 grading or inspection system. Thus, the North Carolina law, which prohibited the use of  
25 state grades, had no impact on North Carolina apple growers. The burden fell entirely on  
26 out-of-state entities. *Id.* But that fact alone was not enough to lead the Court to conclude  
27

1 that the law discriminated against interstate commerce. *Id.*; see also *Exxon*, 437 U.S. at  
2 125-29.

3 In *Hunt*, the plaintiff presented *evidence* that out-of-state apple growers had  
4 incurred substantial costs in complying with the law and had in fact lost accounts as a  
5 direct result of the statute. *Hunt*, 432 U.S. at 347. Indeed, the statute had raised the costs  
6 of doing business in North Carolina to the point where Washington apple growers were  
7 faced with abandoning the North Carolina market. *Id.* at 340. North Carolina apple  
8 growers, by contrast, suffered absolutely no negative impacts under the law. Thus, based  
9 upon this evidence, the Court found that North Carolina had “insidiously” rigged the  
10 playing field in a way that would cause local goods to constitute a larger share of the  
11 market. *Id.* at 351; see also *Black Star Farms*, 600 F.3d 1232 (distinguishing *Hunt*).

12 Here, unlike *Cachia*, plaintiffs have not shown that the Ordinance creates any  
13 barrier to the entry of franchisees into the Seattle market; unlike *Island Silver & Spice*,  
14 they have not shown that the Ordinance will effectively eliminate franchisees from the  
15 Seattle market; and unlike *Hunt*, they have not shown that the playing field has been  
16 rigged in a such way that local goods are certain, or virtually certain, to constitute a larger  
17 share of the market. The evidence of market impact in this case simply does not rise to  
18 the level of that presented in cases where a law has been found to violate the dormant  
19 Commerce Clause.

20 Although plaintiffs contend that by increasing franchisees’ labor costs, the City is  
21 “rigging the playing field,” akin to *Hunt* or the *Islamorada* cases, to prevail on their  
22 dormant Commerce Clause challenge, plaintiffs must present evidence that the City has  
23 done so in a way that will impact the flow of interstate commerce. See, e.g., *Hunt*, 432  
24 U.S. at 349 (“Not every exercise of state authority imposing some burden on the free  
25 flow of commerce is invalid.”); *Milk Control Bd. v. Eisenberg Farm Prod.*, 306 U.S. 346,  
26 351-52 (1939) (“Every state police statute necessarily will affect interstate commerce in  
27 some degree, but such a statute does not run counter to the grant of Congressional power

1 merely because it incidentally or indirectly involves or burdens interstate commerce....”);  
2 *cf. Family Winemakers*, 592 F.3d at 11 (“Here, the totality of the evidence introduced by  
3 the plaintiffs demonstrates that the... [statute’s] effect is to significantly alter the terms of  
4 competition between in-state and out-of-state wineries to the detriment of the out-of-state  
5 wineries that produce 98 percent of the country’s wine.”).

6 Again, the evidence of discriminatory effect must be substantial. *See Black Star*  
7 *Farms*, 600 F.3d at 1233 (distinguishing *Family Winemakers* on this very point and  
8 finding that the “plaintiffs in that case, unlike the plaintiffs here, had *evidence* to prove  
9 their contentions”) (emphases added). Here, there is simply no credible evidence in the  
10 record that indicates franchisees will close up shop or reduce operations, or that new  
11 franchisees will not open up in Seattle. Although one plaintiff’s declaration indicates that  
12 the faster phase-in *may* cause her to go out of business, she is only speculating. (Lyons  
13 Decl.) Dkt. # 37-5, ¶ 20.<sup>16</sup> Her declaration is merely anecdotal and does not include any  
14 data analysis or empirical evidence that would lead the court to believe that imposing a  
15 faster phase-in schedule on franchisees is going to impact interstate commerce. The same  
16 is true regarding the survey results presented by *amici curiae*, in which a minority of  
17 small business owners *predicted* that they were “likely” to limit expansion in response to  
18 the wage increase. (Br. of Am. Hotel & Lodging Ass’n et al.) Dkt. #43-1, p. 8. The  
19 survey is based upon little more than conjecture and, in any case, fails to differentiate the  
20 responses of independent small business owners from those of franchisees.<sup>17</sup> Further,  
21 other *amici* have submitted contrary evidence, showing that although business owners in  
22

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23  
24 <sup>16</sup> Katherine M. Lyons is an individual plaintiff in this matter and the owner of a  
BrightStar Care franchise.

25 <sup>17</sup> *New Survey of Seattle Businesses: \$15 Wage Hike Will Raise Prices, Reduce*  
26 *Job Opportunities, and Shut Doors*, Emp. Policies Inst. (June 24, 2014), available at  
27 <http://www.epionline.org/release/new-survey-of-seattle-businesses-15-wage-hike-will-raise-prices-reduce-job-opportunities-and-shut-doors/>.

1 San Jose made similar predictions in response to that City's minimum wage increase,  
2 "[f]ast-food hiring accelerated once the higher wage was in place."<sup>18</sup> (Br. of Nat'l Emp.  
3 Law Project) Dkt. # 76, p. 15. Indeed, as stated recently by the CEO of Togo's Eateries,  
4 a sandwich franchisor that is planning an expansion into Seattle, "[the increase in the  
5 minimum wage] is what it is. Every city passes its own laws. We have a way to adjust  
6 the pricing and labor models to help us still be competitive but also make a profit."  
7 Rachel Lerman, *Fast-food eatery Togo's will expand to Seattle (not afraid of \$15 wage)*,  
8 Puget Sound Bus. J. (June 11, 2014). Mr. Gordon, one of the franchise experts,  
9 confirmed this possibility, stating, "[F]ranchisors also have the ability to use their greater  
10 financial resources to support the franchise by aiding franchisees during time of business  
11 stress. Because of these advantages, franchisees and franchisors are better able than  
12 independent small businesses to identify and respond to changed business conditions,  
13 including regularly scheduled minimum wage increases." (Gordon Decl.) Dkt. # 70-2,  
14 ¶9.

15 Put simply, there is no evidence demonstrating whether the Ordinance will have  
16 an impact on interstate commerce one way or the other, and the court declines to infer  
17 that it will necessarily have a negative one. At most, plaintiffs have shown *possible* or  
18 *potential* discriminatory effect, and as the Ninth Circuit has already found, that showing  
19 is insufficient. *See Black Star Farms*, 600 F.3d at 1232, 1235 ("Courts examining a  
20 'practical effect' challenge must be reluctant to invalidate a state statutory  
21 scheme...simply because it *might* turn out down the road to be at odds with our  
22

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23 <sup>18</sup> See, e.g., Eric Morath, *What Happened to Fast-Food Workers When San Jose*  
24 *Raised the Minimum Wage? Hold the Layoffs*, Wall Street Journal, April 9, 2014;  
25 Timothy Egan, *For \$7.93 an hour, It's Worth a Trip Across a State Line*, N.Y Times, Jan.  
26 11, 2007 (finding that when Washington State raised its minimum wage, businesses near  
27 the Idaho state line "prospered far beyond their expectations" and suffered no decrease in  
profitability).

1 constitutional prohibition against state laws that discriminate against interstate  
2 commerce.”).

3 2. Tier Two: The Pike Balancing Test

4 Because the court finds no discriminatory purpose or effect, it must move on to the  
5 *Pike* balancing test. Under that test, despite being non-discriminatory, a statute or  
6 regulation may be invalid if it, nevertheless, has an indirect effect on interstate  
7 commerce:

8 When...a statute has only indirect effects on interstate commerce and  
9 regulates evenhandedly, we have examined whether the State’s interest  
10 is legitimate and whether the burden on interstate commerce clearly  
exceeds the local benefits.

11 *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Under *Pike*, if a legitimate local  
12 purpose is found, then the question becomes one of degree. The extent of the burden that  
13 will be tolerated depends on the nature of the local interest involved. *Id.*

14 Even in weighing competing interests, however, “the Supreme Court has  
15 frequently admonished that courts should not second-guess the empirical judgments of  
16 lawmakers concerning the utility of legislation.” *S.D. Myers, Inc. v. City of San*  
17 *Francisco*, 253 F.3d 461, 471 (9th Cir. 2001) (quoting *Pac. Nw. Venison Prods. v.*  
18 *Smitch*, 20 F.3d 1008, 1017 (9th Cir. 1994)). Instead, for a facially neutral statute to  
19 violate the Commerce Clause, the burdens of the statute must so outweigh the putative  
20 benefits as to make the statute unreasonable or irrational. *Id.* (quoting *Ala. Airlines, Inc.*  
21 *v. City of Long Beach*, 951 F.2d 977 (9th Cir. 1991)). A challenge to the legislative  
22 judgment must establish that the legislative facts on which the classification is apparently  
23 based could not reasonably be conceived to be true by the governmental decision-maker.  
24 *Spoklie v. Montana*, 411 F.3d 1051, 1059 (9th Cir. 2005) (quoting *Minnesota v. Clover*  
25 *Leaf Creamery, Co.*, 449 U.S. 456 (1981)).

26 Here, even if the court assumes that the Ordinance will have some incidental  
27

1 burden on interstate commerce, for the reasons articulated above, plaintiffs have not  
2 shown that burden will “clearly exceed” the proffered local benefit, such that the benefit  
3 is unreasonable or irrational. The Ordinance is, at least putatively, designed to assist low  
4 wage workers, to decrease the gender wage gap, and to ensure that workers can better  
5 support and care for their families and fully participate in Seattle’s civic, cultural and  
6 economic life -- objectives that are well within the scope of legitimate municipal  
7 policymaking. While the court may philosophize about ways that the Ordinance could  
8 have been more narrowly tailored to achieve these goals, it is not the court’s place to  
9 second guess the reasoned judgments of the lawmakers who studied and analyzed this  
10 issue as part of an involved legislative process. Ordinance § 1, ¶¶ 5-9. Accordingly, the  
11 court finds that the Ordinance survives the *Pike* balancing test as well.

## 12 **B. Equal Protection**

13 Plaintiffs also contend that the Ordinance arbitrarily and irrationally discriminates  
14 against franchisees because it treats franchisees employing only 5-10 workers as “large”  
15 employers and subjects them to the faster phase-in schedule. This results, they argue, in a  
16 disadvantage to franchisees because they compete with small independent businesses that  
17 will not be subject to the same labor costs during the phase-in of the minimum wage.  
18 (Pls.’ Mot.) Dkt. # 37, pp. 22-25.

19 Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal  
20 protection is not a license for courts to judge the wisdom, fairness, or logic of legislative  
21 choices. *F.C.C. v. Beach Comm’n’s, Inc.*, 508 U.S. 307, 313 (1993). “In areas of social  
22 and economic policy, a statutory classification that neither proceeds along suspect lines  
23 nor infringes fundamental constitutional rights must be upheld against an equal protection  
24 challenge if there is *any reasonably conceivable state of facts* that could provide a  
25 rational basis for the classification.” *Id.* (citations omitted) (emphasis added). This  
26 standard of review is a paradigm of judicial restraint. *Id.* “The Constitution presumes  
27 that, absent some reason to infer antipathy, even improvident decisions will eventually be

1 rectified by the democratic process and that judicial intervention is generally unwarranted  
2 no matter how unwisely we may think a political branch has acted.” *Vance v. Bradley*,  
3 440 U.S. 93, 97 (1979). Thus, those attacking the rationality of the legislative  
4 classification have the burden “to negative every conceivable basis which might support  
5 it.” *Id.* at 315 (citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364  
6 (1973)).

7 Moreover, because courts never require a legislature to articulate its reasons for  
8 enacting a statute, it is entirely irrelevant for constitutional purposes whether the  
9 conceived reason for the challenged distinction actually motivated the legislature. *United*  
10 *States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). In other words, a legislative  
11 choice is not subject to courtroom fact-finding and may be based on rational speculation  
12 unsupported by evidence or empirical data. *Vance*, 440 U.S. at 111. “Only by faithful  
13 adherence to this guiding principle of judicial review of legislation is it possible to  
14 preserve to the legislative branch its rightful independence and its ability to function.”  
15 *Lehnhausen*, 410 U.S. at 365 (quoting *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495,  
16 510 (1937)).

17 Here, there is certainly a “reasonably conceivable state of facts” that provides a  
18 rational basis for the classification of franchisees as large businesses. Two experts, Scott  
19 Shane and John Gordon, have provided declarations outlining the economic benefits  
20 flowing to franchisees as a result of the franchise relationship. *See* (Shane Decl.) Dkt. #  
21 62; (Gordon Decl.) Dkt. # 70-2. Those benefits include, among other things, national  
22 advertising, extremely valuable and well-known trademarks, the market power of a large  
23 corporation when purchasing supplies and raw materials, and access to valuable and  
24 trustworthy information based on the experiences of other franchisees. Dkt. # 62, ¶¶ 10-  
25 17; Dkt. # 70-2, ¶¶ 10-31.

26 Indeed, the individual plaintiffs in this matter do not deny that their franchise  
27 relationships provide them with such benefits. For example, plaintiff Ronald Oh, a

1 partial owner of a Holiday Inn Express franchise, testified that through his franchise  
2 network he receives the use of a large on-line reservation system which provides at least  
3 twenty-percent of his hotel's guests; he receives the benefit of a loyalty reward system  
4 that has 74 million members worldwide; he is able to consult with others in his franchise  
5 network and receive assistance on a host of issues. (Oh Dep.) Dkt. # 87-1, pp. 10-12, 13-  
6 14, 15, 16, 21-24. Mr. Oh's franchise agreement identifies other benefits, including use  
7 of Holiday Inn's trademarks, training, and certain marketing benefits. (Oh Franchise  
8 Agreement) Dkt. # 87-2, pp. 9-11.

9 Similarly, plaintiff Katherine Lyons, partial owner of a BrightStar Care franchise,  
10 acknowledged that her franchisor provided assistance in obtaining an SBA loan; the time-  
11 saving ability to receive assistance with various matters from a single source; a network  
12 of other franchisees who provide trustworthy business advice and whom she can trust;  
13 and a franchise-wide marketing fund. (Lyons Dep.) Dkt. # 87-3, pp. 4, 9, 13-15, 16-17.  
14 Ms. Lyons' franchise agreement identifies the use of business software, training,  
15 trademarks, and assistance with both opening and operating the business as benefits  
16 provided by her franchisor. (Lyons Franchise Agreement) Dkt. # 87-4, pp. 18-19, 21-23,  
17 28-30, 38-39.

18 A third plaintiff, Charles Stempler, confirmed at his deposition that there are  
19 benefits to becoming an AlphaGraphics franchisee, including continuous training and  
20 support, lease assistance, buying power via global contracts with major suppliers,  
21 management consultation, and ongoing regionalized field and sales support among other  
22 things. (Stempler Dep.) Dkt. # 87-5, p. 4; (Stempler Franchise Doc.) Dkt. # 87-6, p. 3.  
23 Mr. Stempler's AlphaGraphics franchise agreement also identifies a number of benefits  
24 that AlphaGraphics has contractually agreed to provide its franchisees including assistance  
25 with site selection; advice on financing; detailed plans for a print shop; three to four  
26 weeks of training; up to forty-eight hours per year of free consultation; operating  
27

1 manuals; and use of trademarks. (Stempler Franchise Agreement) Dkt. #87-7, pp. 16, 17,  
2 19-20, 23-26.

3 Whether these alleged “benefits” actually put franchisees in a better position to  
4 handle the faster phase-in schedule is irrelevant under rational basis review. As  
5 explained above, the court must respect the legislative branch’s “rightful independence  
6 and its ability to function,” and absent some reason to “infer antipathy,” the court cannot  
7 overstep and replace its judgment for the judgment of lawmakers. *Lehnhausen*, 410 U.S.  
8 at 365. As long as there was a “reasonably conceivable state of facts” that supported the  
9 City’s decision, the court must leave that decision alone. *See United States R.R. Ret.*, 449  
10 U.S. at 179 (“Where there are plausible reasons for Congress’ action, our inquiry is at an  
11 end.”) (internal quotations omitted). If the voters are unhappy, they can, of course, resort  
12 to the democratic process.

13 Here, the facts presented by the two experts, along with the facts drawn from the  
14 plaintiffs’ individual depositions and franchise agreements confirm that a rational basis  
15 exists for the City’s decision to classify franchisees as “large” businesses. Based upon  
16 the benefits outlined above, the City could have “reasonably conceived” that franchisees  
17 are in a better position than independent small businesses and therefore better able to  
18 accommodate the faster phase-in schedule for the minimum wage. Again, the realistic  
19 impact of these “benefits” is not part of the court’s inquiry, as the legislature need only  
20 show “rational speculation.” *See Vance*, 440 U.S. at 111 (“[A] legislative choice is not  
21 subject to courtroom fact-finding and may be based on rational speculation unsupported  
22 by evidence or empirical data.”).

23 Notably, no one disputes the City’s decision to draw a line defining “large”  
24 businesses as any employer with 500 or more employees. But who is to say an employer  
25 with 501 employees has more resources than one with 499? And who is to say  
26 businesses with 501 employees can actually accommodate a faster phase-in schedule?  
27 The court is in no position to answer these questions, nor is the court obliged to do so.

1 The City Council, based upon its research, review of historical data, legislative hearings,  
2 and communications with the public, saw fit to draw the “large” business line at 500  
3 employees. *See Beach Commc’ns, Inc.*, 508 U.S. at 315 (“These restraints on judicial  
4 review have added force where the legislature must necessarily engage in a process of  
5 line-drawing.”). And absent a reason to infer antipathy, the court cannot second-guess  
6 the wisdom, fairness, or logic of that choice.

7 The Ordinance’s separate treatment of “integrated enterprises” does not change the  
8 court’s conclusion. The “state of facts” was sufficient to allow the City to “rationally  
9 speculate” that: large businesses (those with more than 500 employees) could handle the  
10 faster phase-in schedule because presumably they have more resources; that “integrated  
11 enterprises” (separate entities that share a certain degree of common control and in  
12 aggregate have more than 500 employees) could handle the faster phase-in because of  
13 their additional resources; and franchisees (separate entities that are subject to some level  
14 of control by a larger entity and receive certain benefits from that larger entity) could  
15 handle the faster phase-in because of that business model. Again, because there is a  
16 rational basis for the line-drawing, judicial intervention is unwarranted.

17 Finally, despite plaintiffs’ arguments to the contrary, there is no reason to infer  
18 antipathy here. The large majority of statements identified by plaintiffs as showing  
19 animus were made by Advisory Committee members and private citizens, not lawmakers.  
20 The court has already explained why it gives little weight to such statements, especially  
21 when they relate to issues as politically charged as this one. Additionally, the statements  
22 by lawmakers distinguished between entities with more resources and those with less  
23 resources. When read in context, no protectionist motive was apparent from any of the  
24 statements.

25 Thus, the court finds plaintiffs have neither shown a likelihood of success nor  
26 raised serious questions going to the merits of their equal protection claim.  
27

1 **C. First Amendment**

2 Plaintiffs next contend that the faster phase-in schedule violates their freedoms of  
3 speech and association. They contend that the Ordinance penalizes franchisees for their  
4 association with franchisors and “their decision to engage in protected speech.” (Pls.’  
5 Mot.) Dkt. # 37, p. 26. They allege that the First Amendment protects their right to  
6 engage in “coordinated marketing and advertising” and that the Ordinance will curtail  
7 this “commercial speech in at least three important respects.” (Compl.) Dkt. # 1, ¶ 169.  
8 First, by increasing the labor costs of franchisees, the Ordinance will reduce the ability of  
9 franchisees to dedicate funding to the promotion of their business and brands. *Id.*  
10 Second, the increased labor costs the Ordinance mandates may cause some franchisees to  
11 shut their doors, reducing the amount of relevant commercial speech they engage in to  
12 zero. *Id.* And third, the Ordinance will likely cause potential franchisees to forego  
13 purchasing a franchise because of the associated higher operation costs. *Id.*

14 Plaintiffs’ argument is unconvincing. The Ordinance does not penalize speech or  
15 association. Rather, it uses certain factors common to franchises to identify them as one  
16 type of business subject to the faster phase-in schedule. The definition used by the City  
17 here is no different than many other federal and state laws which regulate franchises.  
18 *See, e.g.*, 16 C.F.R. § 436.1(h) (“Franchise means any continuing commercial  
19 relationship or arrangement...in which the terms of the offer or contract specify...that the  
20 franchisee will obtain the right to operate a business that is identified or associated with  
21 the franchisor’s trademark...”); R.C.W. § 19.100.010(6) (“Franchise means... the  
22 operation of the business is substantially associated with a trademark...”); Cal. Bus. &  
23 Prof. Code § 20001 (“Franchise means...the operation of the franchisee’s business...is  
24 substantially associated with the franchisor’s trademark...”); N.J.S.A. § 56:10-3  
25 (“Franchise means a written arrangement...in which a person grants to another person a  
26 license to use a...trade mark...”). If the court were to accept plaintiffs’ argument, it  
27 would mean that any regulation that impacts a franchisee’s operation costs implicates the

1 First Amendment because it would necessarily reduce funds that would otherwise be  
2 available for “coordinated marketing and advertising” and other forms of commercial  
3 speech. Plaintiffs, however, cite no case to support this expansive theory of First  
4 Amendment rights.

5 Indeed, as recognized by the First Circuit, “the mere fact that the joint activities  
6 that define the business relationship between the franchisor and its franchisees have some  
7 communicative component cannot, in and of itself, establish an entitlement to the  
8 prophylaxis of the First Amendment.” *See Wine & Spirits Retailers, Inc. v. Rhode Island*,  
9 418 F.3d 36, 51, 53 (1st Cir. 2005); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 634,  
10 638 (1984) (O’Connor, J., concurring) (“[T]here is only minimal constitutional protection  
11 of the freedom of commercial association,” and that in all events, “no First Amendment  
12 interest stands in the way of a State’s rational regulation of economic transactions by or  
13 within a commercial association.”).

14 Accordingly, plaintiffs have not shown a likelihood of success or raised serious  
15 questions going to the merits of this claim.

#### 16 **D. Lanham Act Preemption**

17 Next, plaintiffs contend that the Ordinance is preempted by the Lanham Act.  
18 Though novel and creative, this argument is untenable. Under the Supremacy Clause,  
19 U.S. Const., art. VI, cl. 2, when a local law “stands as an obstacle to the accomplishment  
20 and execution of the full purposes and objectives of Congress,” it is preempted. *Hillman*  
21 *v. Maretta*, 133 S. Ct. 1943, 1950 (2010). Thus, where conflict is alleged between federal  
22 and state law, “the specific purpose of the federal act must be ascertained in order to  
23 assess any potential erosion of the federal plan by operation of the state law.” *Golden*  
24 *Door, Inc. v. Odisho*, 646 F.2d 347, 352 (9th Cir. 1980) (citing *Mariniello v. Shell Oil*  
25 *Co.*, 511 F.2d 853 (3d Cir. 1975)). Deciphering the purposes of the Lanham Act requires  
26 no guesswork, as the Act itself includes an “unusual and extraordinarily helpful”  
27

1 statement of its purposes. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.  
2 Ct. 1377, 1389 (2014). The purposes of the Lanham Act are to:

3            “[R]egulate commerce within the control of Congress by  
4            making actionable the deceptive and misleading use of marks  
5            in such commerce; *to protect registered marks used in such*  
6            *commerce from interference by State, or territorial*  
7            *legislation*; to protect persons engaged in such commerce  
8            against unfair competition; to prevent fraud and deception in  
9            such commerce by the use of reproductions, copies,  
10            counterfeits or colorable imitations of registered marks; and  
11            to provide rights and remedies stipulated by treaties and  
12            conventions respecting trademarks, trade names, and unfair  
13            competition entered into between the United States and  
14            foreign nations.”

15 U.S.C. § 1127 (emphasis added).

12            Nothing in the Ordinance conflicts with these purposes. As explained above, the  
13            Ordinance relies on trademark use as one indicator that a business is a franchise. This  
14            definition is used merely to categorize franchisees and to identify them as subject to the  
15            faster phase-in schedule. Plaintiffs cite no case that holds that such a categorization  
16            “interferes” with the use of trademarks in violation of the Lanham Act.

17            Indeed, there is a presumption against preemption in areas where the states have  
18            traditionally exercised their police powers. *N.Y. State Conference of Blue Cross & Blue*  
19            *Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). Here, the regulation of  
20            wages is firmly within the local police power. *See, e.g., RUI One Corp.*, 371 F.3d at  
21            1150 (acknowledging that “[t]he power to regulate wages and employment conditions  
22            lies clearly within a state’s or municipality’s police power.”). To overcome this  
23            presumption, plaintiffs must show that preemption was Congress’ “clear and manifest  
24            purpose.” *Travelers Ins., Co.*, 514 U.S. at 655. Plaintiffs have made no such showing.

25            Accordingly, plaintiffs have not shown a likelihood of success or raised serious  
26            questions going to the merits of this claim.

1 **E. ERISA Preemption**

2 Plaintiffs next contend that certain health plan-related provisions of the Ordinance  
3 are preempted by the Employment Retirement Income Security Act (“ERISA”). These  
4 provisions allow large employers (those with more than 500 employees), who offer their  
5 employees health plans classified as “silver” or “gold” under the federal Affordable Care  
6 Act, the opportunity to take advantage of an alternative, more favorable, wage schedule.  
7 Rather than complying with the three year phase-in, these employers will be given *four*  
8 years to reach the \$15 per hour minimum wage. Plaintiffs claim that these provisions are  
9 preempted because they “relate to” employee benefit plans that are governed by ERISA.  
10 (Pls.’ Mot.) Dkt. # 37, pp. 24-26.

11 This argument, as a practical matter, is not relevant to the pending motion. The  
12 health plan-related provisions simply have no impact on the franchise-related provisions  
13 plaintiffs seek to enjoin. Here, plaintiffs are asking the court to enjoin the provision that  
14 requires them to comply with the three year phase-in schedule (Schedule 1) and to  
15 compel the City to allow franchisees to take advantage of the seven year phase-in  
16 schedule (Schedule 2). Thus, the validity of this alternative four-year schedule is  
17 irrelevant. Even if the court finds that the health plan-related provisions are preempted  
18 by ERISA, that finding will do nothing to advance the relief requested by the franchisees  
19 in this motion.

20 Nevertheless, for the sake of completeness, the court will address plaintiffs’  
21 argument. To begin with, it is important to reiterate that there is a presumption against  
22 preemption when the statute under review relates to a matter of local concern, such as the  
23 regulation of wages. *See, WSB Elec., Inc. v. Curry*, 88 F.3d 788, 791 (9th Cir. 1996) (“It  
24 is well settled that wages are a subject of traditional state concern, and are not included in  
25 ERISA’s definition of employee benefit plan. Thus, regulation of wages per se is not  
26 within ERISA’s coverage.”) (internal quotation marks omitted). Nevertheless, it is  
27 possible, under certain circumstances, for ERISA to preempt local wage regulations.

1 ERISA preempts and supersedes any and all state laws that “relate to” any employee  
2 benefit plan. *See* 29 U.S.C. § 1144(a). Recognizing that the term “relate to” potentially  
3 had no limits, the Supreme Court narrowed its scope in *New York State Conference of*  
4 *Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, 514 U.S. 645 (1995)  
5 and *California Division of Labor Standards Enforcement v. Dillingham Construction*  
6 *Company*, 517 U.S. 316 (1997). Under the more narrow construction, the “relate to”  
7 criterion is analyzed by determining if the state law: (1) has a “connection with” or (2) a  
8 “reference to” employee benefits plans.

9 1. Does the Ordinance Have a “Connection With” an ERISA Plan?

10 To determine whether a state or local law has a “connection with” ERISA, courts  
11 consider (1) the objectives of ERISA and (2) the nature of the impact that the challenged  
12 law has on ERISA plans. *Dillingham*, 519 U.S. at 325; *Golden Gate Rest. Ass’n v. City*  
13 *& County of San Francisco*, 546 F.3d 639, 655-56 (9th Cir. 2008).

14 The objectives of ERISA focus on maintaining a uniform regulatory regime over  
15 employee benefit plans. Thus, one purpose of ERISA’s preemption clause is to “ensure  
16 that the administrative practices of a benefit plan will be governed by only a single set of  
17 regulations.” *Golden Gate*, 546 F.3d at 655. Accordingly, in considering the nature and  
18 impact local laws have on ERISA plans, courts will often find that they have an  
19 impermissible “connection with” ERISA if they require employers to have health plans,  
20 dictate the specific benefits that must be provided through those plans and/or impose  
21 certain reporting requirements which differ from those of ERISA. *Id.*

22 Here, the Ordinance does not require any employer to provide any ERISA plan; it  
23 does not dictate the contents or any administrative requirements for such a plan; it does  
24 not have any direct impact on any ERISA plan; and it does not impose reporting,  
25 disclosure, funding, or vesting requirements on any ERISA plan.

26 Accordingly, it does not have an impermissible “connection with” ERISA.  
27

1           2. Does the Ordinance Have a “Reference To” an ERISA Plan?

2           A statute has an impermissible “reference to” ERISA plans if it acts immediately  
3 and exclusively upon the plans or if the plans are essential to the law’s operation.  
4 *Dillingham*, 519 U.S. at 324-25; *S. Ca. IBEW-NECA Trust Funds v. Standard Indus.*  
5 *Elec. Co.*, 247 F.3d 920, 525 (9th Cir. 2001). Thus, the challenged statute must do more  
6 than mention ERISA to be preempted; it must have some effect upon ERISA plans. *WSB*  
7 *Elec., Inc. v.*, 88 F.3d at 793.

8           Here, the Ordinance does not have any effect upon ERISA plans. It does not  
9 require any employer to provide benefits through ERISA plans nor does it dictate the  
10 contents of any such plan. The Ordinance merely allows large employers to take  
11 advantage of an alternative four year phase-in schedule if they happen to provide certain  
12 benefits to their employees. Thus, while ERISA plans may be optional under the  
13 Ordinance, they are certainly not required or “essential” to the law’s operation. *See, e.g.*,  
14 *WSB Elec., Inc*, 88 F.3d at 793 (noting that the statute at issue did not premise any  
15 employer obligation on the existence of benefit plans, but instead merely took account of  
16 such plans if they happened to exist).

17           Accordingly, the Ordinance does not have an impermissible “reference to”  
18 ERISA.

19 **F. Privileges and Immunities Under Washington State Constitution**

20           Finally, plaintiffs contend that the Ordinance violates the privileges and  
21 immunities clause of the Washington Constitution because it infringes on their  
22 fundamental right to “carry on business” in Seattle.

23           Article I, section 12 of the Washington Constitution provides:

24                   No law shall be passed granting to any citizen, class of  
25                   citizens, or corporation other than municipal, privileges or  
26                   immunities which upon the same terms shall not equally  
27                   belong to all citizens or corporations.

1 Washington courts have often construed article I, section 12 consistent with the  
 2 federal Equal Protection Clause. *Ockletree v. Franciscan Health Sys.*, 179 Wash. 2d 769,  
 3 776 (2014). However, if the matter at issue is one of particular local concern -- such as  
 4 the power to regulate wages -- an independent analysis is warranted. *Grant County Fire*  
 5 *Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wash. 2d 791, 811 (2004)). This analysis  
 6 involves a two-step inquiry. *Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State*  
 7 *Liquor Control Bd.*, 340 P.3d 849, 857 (Wash. 2015) (en banc). The first step is to  
 8 determine whether the law in question involves a privilege or immunity; if not, then  
 9 article I, section 12 is not implicated. *Id.* If there is a privilege or immunity, the second  
 10 step is to determine whether the legislature had a "reasonable ground" for granting the  
 11 privilege or immunity. *Id.*

12 1. Does the Ordinance Involve a Privilege or Immunity?

13 Plaintiffs contend that the slower phase-in schedule is a "privilege" that is granted  
 14 on unequal terms. (Pls.' Mot.) Dkt. # 37, pp. 31-32. Although plaintiffs are correct that  
 15 the slower phase-in schedule favors small independent businesses over other types of  
 16 businesses in Seattle, plaintiffs fail to show that this benefit is a "privilege" that  
 17 implicates the Washington Constitution.

18 The privileges and immunities clause is not violated anytime the legislature treats  
 19 similarly situated businesses differently.<sup>19</sup> *Am. Legion Post No. 149 v. Dep't of Health*,  
 20 164 Wash. 2d 570, 607 (2008). "[N]ot every legislative classification constitutes a  
 21 'privilege' within the meaning of article I, section 12 but only those where it is, 'in its  
 22 very nature, such a fundamental right of a citizen that it may be said to come within the  
 23 prohibition of the constitution, or to have been had in mind by the framers of that organic  
 24 law.'" *Ockletree*, 179 Wash. 2d at 778. As the court found in *Ockletree*,

---

25  
 26 <sup>19</sup> The court has already outlined the differences between independent small  
 27 businesses and franchisees.

1           Accepting Ockletree’s definition means recognizing a  
2           privilege anytime a statute grants a right to some but not  
3           others...As a result, we could be called upon to second-guess  
4           the distinctions drawn by the legislature for policy reasons  
5           nearly every time it enacts a statute. For example, the  
6           property tax exemptions for citizens “[s]ixty-one years of age  
7           or older” and “veterans with one hundred percent service-  
8           connected disabilities” could be challenged as  
9           unconstitutional grants of special privileges to certain classes  
10          of citizens but not others. Similarly, exemptions from  
11          emission control inspections for “[f]arm vehicles,” “[s]treet  
12          rod vehicles,” “[h]ybrid motor vehicles,” and “[c]lasses of  
13          motor vehicles exempted by the director of the department of  
14          ecology,” among others, would all be subject to challenge  
15          under article I, section 12. RCW 46.16A.060(2)(e), (f), (h),  
16          (i). We therefore reject Ockletree’s invitation to broaden the  
17          meaning of the word “privilege” for purposes of article I,  
18          section 12 and reiterate that a privilege in this context is  
19          limited to those fundamental rights of citizenship.

20          *Id.* at 779 (emphasis added).

21          Plaintiffs insist, however, that a fundamental right is at issue here. They claim that  
22          allowing independent small businesses to phase-in the minimum wage at a slower pace  
23          than franchisees infringes upon the franchisees’ fundamental right to “carry on business.”  
24          (Pls.’ Mot.) Dkt. # 37, p. 31. The court disagrees.

25          Plaintiffs’ reliance on *Ralph v. City of Wenatchee*, 34 Wash. 2d 638 (1949) is  
26          misplaced. There, the City of Wenatchee enacted an ordinance that clearly and  
27          purposefully discriminated against itinerant photographers. *Id.* at 638-39, 643. The  
28          ordinance imposed substantial licensing fees on the photographers and prohibited them  
29          from soliciting business in public places, private homes, and private businesses (i.e.,  
30          almost everywhere in the city). *Id.* at 639-40, 643. The court found that the effect of  
31          these regulations was to “*substantially* prohibit activity of non-resident photographers in  
32          the city of Wenatchee.” *Id.* at 642 (emphasis added). Rather than reasonably regulate the  
33          activities of itinerant photographers, the city enacted significant burdens and prohibitions  
34          on “what is in itself a completely lawful business.” *Id.* at 644.

1 Here, nothing in the Ordinance prevents anyone from exercising their right to  
 2 “carry on business.” *See, e.g., Am. Legion*, 164 Wash. 2d at 608 (holding that business  
 3 regulations that do not “prevent any entity from engaging in business” do not involve a  
 4 fundamental right). The Ordinance requires all businesses to pay the higher minimum  
 5 wage. That “large” businesses must pay \$1.00 more in labor costs in 2015, \$2.50 more in  
 6 2016, and \$4 more in 2017 does not substantially burden or prohibit those entities from  
 7 carrying on business in Seattle. Accordingly, the Ordinance does not implicate a  
 8 “privilege” under the Washington Constitution.

9 2. Did the Legislature Have a “Reasonable Ground” for Granting the Privilege or  
 10 Immunity?

11 Even if the court were to find that the Ordinance implicates a “privilege or  
 12 immunity,” plaintiffs’ article I, section 12 challenge still fails because reasonable grounds  
 13 exist for the distinction between franchisees and small independent businesses. To meet  
 14 the reasonable ground requirement, distinctions must rest on “real and substantial  
 15 differences bearing a natural, reasonable, and just relation to the subject matter of the  
 16 act.” *Ockletree*, 179 Wash. 2d at 783. The Ordinance readily satisfies this standard for  
 17 the reasons previously stated. Franchisees enjoy certain benefits as a result of the  
 18 franchise relationship and those benefits have recognizable economic value to the  
 19 franchisees. These benefits support the reasonableness of the Ordinance’s distinction  
 20 between franchises and independent small businesses.

21 Accordingly, plaintiffs have neither shown a likelihood of success nor raised  
 22 serious questions regarding the merits of this claim.

23 **G. Irreparable Harm, Balance of the Equities and Public Interest**

24 Although plaintiffs have not shown a likelihood of success on the merits of any  
 25 of their claims, the court will nevertheless address the remaining preliminary  
 26 injunction factors.  
 27

1           1. Irreparable Harm

2           A preliminary injunction is an extraordinary remedy and to obtain such relief,  
3 plaintiffs must demonstrate more than a mere “possibility” of harm. *Winter*, 555 U.S.  
4 at 22. Indeed, the need to show “substantial and immediate irreparable injury” is  
5 especially strong when plaintiffs seek to enjoin the activity of a state or local  
6 government. *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1042 (9th Cir. 1999)  
7 (“The Supreme Court has repeatedly cautioned that, absent a threat of immediate and  
8 irreparable harm, the federal courts should not enjoin a state to conduct its business in  
9 a particular way.”).

10           Here, plaintiffs have not met their burden of demonstrating the requisite  
11 irreparable harm. Although plaintiffs assert that they will suffer competitive injury,  
12 loss of customers, loss of goodwill, and the risk of going out of business, Dkt. # 37, p.  
13 32, the court finds that these allegations are conclusory and unsupported by the facts  
14 in the record. It is true that “evidence of threatened loss of prospective customers or  
15 goodwill” supports a finding of irreparable harm, *Stuhlberg Int’l Sales Co. v. John D.*  
16 *Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001), but that *evidence* is lacking here.  
17 Although the court is sympathetic to the concerns of franchisees, the individual  
18 plaintiffs’ declarations in this matter consist only of speculation. There is no actual  
19 evidence of the alleged negative impacts that plaintiffs fear will occur as a result of  
20 the faster phase-in schedule. *See Oakland Tribune Inc. v. Chronicle Pub. Co., Inc.*,  
21 762 F.2d 1374, 1377 (9th Cir. 1985) (discounting conclusory statements concerning  
22 irreparable harm made by interested party); *see also Am. Passage Media Corp. v.*  
23 *Cass Commc’ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985) (reversing a preliminary  
24 injunction and finding that plaintiff’s forecast of large losses was insufficient to show  
25 it was “threatened with extinction”).  
26  
27

1           2. Balance of the Equities and Public Interest

2           The balance of the equities and public interest factors also weigh against the entry  
3 of a preliminary injunction. Plaintiffs' harm is speculative and does not outweigh the  
4 concrete harm that will be suffered by employees who are entitled to a Schedule 1  
5 increase in their wages under the Ordinance. When weighing the *imminent* costs to  
6 franchisees (*i.e.*, a \$1 per hour differential in pay to their employees and other speculative  
7 consequential harms) against the concrete harm to those employees in the form of lost  
8 income, it is impossible for the court to find that the equities tip sharply in plaintiffs'  
9 favor.

10           Additionally, contrary to plaintiffs' contentions, granting injunctive relief would  
11 not maintain the status quo. Here, the status quo is the Ordinance, which the citizens of  
12 Seattle expect to go into effect on April 1, 2015. The public has an interest in ensuring  
13 that laws passed by its legislative body are implemented. *See, e.g., Golden Gate Rest.*  
14 *Ass'n v. City of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008) (observing that  
15 enjoining the implementation of an ordinance would disturb rather than maintain the  
16 status quo); *Planned Parenthood of Blue Ridge v. Camblos*, 116 F.3d 707, 721 (4th Cir.  
17 1997) (“[T]he status quo is that which the People have wrought, not that which  
18 unaccountable federal judges impose upon them.”)

19 **H. The “Serious Questions” Test**

20           Finally, the court finds that plaintiffs have failed to satisfy the alternative “serious  
21 questions” standard. *See, e.g., Alliance for the Wild Rockies*, 632 F.3d at 1135  
22 (“[S]erious questions going to the merits’ and a balance of the hardships that tips sharply  
23 towards the plaintiff can support the issuance of a preliminary injunction...”); *Sierra*  
24 *On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984) (noting that  
25 a “serious question” is one on which the movant has “a fair chance of success on the  
26 merits”). Even if the court were to assume that plaintiffs raised “serious questions”  
27 regarding their dormant Commerce Clause claim, as set forth above, they have not shown

1 that the balance of the equities tips sharply in their favor. Accordingly, the court cannot  
2 grant a preliminary injunction under the alternative standard.

3 **V. CONCLUSION**

4 For all the foregoing reasons, the court denies plaintiffs' motion for preliminary  
5 injunction. Dkt. # 37.

6 Dated this 17th day of March, 2015.

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10 The Honorable Richard A. Jones  
11 United States District Judge  
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THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

INTERNATIONAL FRANCHISE  
ASSOCIATION, INC.; CHARLES  
STEMPLER; KATHERINE LYONS;  
MARK LYONS; MICHAEL PARK; and  
RONALD OH,

Plaintiffs,

v.

CITY OF SEATTLE, a municipal  
corporation; and FRED PODESTA,  
Director of the Department of Finance and  
Administrative Services,

Defendants.

NO. 2:14-CV-00848-RAJ

**[PROPOSED] AMICUS CURIAE BRIEF OF  
MARTINA PHELPS, CRYSTAL THOMPSON,  
SERVICE EMPLOYEES INTERNATIONAL  
UNION HEALTHCARE 1199NW, OPEIU  
LOCAL 8, SEIU LOCAL 6, SEIU  
HEALTHCARE 775NW, UFCW LOCAL 21,  
ONEAMERICA AND WORKING  
WASHINGTON IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR A LIMITED  
PRELIMINARY INJUNCTION**

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6

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6

1. The Ordinance does not violate the Commerce Clause.

6

a. There is no facial discrimination.

7

b. There are no discriminatory effects.

8

c. There is no discriminatory purpose.

10

d. The Ordinance's burden on interstate commerce does not clearly exceed its local benefits.

11

2. The Ordinance does not violate the Equal Protection Clause.

12

3. The Ordinance does not violate the First Amendment.

14

4. The Ordinance is not preempted by the Lanham Act.

16

5. The Ordinance is not preempted by ERISA.

18

6. The Ordinance does not violate the Washington Constitution.

20

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**INTRODUCTION**

The Seattle City Council made a legislative policy judgment that franchisees associated with large franchise networks, by virtue of their franchise relationships, are generally in a better position than small, independent businesses to absorb a more accelerated minimum wage increase schedule. That decision was well within the discretion of the legislative policymakers and does not discriminate based on the location of franchises, speech or association, irrational factors, or privileges and immunities under state law. Nor is it preempted by any federal law. For these reasons, and because the harm that will result from delaying the minimum wage increases due thousands of low-wage workers far outweighs Plaintiffs’ speculative showing of harm, the preliminary injunction should be denied.

**BACKGROUND**

**A. The Franchise Business Model**

Under the franchise business model, a franchisee agrees to pay a fee to a franchisor, and often royalty payments, in return for the right to use the franchisor’s brand, products, and business practices. Although the terms of each franchise agreement differs, this fundamental bargain – purchase of the right to use business models and intellectual property – is at the heart of every franchise agreement. The franchising relationship is ongoing. Typically, franchisees make periodic payments and agree to abide by brand standards (which often impose significant constraints on how franchisees operate their business) and to submit to varying degrees of franchisor oversight. Declaration of John A. Gordon (“Gordon Decl.”) ¶6 and Exh. 3 at 5. In turn, franchisors commit to provide continuing support in the form of brand development, operational guidance, advertising, and other benefits. Gordon Decl. ¶9 and Exh. 3 at 10. As plaintiff International Franchise Association (“IFA”) boasts in its promotional materials, “[o]wning a franchise allows you to go into business for yourself, but not by yourself.” Declaration of Ann Niehaus (“Niehaus Decl.”) Exh. 1 (IFA Fact Sheet).

1 Franchisees are willing to pay the licensing fees and royalties required to join a franchise  
2 network because they derive meaningful benefits from the franchise relationship. These benefits  
3 place franchisees on stronger footing and make them better equipped to absorb increased labor  
4 costs than other small businesses in the same industries. Although franchise agreements differ,  
5 common benefits enjoyed by participants in the franchise relationship include: 1) extensive  
6 operational guidance, including information on best practices developed over time and on the  
7 basis of the experience of numerous similarly situated franchisees, 2) strength of brand identity,  
8 providing an established customer base built on brand recognition and loyalty, 3) cooperative  
9 advertising, often run on a national or international scale, 4) access to sophisticated market  
10 research providing guidance on topics including site selection, regional product preferences, and  
11 the most effective displays and store layouts, 5) increased access to financing, sometimes offered  
12 by the franchisor itself, or from other sources based on cachet afforded by franchise affiliation,  
13 6) training, both prior to opening and ongoing, 7) lower purchasing costs due to volume created  
14 by joint purchasing agreements, and 8) access to a network of franchisees operating similar  
15 businesses among which best practices can be shared and common issues addressed. Gordon  
16 Decl. ¶9.<sup>1</sup>

17 IFA's own publications highlight the benefits of the franchise model: "A franchise  
18 provides an established product or service which may already enjoy widespread brand-name  
19 recognition. This gives the franchisee the benefits of a pre-sold customer base which would  
20 ordinarily take years to establish." Gordon Decl. Exh. 3 at 10; *see also* Neihaus Decl. Exh. 1  
21 (IFA Fact Sheet). IFA goes on to list the specific benefits of the franchise relationship:  
22 "Franchises offer important pre-opening support: [1] site selection, [2] design and construction,  
23 [3] financing, [4] training, [5] grand-opening program." Gordon Decl. Exh. 3 at 10. IFA adds,  
24

25 <sup>1</sup> Franchisee Plaintiffs insist that they derive no significant benefits from their franchise relationships, *see* Stempler  
26 Decl. ¶28; Lyons Decl. ¶¶23-28, but fail to explain why, if that is the case, they are willing to pay the licensing and  
royalty fees required by their franchise agreements.

1 “Franchises offer ongoing support: [1] training, [2] national and regional advertising, [3]  
2 operating procedures and operational assistance, [4] ongoing supervision and management  
3 support, [5] increased spending power and access to bulk purchasing.” *Id.*

4 The franchisee Plaintiffs’ own agreements provide specific examples of the franchise  
5 model’s benefits. For example, Plaintiff Stempler’s AlphaGraphics franchise agreement  
6 provides:

7 “During the term of this Agreement, COMPANY agrees to furnish support to  
8 FRANCHISEE in connection with: (1) methods, standards and operating  
9 procedures utilized by ALPHAGRAPHERICS® Printshops; (2) purchasing required  
10 equipment, fixtures, furnishings, products, signs, materials and supplies; (3)  
11 marketing programs; (4) administrative, bookkeeping, accounting, inventory  
12 control, and general operating and management procedures; and (5) developing  
13 annual profit plans for the PRINTSHOP.

14 Gordon Decl. Exh. 7 (IFA-0024).

15 Similarly, Plaintiff Lyons’ franchise agreement provides that the franchisor will provide  
16 extensive “Operating Assistance,” including access to an operations manual, assistance in  
17 purchasing business supplies, “a forecast to manage business expectations,” extensive training,  
18 sample advertisements, “[r]egular consultation and advice in response to Franchisee’s inquiries  
19 about specific administrative and operating issues,” and access to an online system for many  
20 administrative functions (e.g., sales, recruiting, payroll, billing, HR). Gordon Decl. Exh. 5 (IFA-  
21 0122 to -0124); *see also* Gordon Decl. ¶12-15 (discussing benefits of franchise model).

22 Franchisees may also benefit from participation in franchisee associations, which connect  
23 franchisees with other franchisees in the same network who sell identical products under the  
24 same brand pursuant to similar (often identical) franchise agreements. Gordon Decl. ¶25-26.  
25 These networks can provide invaluable assistance in identifying best practices, responses to  
26 changed circumstances, and important developments. *Id.*

In addition to these structural benefits, franchisees are made stronger by the potential  
availability of other types of franchisor assistance. For example, franchisors have the capability

1 to offer support such as phased-in royalty payments for franchisees with special needs, to reduce  
2 marketing fees, to restructure debt obligations and/or to decrease rents on property owned by the  
3 franchisor. *Id.* ¶27-30. Similarly, franchisors can offer additional training or operational  
4 guidance for franchisees facing unforeseen problems or changing circumstances. *Id.* ¶12-15, 27.  
5 A franchisor can always choose to provide assistance to a struggling franchisee, even if not  
6 compelled to do so. *Id.* ¶27.<sup>2</sup>

## 7 **B. The Seattle Minimum Wage Ordinance**

### 8 **1. Implementation of the Minimum Wage Increase**

9 Under the Ordinance, Schedule 1 employers – those with more than 500 employees in the  
10 United States and all franchisees associated with a franchisor or network of franchisees that  
11 employ more than 500 employees in the aggregate – face more accelerated increases than smaller  
12 employers covered by Schedule 2. Dkt. 38-1 at 8.

### 13 **2. Legislative History of the Franchise Provisions of the Ordinance**

14 The decision to include the franchise provisions of the Ordinance was the product of  
15 legislative compromise and was informed by the Council members’ understanding of features of  
16 the franchise relationship that distinguish franchisees from independent small businesses.

17 To establish the City Council’s supposed animus toward franchisees, Plaintiffs quote a  
18 select number of comments in emails, meetings, Facebook postings, correspondence, public  
19 hearings, and newspaper editorials by members of the Income Inequality Advisory Committee  
20 (“IIAC”), city hall staff members, the *Seattle Times* editorial board, and IFA’s own board  
21 members, Dkt. 37 at 5-8 – none of whom are competent to establish the *City Council’s* intent.<sup>3</sup>

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22  
23 <sup>2</sup> For example, the Burger King Corporation recently offered royalty rate reductions to its franchisees to  
24 accommodate increased costs due to required restaurant remodels, and has also worked with struggling franchisees  
25 to restructure their financial obligations. *See* Gordon Decl. ¶¶27-30 and Exhs. 9-11 (providing additional examples).

26 <sup>3</sup> The IIAC is an independent body formed by Seattle Mayor Ed Murray and comprised of representatives from the  
business, labor and community advocacy communities. Dkt. 63 (Feldstein Decl. ¶7). Plaintiffs acknowledge that  
the IIAC neither drafted the ordinance nor recommended its franchise provisions of the ordinance pertaining to  
franchises. Dkt. 37 at 5.

1 Plaintiffs also quote several statements by city officials regarding this lawsuit. *Id.* at 11-  
2 12. But those statements were made well after the Ordinance was adopted. Moreover, those  
3 statements simply explain that the franchisees' ongoing relationships with their franchisors and  
4 the overall franchise network distinguish them from independent small businesses and may make  
5 it easier for franchisees than for independent small businesses to adjust to any strain caused by  
6 the schedule of minimum wage increases set by the Ordinance. *Id.*

7 Yet Plaintiffs ignore the most relevant legislative history demonstrating why the City  
8 Council adopted that provision: the legislators' own pre-enactment statements.

9 For example, at the May 22, 2014 meeting of the Select Committee on Minimum Wage  
10 and Income Inequality ("Select Committee"), Council Member Licata explained that the  
11 proposed legislation treated franchises differently than independent small businesses because of  
12 specific, salient characteristics of the franchise business model:

13 [T]hey have the option of not being a franchise, be an independent restaurant, or  
14 independent fast food if they wish, but one of the reasons they often don't is  
15 because the franchise controls so much of their business. Perhaps the food  
16 supply, the advertising, so, there is a relationship there that they obviously benefit  
17 from and, so, they may be an LLC, they may be some legal model that they sign  
18 the check as a boss, but they are part of the corporate structure and they contribute  
19 to the corporate profits.

20 Niehaus Decl. Exh. 3 (May 22, 2014 Select Committee Hearing).

21 Similarly, at an April 9, 2014 Select Committee hearing, Councilmember Clark explained  
22 her belief that franchisees differed from independent small businesses in their ability to absorb  
23 increased labor costs: "[I]t's good to point out that we don't have the McDonald's, and the Olive  
24 Trees and the Pizza Huts here at the table. And to some degree, I'm ok with that because I don't  
25 actually worry about them absorbing a fifteen dollar wage mandate in the city." Niehaus Decl.  
26 Exh. 2 (April 9, 2014 Select Committee Hearing).

Mayor Murray released a statement explaining the franchise provisions of the Ordinance:

Franchises have resources that a small business in the Rainier Valley or a small  
sandwich shop on Capitol Hill do not have. Franchise restaurants have menus that

1 are developed by a corporate national entity, a food supply and products that are  
2 provided by a corporate national entity, training provided by a corporate national  
3 entity, and advertising provided by a corporate national entity. They are not the  
4 same as a local sandwich shop that opens up or a new local restaurant that opens  
up in the city. Our process for reaching \$15 an hour in Seattle recognizes that  
difference.

5 Dkt. 38-16 (June 11, 2014 Statement).

6 In light of the foregoing, it is clear that Plaintiff's contention that the franchise provisions  
7 of the Ordinance were adopted for improper or irrational reasons is without merit.<sup>4</sup>

## 8 ARGUMENT

9 Plaintiffs seeking a preliminary injunction must establish that they are likely to succeed  
10 on the merits, that they are likely to suffer irreparable harm in the absence of preliminary relief,  
11 that the balance of equities tips in their favor, and that an injunction is in the public interest.  
12 *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). Plaintiffs here can  
13 satisfy none of those four prerequisites.

### 14 A. Likelihood of Success

#### 15 1. The Ordinance does not violate the Commerce Clause.

16 Under the "dormant" Commerce Clause, U.S. Const. art. I, §8, cl. 3, a local or state  
17 measure that "discriminate[s] against interstate commerce either on its face or in practical effect"  
18 is subject to heightened scrutiny. *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1230 (9th Cir.

19 <sup>4</sup> Indeed, the Ordinance is not even the first legislative enactment by the City of Seattle that acknowledges the  
20 significant differences between franchisees and other businesses. Any business that wishes to lease space in  
21 Seattle's Pike Place Market, which legally is the "Pike Place Market Historic District" created by the City of Seattle  
22 under the city code, *see* Seattle Municipal Code ("SMC") §25.24. is subject to the Market Historical Guidelines  
administered by the City of Seattle. *See, e.g.*, SMC §25.24.030; [http://www.pikeplacemarket.org/pages/commercial-](http://www.pikeplacemarket.org/pages/commercial-leasing)  
[leasing](http://www.pikeplacemarket.org/pages/commercial-leasing). Those Guidelines very specifically preclude from this opportunity any business that is part of any  
"franchise" operation:

23 2.6.8 Ownership or Control Outside the Market. The Commission may deny an application that  
24 otherwise meets the Guidelines if the owner or the business entity has an ownership interest in or  
25 controls a similar business outside the Market. **Franchise ownership and chain operations  
especially are not allowed in the Market....**

26 <http://www.seattle.gov/neighborhoods/preservation/documents/MHCGuidelinesApril25-2012.pdf> (emphasis added).  
Any determination by this Court that franchisees may not be treated differently from other businesses of the same  
size would render this time-honored limitation on franchises in the Pike Place Market invalid, as well.

1 2010) (internal quotation marks omitted). A law “can discriminate against out-of-state interests  
 2 in three different ways: (a) facially, (b) purposefully, or (c) in practical effect.” *National Ass’n*  
 3 *of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 525 (9th Cir. 2009)  
 4 (“*Optometrists I*”) (internal quotation marks omitted). “Discrimination” means “differential  
 5 treatment of in-state and out-of-state economic interests that benefits the former and burdens the  
 6 latter.” *Oregon Waste Sys., Inc. v. Department of Environmental Quality*, 511 U.S. 93, 99  
 7 (1994). “Of course, the ‘differential treatment’ must be as between persons or entities who are  
 8 similarly situated.” *Black Star Farms*, 600 F.3d at 1230; *accord Gen. Motors Corp. v. Tracy*,  
 9 519 U.S. 278, 298-99 (1997). No such discrimination has been, or could be, shown here.

10 **a. There is no facial discrimination.**

11 The Seattle Ordinance does not treat businesses located in Washington State any more  
 12 favorably than out-of-state businesses. The Ordinance implements a graduated wage schedule  
 13 that allows smaller businesses additional time to absorb the economic impact of the wage  
 14 increases that will lift their Seattle employees out of poverty. In determining which minimum  
 15 wage increase schedule applies – the decelerated schedule for small employers or the more  
 16 accelerated schedule for large employers – the Ordinance counts all employees of a particular  
 17 employer nationwide. If the employer at issue is a franchisee, the Ordinance counts all  
 18 employees in the franchise network. *Where* the franchisors and their associated franchisees are  
 19 located (*i.e.*, whether in-state or out-of-state) is wholly irrelevant to which wage schedule  
 20 applies.

21 Plaintiffs’ repeated suggestion that the applicability of Schedule 1 to a franchisee depends  
 22 on whether the franchisee’s network is “interstate” and/or whether the franchisor is located or  
 23 headquartered in- or out-of-state, is simply false.<sup>5</sup> The Ordinance makes no such distinction;

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24  
 25 <sup>5</sup> *See, e.g.*, Dkt. 37 at 13:22-26 (quoted above), 14:7-8 (“This differential minimum wage requirement [is] based  
 26 solely on whether a small business affiliates with an *interstate* franchise network”), 14:26-27 (“the tax is imposed on  
 entities operating in Seattle based on their affiliations with *interstate* commerce”), 15:2-3 (“The ordinance’s

1 rather, it classifies all franchisees as Schedule I employers if the franchise's network collectively  
2 employs more than 500 employees. See SMC §§14.19.010(I); 14.19.010(K). Nor does the  
3 Ordinance discriminate against Washington franchisees that have out-of-state contacts, or make  
4 any distinction among franchisees based on the location of other members of the franchise  
5 network. See SMC §§14.19.010(I); 14.19.010(J).

6 **b. There are no discriminatory effects.**

7 Plaintiffs' argument that the Ordinance nonetheless has discriminatory effects because  
8 *most* affected franchisees happen to be affiliated with franchisors that are headquartered out-of-  
9 state, and/or because all affected franchisees are part of franchise networks with at least *some*  
10 out-of-state participants, fails for two independent reasons.

11 First, alleged disparate treatment of different *in-state* economic interests does not  
12 establish a dormant Commerce Clause discrimination claim. In *Yakima Valley Memorial Hosp.*  
13 *v. Wash. Dep't of Health*, 731 F.3d 843, 846 (9th Cir. 2013), the Ninth Circuit rejected a  
14 Commerce Clause challenge to a state law that would have shifted business from one in-state  
15 hospital to another, reasoning that the law did not treat in-state and out-of-state entities  
16 differently. Here, Plaintiffs argue that *independent businesses* located in Seattle are treated more  
17 favorably than *franchisees* located in Seattle. As the Ninth Circuit has held, such a claim of  
18 disparate treatment between two in-state entities fails to state a Commerce Clause discrimination  
19 claim.

20 Second, even if disparate treatment between two in-state economic interests *could*  
21 amount to discrimination, Plaintiffs cannot demonstrate differential treatment of *similarly*  
22 *situated* entities. "[A]ny notion of discrimination assumes a comparison of *substantially similar*  
23 entities." *Dept. of Revenue of Ky. v. Davis*, 553 U.S. 328, 342 (2008) (emphasis added) (internal  
24

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25 disparate treatment of small businesses based on whether they have ties to an *interstate* franchise network and out-  
26 of-state businesses"), 16:13-14 (Ordinance "treat[s] small businesses differently based on whether they choose to  
develop ties with an *interstate* franchise network") (emphasis supplied in all instances).

1 quotation marks omitted); *see also Tracy*, 519 U.S. at 298-99; *Optometrists I*, 567 F.3d at 525  
2 (“To determine whether the laws have a discriminatory effect it is necessary to compare  
3 LensCrafters with a similarly situated in-state entity.”).

4 Under the controlling legal authority, franchisees are not similarly situated to independent  
5 small businesses for purposes of a Commerce Clause discrimination claim. In *Optometrists I*,  
6 the Ninth Circuit rejected the argument that businesses were similarly situated simply because  
7 they competed in the same market, holding that differential treatment is constitutional where the  
8 competitors have “different business structures.” 567 F.3d at 527. It went on to note that “a  
9 state may prevent businesses with certain structures or methods of operation from participating  
10 in a retail market without violating the dormant Commerce Clause.” *Id.* (citing *Exxon Corp. v.*  
11 *Governor of Md.*, 437 U.S. 117, 125-26 (1978)). As in *Optometrists I*, franchisees have  
12 “different business structures” from, and enjoy some “advantages” over, their independent  
13 competitors. 567 F.3d at 527, 528.

14 Nor can Plaintiffs establish discriminatory effect through evidence that *most* franchisors  
15 are located out-of-state, or even that *all* affected franchisees happen to be part of franchises with  
16 at least one out-of-state franchisee. Dkt. 37 at 13:28-14:1. In *Exxon*, plaintiff argued that a state  
17 statute barring gasoline refiners from owning retail gas stations in Maryland discriminated  
18 against interstate commerce because “the burden of the divestiture requirements [fell] *solely* on  
19 interstate companies” (because no gasoline refiners operated in Maryland). 437 U.S. at 125  
20 (emphasis added). The Supreme Court rejected the argument, concluding that this fact did “not  
21 lead, either logically or as a practical matter, to a conclusion that the State is discriminating  
22 against interstate commerce.” *Id.*; *see also CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69,  
23 88 (1987) (rejecting argument that “statute is discriminatory because it will apply most often to  
24 out-of-state entities” on ground that statute imposes same burden on similarly situated in- and  
25 out-of-state entities); *Pharm. Research and Mfrs. of Amer. v. Cnty. of Alameda*, \_\_ F.3d \_\_, 2014  
26 WL 4814407, at \*2 (9th Cir. Sept. 30, 2014) (“[A] statute that treats all private companies

1 exactly the same does not discriminate against interstate commerce. This is so even when only  
 2 out-of-state businesses are burdened because there are no comparable in-state businesses.”)  
 3 (internal quotation marks omitted); *Dex Media West, Inc. v. City of Seattle*, 793 F.Supp.2d 1213,  
 4 1235 (W.D. Wa. 2011), *rev'd on other grounds*, 696 F.3d 952 (9th Cir. 2012) (“that [an]  
 5 exemption may apply to more local than out-of-state entities does not establish that the  
 6 exemption is discriminatory in effect against interstate commerce”).

7 Plaintiffs assert that the Ordinance’s minimum wage schedules are “tantamount to a tariff  
 8 on interstate commerce.” Dkt. 37 at 14:8. However, a tariff “taxes goods imported from other  
 9 States, but does not tax similar products produced in State.” *West Lynn Creamery v. Healy*, 512  
 10 U.S. 186, 193 (1994). Thus, in *West Lynn Creamery*, Massachusetts imposed a tax that  
 11 ostensibly burdened all milk producers (whether in- or out-of-state) but then effectively  
 12 exempted in-state producers through a rebate that offset the tax. *Id.* at 190-91, 194. Here, by  
 13 contrast, there is no such discrimination between in- and out-of-state entities. Thus, even if the  
 14 Ordinance’s wage schedules could be characterized as a tax, it is not akin to a tariff because  
 15 “[t]ariff-like statutes . . . provide distinct advantages to in-state entities over out-of-state entities.”  
 16 *Pharm. Research*, 2014 WL 4814407, at \*3. As with the ordinance that the Ninth Circuit  
 17 considered in *Pharm. Research*, “[g]iven that the Ordinance applies across the board, it does not  
 18 discriminate at all, let alone in the same way as a tariff.” *Id.*

19 **c. There is no discriminatory purpose.**

20 Plaintiffs assert that the Ordinance is invalid because it is based on “a forbidden interest  
 21 in protecting local enterprises.” Dkt. 37 at 15. But in evaluating dormant Commerce Clause  
 22 claims, courts must “assume that the objectives articulated by the legislature are actual purposes  
 23 of the statute, unless an examination of the circumstances forces [a conclusion] that they could  
 24 not have been a goal of the legislation.” *Rocky Mountain Farmers Union v. Corey*, 730 F.3d  
 25 1070, 1097-98 (9th Cir. 2013) (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456,  
 26 463 n.7 (1981)). Plaintiffs’ evidence does not compel such a conclusion.

1 Plaintiffs have not identified a single alleged statement of discriminatory purpose related  
 2 to in-state versus out-of-state commerce uttered by a single legislator at the time of the  
 3 Ordinance's enactment. *See Dex Media West*, 793 F.Supp.2d at 1235 ("The words of the  
 4 legislative body itself, written contemporaneously with the passage of the law in question, are  
 5 usually the most authoritative guide to legislative purpose."). Plaintiffs instead rely on  
 6 statements by private individuals that are not indicative of legislative purpose; and they  
 7 mischaracterize the two public officials' statements (one by a council member and the other by  
 8 the Mayor) they cite. *See supra* at 5. Accordingly, Plaintiffs provide no evidence of a  
 9 protectionist purpose and this Court must therefore conclude that the Ordinance's stated goals –  
 10 promoting "the general welfare, health, and prosperity of Seattle" and responding "to the  
 11 challenge of rising income inequality" – are its "actual purposes." *Rocky Mountain Farmers*  
 12 *Union*, 730 F.3d at 1098.

13 **d. The Ordinance's burden on interstate commerce does not clearly exceed its**  
 14 **local benefits.**

15 When, as is the case here, a statute "has only indirect effects on interstate commerce and  
 16 regulates evenhandedly," the Court may choose to examine whether the State's interest is  
 17 legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.  
 18 *S.D. Myers, Inc. v. City & Cnty. of San Francisco*, 253 F.3d 461, 466, 471 (9th Cir. 2001). As  
 19 the City points out, Dkt. 61 at 6, Plaintiffs do not make this argument. And for good reason,  
 20 because it would be meritless.

21 First, the Ordinance serves a number of important legitimate local interests, the most  
 22 important of which is assuring good wages for employees working in the City of Seattle,  
 23 including for franchises. Second, under *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970),  
 24 "[i]f a legitimate local purpose is found, then the question becomes one of degree. And the  
 25 extent of the burden that will be tolerated will of course depend on the nature of the local interest  
 26 involved...." *S.D. Myers, Inc.*, 253 F.3d at 471 (quoting *Pike*, 397 U.S. at 142). Here, Plaintiffs

1 fail to show *any* burden on interstate commerce. *See Indep. Training and Apprenticeship Prog.*  
 2 *v. Cal. Dept. of Indus. Rel.*, 730 F.3d 1024, 1038-39 (9th Cir. 2013) (improving apprentice’s  
 3 chances to obtain employment in specific trade within particular geographic area was “putative  
 4 local benefit” that outweighed any burden on interstate commerce caused by apprenticeship  
 5 program test); *S.D. Myers*, 253 F.3d at 471 (absent specific details as to how the costs of the  
 6 Ordinance burdened interstate commerce, the benefit of ensuring nondiscriminatory employment  
 7 benefits for City contractors was not clearly outweighed by a burden on interstate commerce);  
 8 *Pharm. Research*, 2014 WL 4814407, at \*5 (impact on commerce means impact on flow of  
 9 goods into/out of the geographic area). Any balancing analysis would therefore necessarily  
 10 establish that the burden on interstate commerce does not clearly exceed the Ordinance’s local  
 11 benefits.

## 12 2. The Ordinance does not violate the Equal Protection Clause.

13 Because Plaintiffs do not allege that the Ordinance infringes a fundamental right or  
 14 targets a suspect class, the City Council’s classification is subject only to rational basis review.  
 15 *See FCC v. Beach Comm’ns*, 508 U.S. 307, 313 (1993). “[T]he wisdom, fairness, or logic of  
 16 legislative choices” is thus irrelevant; a law survives rational basis review so long as “there is  
 17 any reasonably conceivable state of facts that could provide a rational basis for the  
 18 classification.” *Id.* Moreover, the Ordinance comes to this Court “bearing a strong presumption  
 19 of validity,” and Plaintiffs “have the burden ‘to negative *every* conceivable basis which might  
 20 support it.’” *Id.* at 314-15 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364  
 21 (1973) (internal citations omitted) (emphasis added)).<sup>6</sup>

22 Plaintiffs argue that the franchisee classification is “irrational” because it will subject  
 23 “businesses that are identical in all material respects” to different minimum wage requirements.

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24  
 25 <sup>6</sup> Because a party challenging an economic regulation on Equal Protection grounds must negate all possible reasons  
 26 for the classification, a legislature is “never require[d] . . . to articulate its reasons for enacting a statute, [and] it is  
 entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually  
 motivated the legislature.” *Beach Comm’ns*, 508 U.S. at 315.

1 Dkt. 37 at 17. But in analogous circumstances, the Ninth Circuit upheld the extension of a local  
 2 living wage ordinance to a small number of employers based on size, location, and revenue,  
 3 reasoning that “[s]uch legislative decisions are ‘virtually unreviewable, since the legislature must  
 4 be allowed leeway to approach a perceived problem incrementally’” by “‘addressing itself to the  
 5 phase of the problem which seems most acute to the legislative mind.’” *RUI One Corp. v.*  
 6 *Berkeley*, 371 F.3d 1137, 1155 (9th Cir. 2004) (quoting *Beach Comm’ns*, 508 U.S. at 316).  
 7 Here, the City may have concluded that franchisees have access to resources and advantages that  
 8 small independent businesses do not, or that franchisees employ a disproportionate number of  
 9 low-wage workers and thus should be required to increase their wages on the regular, non-  
 10 decelerated timeline. *See, e.g., Wine and Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 53-  
 11 54 (1st Cir. 2005) (rejecting equal protection challenge to state law barring franchise from  
 12 owning liquor licenses based on advantages enjoyed by franchisees); *Woodfin Suite Hotels, LLC*  
 13 *v. City of Emeryville*, 2006 WL 2739309, at \*21 (N.D. Cal. Aug. 23, 2006) (city’s minimum  
 14 wage law, which applied to hotel operators based on number of rooms rather than revenues, was  
 15 rational because “legislature [may] approach a perceived problem incrementally”).<sup>7</sup>

16 Such legislative classifications need not effectuate an exact, individualized fit. Of course  
 17 some franchisees *may* face difficulties accommodating wage increases that are similar to those  
 18 faced by a small, independent business. But imperfect fit does not establish an equal protection  
 19 violation, because legislators “had to draw the line somewhere . . . . This necessity renders the  
 20 precise coordinates of the resulting legislative judgment virtually unreviewable.” *Beach*  
 21 *Comm’ns*, 508 U.S. at 315-16.

22  
 23 <sup>7</sup> *See also Fortuna Enterprises, L.P. v. City of Los Angeles*, 673 F.Supp.2d 1000, 1002 (C.D. Cal. 2008) (upholding  
 24 local ordinance that created Airport Hospitality Enhancement Zone within which hotels with 50 or more guest  
 25 rooms must pay employees “living wage”); *compare West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 390, 395  
 26 (1937) (specifically approving state and local employment laws limited to particular industries) (citing *Spokane*  
*Hotels v. Younger*, 113 Wash. 359, 360-361 (1920), which defined special minimum wage for hotel housekeepers  
 but no other job classifications, and *Miller v. Wilson*, 236 U.S. 373, 382-384 (1915), which rejected argument that  
 maximum-hours law was unconstitutional because it applied only to hotels, not to boarding houses or domestic  
 servants).

1 Finally, Plaintiffs' contention that "mere animus or a forbidden motive like local  
 2 protectionism" motivated the City Council, Dkt. 37 at 19, is beside the point, in addition to being  
 3 unsupported (*see supra* at 4-5). In *RUI One Corp.*, plaintiff alleged that the reasons cited in the  
 4 living wage ordinance's purpose section "were not the real reasons motivating the City Council's  
 5 decision, but that the City Council was instead motivated by a desire to help in the unionization  
 6 campaign at a Marina hotel." 371 F.3d at 1155. The Ninth Circuit rejected the argument,  
 7 holding "it is entirely irrelevant for constitutional purposes whether the conceived reason for the  
 8 challenged distinction actually motivated the legislature." *Id.* (*quoting Beach Comm'ns*, 508  
 9 U.S. at 315); *see also Fortuna Enterprises*, 673 F.Supp.2d at 1014 ("The Court will not engage  
 10 in a more searching scrutiny of the legislative purposes, given the Ninth Circuit's admonition  
 11 that the actual motivations are 'entirely irrelevant.'"); *Goebel v. Elliott*, 178 Wash. 444, 447-48  
 12 (1934) (rejecting evidence of city council's purported motives in enacting minimum wage law,  
 13 because even "[a]ssuming that the wage scale was proposed by a labor union. . . there is nothing  
 14 therein which can be considered by the courts. Under no consideration or circumstance will the  
 15 motives of legislators . . . be inquired into by a judicial tribunal.").<sup>8</sup>

### 16 3. The Ordinance does not violate the First Amendment.

17 Because Plaintiffs' free association claim rests upon the purported deprivation of free  
 18 speech, the two claims should be analyzed together.<sup>9</sup> The Ordinance does not penalize  
 19 association or speech. Rather, it distinguishes between franchisees and independent businesses  
 20

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21 <sup>8</sup> The cases Plaintiffs cite are not to the contrary. In striking down a statute barring states from charging certain fees  
 22 for disabled permits as extending beyond constitutional authority, the court in *Brown v. N.C. Div. of Motor Vehicles*,  
 23 166 F.3d 698, 707 (4th Cir. 1999), noted that "arbitrary state action or state action motivated by animus" may violate  
 24 equal protection. But as both the case it quotes from, *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988),  
 and Plaintiffs' other authority, *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 529, 534-38 (1973), make clear, laws  
 will be upheld as rational even when there is evidence of animus, unless *no* legitimate purpose that is furthered by  
 the classification can be identified.

25 <sup>9</sup> Other than a claim based on intimate association (which does not include business relationships, *Kraft v. Jacka*,  
 26 872 F.2d 862, 871 (9th Cir. 1989), *abrogated on other grounds, Dennis v. Higgins*, 498 U.S. 439 (1991)), a free  
 association claim is essentially a group claim for infringement of speech, worship, or petitioning the government,  
*IDK, Inc. v. Clark County*, 836 F.2d 1185, 1192 (9th Cir. 1988).

1 based a business arrangement that implicates speech only incidentally. Plaintiffs' argument  
 2 would mean that franchisees can *never* be subject to regulation (without satisfying strict scrutiny)  
 3 because their business model itself "implicates" speech and association. That is not the law.<sup>10</sup>

4 It does not "abridge[e] freedom of speech" to regulate a business relationship "merely  
 5 because the conduct was in part initiated, evidenced, or carried out by means of language."  
 6 *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949); *see also Roberts v. U.S.*  
 7 *Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring in part and in the judgment)  
 8 ("There are, of course, some constitutional protections of commercial speech—speech intended  
 9 and used to promote a commercial transaction with the speaker. But the State is free to impose  
 10 any rational regulation on the commercial transaction itself."); *Ohralik v. Ohio State Bar Ass'n*,  
 11 436 U.S. 447, 456 (1978) ("[T]he State does not lose its power to regulate commercial activity  
 12 deemed harmful to the public whenever speech is a component of that activity"); *Las Vegas*  
 13 *Nightlife, Inc. v. Clark Cnty., Nev.*, 38 F.3d 1100, 1102 (9th Cir. 1994) ("Ordinary commercial  
 14 activity ... is subject to government regulation without offending the First Amendment.") (citing  
 15 *Ohralik's* examples of regulation of exchanges of commercial information). Here, the City is not  
 16 regulating Plaintiffs' speech or association; it is determining which wage schedule applies to  
 17 which employees based on factors including size and business relationships.<sup>11</sup>

18 Based on such a distinction, the First Circuit rejected a free association challenge to a  
 19 state law that banned stores holding liquor licenses from entering franchise relationships (defined

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20  
 21 <sup>10</sup> In fact, many regulations apply solely to the franchise business arrangement. Washington, like many states,  
 22 directly regulates franchise relationships. *See Wash. Rev. Code* §19.100 *et seq.* As noted *supra*, note 5, the City of  
 23 Seattle already distinguishes franchisees from independent business by allowing only the latter to operate in Pike  
 24 Place Market. Pike Place Market Hist. Commission Guideline 2.6.8 ("Franchise ownership and chain operations  
 25 especially are not allowed in the Market."), *authorized by SMC* 25.24.030. Other cities place limits on the operation  
 26 of formula restaurants. *E.g.*, Bainbridge Island Municipal Code §§18.09.020-030 (limiting "formula take-out  
 restaurants" to one planning zone, limiting their size to 4,000 square feet, and requiring them to share buildings with  
 at least one business that is not a "formula take-out food restaurant").

<sup>11</sup> In *Giboney* and *Ohralik*, unlike here, the government regulation directly burdened First Amendment conduct.  
*See Giboney*, 336 U.S. at 497-98 (affirming injunction of labor union's picketing); *Ohralik*, 436 U.S. at 448-49  
 (upholding state bar's discipline of attorney for advertising at hospital).

1 in part based on coordinated advertising). *Wine and Spirits Retailers*, 418 F.3d at 50-53. The  
 2 court reasoned that “[b]usiness entities have no First Amendment right to combine operations or  
 3 coordinate market activities,” even if “communication serves as the primary instrument” of such  
 4 coordination. *Id.* at 51. There, as here, “the mere fact that the joint activities that define the  
 5 business relationship between the franchisor and its franchisees have some communicative  
 6 component cannot, in and of itself, establish an entitlement to the prophylaxis of the First  
 7 Amendment.” *Id.* at 53.

8 The cases cited by Plaintiffs are not to the contrary, for in those cases the government  
 9 attempted to regulate *expressive* activity. Dkt. 37 at 21-22. Thus, in *Ashcroft v. Free Speech*  
 10 *Coal.*, 535 U.S. 234, 239, 244 (2002), the Court invalidated a federal law that directly imposed  
 11 “criminal penalties on protected speech” by outlawing possession of certain sexually explicit  
 12 images, while in *Friedman v. Rogers*, 440 U.S. 1, 5, 11 (1979), an optician challenged a state law  
 13 that directly *outlawed* “a form of commercial speech” by prohibiting “the practice of optometry  
 14 under an assumed name, trade name, or corporate name.”<sup>12</sup>

15 **4. The Ordinance is not preempted by the Lanham Act.**

16 “In the area of trademark law, preemption is the exception rather than the rule.” *JCW*  
 17 *Investments, Inc. v. Novelty, Inc.*, 482 F.3d 910, 919 (7th Cir. 2007). Plaintiffs’ challenge the  
 18 Ordinance on the ground that it “disfavor[s] a class of employers defined in significant part by  
 19 their use of a shared trademark,” Dkt. 37 at 23:17-18, but that argument has no merit.

20 Plaintiffs apparently concede that the Lanham Act’s express preemption provision, which  
 21 prohibits a narrow set of local actions requiring the alteration of trademarks, is inapplicable. 15  
 22 U.S.C. §1121. This provision “is powerful evidence” that Congress did not intend to preempt  
 23 laws that, like the Ordinance, fall outside its boundaries. *See Wyeth v. Levine*, 555 U.S. 555,

24 \_\_\_\_\_  
 25 <sup>12</sup> Plaintiffs’ quotation from Justice Blackmun (Dkt. 37 at 22) actually comes from the *dissenting* portion of his  
 26 opinion. *Friedman*, 440 U.S. at 22 n.3. Moreover, the Court in *Friedman* actually *upheld* the regulation. *Id.* at 15-  
 16.

1 574-75 (2009) (Congress' express preemption regarding medical devices, but silence on  
2 prescription drugs, shows no intent to preempt); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288  
3 (1995) (express preemption clause establishes inference that implied preemption claim is  
4 foreclosed); *Mobil Oil Corp. v. Virginia Gasoline Marketers & Auto. Repair Ass'n, Inc.*, 34 F.3d  
5 220, 227 (4th Cir. 1994) (applying presumption against preemption to law not prohibited by  
6 §1121). Moreover, where, as here, a state or locality is exercising traditional police powers,  
7 there is a presumption of non-preemption. See *New York State Conference of Blue Cross & Blue*  
8 *Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995); see also *Mass. v. Morash*, 490 U.S.  
9 107, 119 (1989) (regulation of wages is historic state power).

10 Plaintiffs' challenge is based solely on the Ordinance's definition of "franchise" to mean  
11 a written agreement granting certain specified rights, in return for a franchise fee, when the  
12 operation of the business "is substantially associated with a trademark, service mark, trade name,  
13 advertising, or other commercial symbol[] designating, owned by, or licensed by the grantor or  
14 its affiliate." Dkt. 38-1, Sec. 2 (14.19.010(I)(2)); see Dkt. 37 at 24:1-5. This language, of course,  
15 is taken directly from Washington State's definition of "franchise" for purposes of determining,  
16 among other things, the applicable rules for registration, sales, and advertising of franchises.  
17 RCW §19.100.010(6)(a)(ii).

18 In arguing that the Lanham Act preempts the Ordinance's use of this state law definition  
19 of franchises, Plaintiffs misleadingly quote from two cases, *Golden Door, Inc. v. Odisho*, 646  
20 F.2d 347, 352 (9th Cir. 1980), and *Mister Donut of Am., Inc. v. Mr. Donut, Inc.*, 418 F.2d 838,  
21 844 (9th Cir. 1969). Dkt. 37 at 23:24-30. Plaintiffs fail to mention, however, that *Golden Door*  
22 actually "reject[s] the *Mister Donut* dicta" that Plaintiffs nonetheless cite as if it remains good  
23 law, and the Ninth Circuit holds in that case that the only local laws that are preempted are those  
24 that conflict with "[t]he limited intent of Congress in enacting the Lanham Act." 646 F.2d at 352  
25 (emphasis added). Those limited purposes are "'to legislate so that the public can buy with  
26 confidence, and the trademark holder will not be pirated.'" *Id.* (quoting *Mariniello v. Shell Oil*

1 Co., 511 F.2d 853, 858 (3d Cir. 1975)); *see also New Kids on the Block v. News Am. Pub., Inc.*,  
2 971 F.2d 302, 305-06 (9th Cir. 1992) (the Act's purposes are "constant and limited:  
3 Identification of the manufacturer or sponsor of a good or the provider of a service [a]nd . . .  
4 [p]reventing producers from free-riding on their rivals' marks").

5 Plaintiffs point to *no* authority supporting their assertion that the Lanham Act impliedly  
6 preempts any law that takes a trademark into consideration. *See Mobil Oil Corp.*, 34 F.3d at 227  
7 (rejecting preemption challenge to state law prohibiting sales quotas and other provisions in gas  
8 station franchise agreements, because the "fact that a franchisee may not sell as much product as  
9 Mobil would desire does not adversely affect Mobil's trademark image"). In the absence of such  
10 authority, Plaintiffs argument has no merit.<sup>13</sup>

11 **5. The Ordinance is not preempted by ERISA.**

12 Plaintiffs' argument that the Ordinance's grant of "favorable treatment" to employers that  
13 offer certain health plans violates ERISA's preemption provision also lacks merit. The Ninth  
14 Circuit rejected a virtually identical ERISA preemption challenge to a law that reduced  
15 employers' prevailing wage obligations based on their expenditures on benefits including those  
16 provided through ERISA plans, holding that ERISA does *not* preempt credits toward a wage  
17 requirement based on ERISA plan spending because such laws "do[] not force employers to  
18 provide any particular employee benefits or plans, to alter their existing plans, or to even provide  
19 ERISA plans or employee benefits at all." *WSB Elec., Inc. v. Curry*, 88 F.3d 788, 793 (9th  
20 Cir.1996) (upholding prevailing wage law that gave employers credit for expenditures on  
21 benefits but did not *require* provision of benefits); *see also S. Cal. IBEW-NECA Trust Funds v.*  
22 *Standard Industrial Elec. Co.*, 247 F.3d 920, 925 (9th Cir. 2001) (state law that "does not require  
23

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24 <sup>13</sup> Compare also, e.g., *JCW Investments, Inc. v. Novelty, Inc.*, 482 F.3d 910, 919 (7th Cir. 2007) (upholding state  
25 punitive damages remedies for trademark violations against preemption challenge); *Lisa's Party City, Inc. v. Town*  
26 *of Henrietta*, 185 F.3d 12, 15 (2d Cir. 1999) (Lanham Act does not preempt local ordinance regulating sign  
aesthetics); *Tonka Corp. v. Tonk-A-Phone, Inc.*, 805 F.2d 793, 794-95 (8th Cir. 1986) (local law providing for  
attorneys' fees in trademark cases does not conflict with Lanham Act).

1 the establishment of a separate benefit plan, and imposes no new reporting, disclosure, funding,  
 2 or vesting requirements for ERISA plans” not preempted); *Ironworkers Dist. Council of the*  
 3 *Pacific Northwest v. Woodland Park Zoo Planning & Development*, 87 Wn. App. 676, 685-686  
 4 (1997) (prevailing wage law that gave credit for health plan expenditures not preempted). Here,  
 5 similarly, the Ordinance does not require any employer to modify its existing health plans or to  
 6 offer any new plan, because employers can comply solely through the payment of specified  
 7 wages. As the Third Circuit has explained, “[w]here a legal requirement may be easily satisfied  
 8 through means unconnected to ERISA plans, and only relates to ERISA plans at the election of  
 9 an employer, it affects employee benefit plans in too tenuous, remote, or peripheral a manner to  
 10 warrant a finding that the law ‘relates to’ the plan.” *Keystone Chapter of Associated Builders &*  
 11 *Contractors v. Foley*, 37 F.3d 945, 960 (3d Cir. 1994) (internal quotations, citations and brackets  
 12 omitted).<sup>14</sup>

13 Nor does the Ordinance’s mere “reference” to specific types of ERISA plans render it  
 14 preempted. Dkt. 37 at 25-26. As the City explains, Dkt. 61 at 23, a law has a forbidden  
 15 “reference” only when it “acts immediately and exclusively upon ERISA plans” or “the  
 16 existence of ERISA plans is essential to the law’s operation.” *Cal. Div. of Labor Standards*  
 17 *Enforcement*, 519 U.S. 316,325. A local law that gives credit to employers based on certain  
 18 ERISA plans, but “can have its full force and effect even if no employer in the City has an  
 19 ERISA plan,” is not preempted. *Golden Gate Restaurant Ass’n*, 546 F.3d at 657. “Where a law  
 20 is fully functional even in the absence of a single ERISA plan, as it was in *WSB Electric* and as it  
 21  
 22

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23 <sup>14</sup> Plaintiffs may respond that the Ordinance incentivizes employers to modify their ERISA plans, but it does not  
 24 require any covered employer to do so. That a state or local law may influence employers to change their ERISA  
 25 plans does not trigger ERISA preemption. See *Cal. Div. of Labor Standards Enforcement v. Dillingham Const.,*  
 26 *N.A., Inc.*, 519 U.S. 316, 333-34 (1997) (no preemption where state law “alters the incentives, but does not dictate  
 the choices, facing ERISA plans”; preemption only where inducement is “tantamount to a compulsion”); *Golden*  
*Gate Restaurant Ass’n v. City and County of San Francisco*, 546 F.3d 639, 656 (9th Cir. 2008) (noting that Supreme  
 Court upheld law that “exerted economic pressure” on structuring of ERISA plans); *WSB*, 88 F.3d at 795-96 (fact  
 that law discourages certain ERISA plan spending does not render it preempted).

1 is in this case, it does not make an impermissible reference to ERISA plans.” *Id.* at 659.<sup>15</sup>

2 In *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 130 (1992), the  
3 challenged law was preempted because an employer’s provision of ERISA benefits directly  
4 triggered an obligation to offer the same benefits through workers’ compensation. By contrast,  
5 here the Ordinance can operate even if no Seattle employer has an ERISA plan, and “[t]he  
6 references to ERISA plans ... have no effect on any ERISA plans, but simply take them into  
7 account when calculating the cash wage that must be paid.” *WSB Elec.*, 88 F.3d at 793.<sup>16</sup>

8 **6. The Ordinance does not violate the Washington Constitution.**

9 Plaintiffs’ claim that the Ordinance violates Article, I, Section 12 of the Washington  
10 Constitution (the Privileges and Immunities Clause) will also fail because they cannot establish  
11 any “privilege or immunity” under Washington law. *See Ockletree v. Franciscan Health Sys.*,  
12 179 Wn.2d 769, 776 (2014).

13 Plaintiffs erroneously argue that the Privileges and Immunities Clause “is violated if a  
14 statute treats two businesses that are’ similarly situated ‘differently.’” Dkt. 37 at 26 (quoting *Am.*

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18 <sup>15</sup> Plaintiffs also complain that certain small employers are not required under the Affordable Care Act to offer  
19 health plans, but acknowledge that nothing prohibits them from offering such plans; and Plaintiffs do not appear to  
20 make any preemption argument based on this distinction. Dkt. 37 at 25:2-15.

21 <sup>16</sup> Even if Plaintiffs’ challenge had merit, the proper remedy would be to strike the health plan provision, not other  
22 portions of the Ordinance. Under Washington law, when part of a statute is invalid, that provision should be severed  
23 and the remainder of the law upheld unless: 1) it cannot reasonably be believed that the law would have passed  
24 without the invalid portions; or 2) elimination of the invalid portion would render the remaining part useless to  
25 accomplish the legislative purpose. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 227-28 (2000).  
26 Here, it can reasonably be believed that the City Council would have adopted the Schedule 1 wages even if  
employers with the specified health plans would be covered, and the remaining provision of the Ordinance certainly  
accomplishes its purposes as set forth therein. *See* Dkt. 38-1 at 3-4 (“whereas” clauses setting forth intent to address  
income inequality and to allow employees to meet basic needs, support families, and fully participate in community  
life). Moreover, the severability clause (*see* Dkt. 38-1 at 17:19-25 (Section 8, adding §14.19.070)) “provide[s] the  
assurance that the legislative body would have enacted remaining sections even if others are found invalid.”  
*Amalgamated Transit*, 142 Wn.2d at 228. That severability clause *alone* can “provide the necessary assurance that  
the Legislature would have enacted the appropriate sections of the legislation despite the unconstitutional sections.”  
*Gerberding v. Munro*, 134 Wn.2d 188, 197 (1998).

1 *Legion Post #149 v. Washington State Dep't of Health*, 164 Wn.2d 570, 607 (2008)).<sup>17</sup> In fact,  
 2 the Washington Supreme Court has expressly “*rejected* the notion that the privileges and  
 3 immunities clause is violated any time the legislature treats similarly situated businesses  
 4 differently.” *Ockletree*, 179 Wn.2d at 781 (emphasis added). The right to carry on business is  
 5 implicated only where a law “prevent[s] [an] entity from engaging in business” altogether. *Id.*;  
 6 *see also Am. Legion*, 164 Wn.2d at 583, 608 (rejecting plaintiff’s argument that law prohibiting  
 7 smoking in some businesses but exempting others violated privileges or immunities because the  
 8 law did “not prevent any entity from engaging in business” and smoking was not a fundamental  
 9 right of citizenship); *Dex Media West*, 2011 WL 4352121 \*15-16 (Privileges and Immunities  
 10 Clause not “implicated” by ordinance imposing costly requirements upon businesses that  
 11 published and delivered yellow pages but not those that delivered other similar publications,  
 12 because law did not “prevent[] Plaintiffs from engaging in or carrying on business,” but “simply  
 13 imposes certain business regulations upon Plaintiffs” and “there is no fundamental right to  
 14 deliver yellow pages directories to the doorsteps of residents who do not want them,” nor to  
 15 avoid the fees and reports required by the law).

16 Here, similarly, the Ordinance does not prevent Plaintiffs from engaging in business  
 17 altogether, and payment of less than the Schedule 1 minimum wage is not a fundamental right.  
 18 Because Plaintiffs have failed to demonstrate that the Ordinance implicates a “privilege or  
 19 immunity,” they will not be able to prevail on this claim. Even if that were not the case,  
 20 Plaintiffs would be unlikely to succeed for the additional reason that the varied phase-in  
 21 timelines rest on a “reasonable ground,” *Ockletree*, 179 Wn.2d at 783.<sup>18</sup>

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 24 <sup>17</sup> In the language Plaintiffs quoted from *American Legion*, the Washington Supreme Court was actually  
 25 summarizing the plaintiff’s argument. A few sentences later, the Court roundly *rejected* that broad reading of the  
 26 Privileges and Immunities Clause, holding that the plaintiff had “misconstrue[d] the meaning of a privilege.” 164  
 Wn.2d at 607.

<sup>18</sup> *Cf. Griffin v. Eller*, 130 Wn. 2d 58, 66 (1996) (rejecting equal protection challenge to anti-discrimination law’s  
 exemption for small employers because distinction rested on “reasonable grounds”; legislature “must draw the line

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3 **B. Irreparable Harm**

4 In light of federalism and separation-of-powers concerns, a plaintiff seeking to enjoin  
5 local or state government must meet “heightened requirements of a showing of irreparable  
6 harm,” *Garcia v. Lawn*, 805 F.2d 1400, 1404 (9th Cir. 1986), and must establish the likelihood  
7 of “substantial and immediate” irreparable injury, *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037,  
8 1043 (9th Cir. 1999) (en banc). “When a plaintiff seeks to enjoin the activity of a government  
9 agency . . . his case must contend with the well-established rule that the Government has  
10 traditionally been granted the widest latitude in the dispatch of its own internal affairs.” *Rizzo v.*  
11 *Goode*, 423 U.S. 362, 378-79 (1976) (internal quotation marks omitted). “This ‘well-established  
12 rule’ bars federal courts from interfering with non-federal government operations in the absence  
13 of facts showing an immediate threat of substantial injury.” *Midgett v. Tri-County Metro.*  
14 *Transp. Dist. of Oregon*, 254 F.3d 846, 850 (9th Cir. 2001).

15 Plaintiffs have not come close to demonstrating the requisite irreparable harm. Their  
16 asserted injuries are purely speculative, arising not from the Ordinance itself but from an  
17 uncertain chain of events that Plaintiffs predict will come to pass. Plaintiffs posit that as a result  
18 of the Ordinance, they will have higher labor costs than non-franchised small businesses; that  
19 those higher labor costs will force them to increase prices; and that these higher prices will cost  
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22 somewhere”); *City of Seattle v. Rogers Clothing for Men, Inc.*, 114 Wn.2d 213, 235 (1990) (rejecting equal  
23 protection challenge to downtown business improvement assessment because there were “reasonable grounds” for  
24 imposing disproportionate burden upon smaller businesses); *Hemphill v. Washington State Tax Comm’n*, 65 Wn.2d  
25 889, 891-94 (1965) (in rejecting Privileges and Immunities challenge, concluding there was rational basis to tax  
26 skating rinks and other recreational businesses but exclude bowling alleys); *Goebel*, 178 Wn. at 448 (in rejecting  
discrimination challenge to contractor wage law, noting city has power to “classify the different kinds of labor or to  
classify common labor according to the kind and character of the work involved and to provide a different wage  
scale for each classification”); *Spokane Hotels*, 113 Wash. at 360-361 (approving special minimum wage for hotel  
housekeepers but no other job classifications).

1 them customers and revenue. Dkt. 37 at 27-29. Each of these attenuated steps in the chain of  
2 causation is speculative by itself; and in combination even more so.

3 To take just one example, each franchisee Plaintiff simply asserts that the Ordinance will  
4 result in a gap between the higher wages they will pay and those paid by their competitors. Dkt.  
5 37-1 ¶23; Dkt. 37-5 ¶18; Dkt. 37-6 ¶12. While the Ordinance may *require* those Plaintiffs to pay  
6 more than it *requires* Schedule 2 businesses to pay, as a practical matter the actual wage gap is  
7 not likely to be significant because both sets of businesses are competing to hire and retain  
8 workers from the same employment pool. *See* Gordon Decl. ¶41-42. Just as Plaintiff Stempler  
9 asserts that he will (voluntarily, rather than under compulsion of the Ordinance) raise wages even  
10 for employees outside of Seattle “to maintain an equitable pay structure,” Dkt. 37-1 ¶¶18-19, so  
11 too will many Schedule 2 businesses competing for new employees voluntarily raise wages to  
12 avoid losing qualified employees to Schedule 1 businesses.

13 Similarly, although the franchisee Plaintiffs complain that the Ordinance will force them  
14 to raise their prices, *see* Dkt. 37-1 ¶23; Dkt. 37-5 ¶19; Dkt. 37-6 ¶15, the truth is that those  
15 businesses, like others, have several options for offsetting higher labor costs (to the extent that is  
16 even necessary when many competitors are paying higher wages as well). These options  
17 include: accepting lower profit margins; cutting other costs; and where possible, renegotiating  
18 their franchise relationships. *See* Gordon Decl. ¶36-40. Moreover, despite their bald assertions  
19 to the contrary, Plaintiffs submit no persuasive evidence that price increases resulting from the  
20 Ordinance (if any) would cause them to lose customers, *see* Dkt. 37-1 ¶23; Dkt. 37-5 ¶19,  
21 particularly given the many factors affecting a customer’s decision about which businesses to  
22 patronize. *See* Dkt. 62 (Shane Decl. ¶¶35-36). Although Plaintiff Lyons asserts that the  
23 Ordinance “definitely threatens” to put her out of business and cause her and her husband to lose  
24 their home, Dkt. 37-5 ¶20, there is simply no basis for speculating, in the complete absence of  
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1 supporting evidence, that any loss of business will occur, let alone be enough to deprive  
2 Plaintiffs of meaningful revenue or drive them out of business.<sup>19</sup>

3 The Supreme Court has made clear that the mere “possibility” of harm is insufficient to  
4 support a preliminary injunction, and Plaintiff’s allegations of harm do not rise above the level of  
5 possibility. *Winter*, 555 U.S. at 22; *see also Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654  
6 F.3d 989, 996-97 (9th Cir. 2011) (same). Even under the lower “possibility” of harm standard  
7 (which the Ninth Circuit applied prior to *Winter*), the Ninth Circuit rejected irreparable harm  
8 arguments that relied on an attenuated chain of events or uncertain contingencies such as those  
9 urged here. *See Caribbean Marine Serv. Co., Inc. v. Baldrige*, 844 F.2d 668, 671-72, 675 (9th  
10 Cir. 1988) (alleged harms from allowing female observers aboard tuna boats, including lower  
11 efficiency, lost profits, and potential liability for harassment or sexual assault were “too remote  
12 and speculative to constitute an irreparable injury meriting preliminary injunctive relief”); *Colo.*  
13 *River Indian Tribes v. Town of Parker*, 776 F.2d 846, 849 (9th Cir. 1985) (“We have long since  
14 determined that speculative injury does not constitute irreparable injury.”); *Oakland Tribune,*  
15 *Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (discounting conclusory  
16 statements concerning irreparable harm made by “interested party”); *Wilson v. Seattle Hous.*  
17 *Auth.*, No. C09-226MJP, 2010 WL 1945740, at \*4 (W.D. Wash. May 13, 2010) (rejecting  
18 request for injunction reinstating section 8 benefits and finding “[w]hatever connection there is  
19 between her loss of public benefits in 2007 and her inability to pay rent in 2010 is too attenuated  
20 to justify categorizing SHA’s conduct and regulations as the proximate cause of the ‘irreparable  
21 harm’ she claims and to further justify the extraordinary relief she seeks”); *Nampa Classical*  
22 *Academy v. Goesling*, No. 09-cv-427-EJL, 2009 WL 2923069, at \*3 (D. Idaho Sept. 10, 2009)

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25 <sup>19</sup> Plaintiff Oh states that the Ordinance has caused him to lose goodwill because his hotel appears on a boycott list  
26 of those supporting this lawsuit, Dkt. 37-6 ¶17, and Plaintiff Lyons asserts that the Ordinance and the campaign to  
pass it have cost her goodwill by sending a “message” that franchise businesses are not welcome in Seattle, Dkt. 37-  
5 ¶21. Any harm caused by the campaign in support of the Ordinance is the product of a political campaign and  
protected speech – not the Ordinance. This cannot constitute irreparable harm supporting injunctive relief.

1 (“Harm that is speculative, conjectural, attenuated or remote does not constitute irreparable  
2 injury . . .”).

3 Finally, Plaintiffs are unable to show that any harm is imminent. *See Monsanto Co. v.*  
4 *Geertson Seed Farms*, 561 U.S. 139, 162 (2010) (injunction “not now needed to guard against  
5 any present or imminent risk of likely irreparable harm”); *Amylin Pharm., Inc. v. Eli Lilly and*  
6 *Co.*, 456 F. App’x 676, 679 (9th Cir. 2011) (“To support injunctive relief, harm must not only be  
7 irreparable, it must be imminent, establishing a threat of irreparable harm in the indefinite future  
8 is not enough.”). Plaintiffs do not even allege imminent harm. Rather, they argue that they will  
9 lose revenue and, in one instance, face the risk of going out of business because more than six  
10 months from now they will face an hourly minimum wage \$1 higher than other businesses with  
11 the differential growing larger over the next ten years. Dkt. 37 at 27-28.

12 Plaintiffs’ authority for the propositions that irreparable harm may be established by any  
13 competitive disadvantage or possible loss of customers does not withstand scrutiny. In *American*  
14 *Passage Media Corp. v. Cass Communications, Inc.*, 750 F.2d 1470 (9th Cir. 1985), the Ninth  
15 Circuit *reversed* a preliminary injunction, finding that the plaintiff’s forecast of large losses was  
16 insufficient to show that it was “threatened with extinction.” 750 F.2d at 1474. The Ninth  
17 Circuit explained that “[e]ven if the evidence showed that [customers] were unwilling to do  
18 business with [plaintiff] because [of defendant’s actions], this would be insufficient evidence of  
19 irreparable harm.” *Id.* at 1473. In *UBS Financial Services, Inc. v. Hergert*, No. C13-1825RAJ,  
20 2013 WL 5588315, at \*2 (W.D. Wash. Oct. 10, 2013), this Court issued a limited TRO enjoining  
21 a former employee’s use of an allegedly protected client list in his new job. But the harm in that  
22 case was immediate and direct – personal solicitation of the company’s customers by a  
23 competitor – unlike the attenuated and uncertain harm alleged here. Moreover, the TRO was  
24 issued on an *ex parte*, time-limited basis, and the Court later declined to issue a preliminary  
25 injunction, concluding that irreparable harm had *not* been shown. *UBS Financial Services, Inc.*  
26 *v. Hergert*, No. C13-1825RAJ, 2013 WL 5775667, at \*3 (W.D. Wash. Oct. 25, 2013). The rest

1 of the cases Plaintiffs cite, Dkt. 37 at 27-28, are either not on point,<sup>20</sup> were based upon the  
 2 “possibility”-of-irreparable-harm standard that has been rejected by the Supreme Court,<sup>21</sup> or  
 3 concerned regulations that completely prevented plaintiffs from doing business in certain  
 4 markets – not an uncertain chain of events leading to a potential future competitive  
 5 disadvantage.<sup>22</sup>

### 6 C. Balance of Equities and Public Interest

7 The balance of the equities and public interest also weigh against entry of a preliminary  
 8 injunction. As previously explained, Plaintiffs’ showing of irreparable injury is speculative and  
 9 contingent. By contrast, the City’s inability to effectuate its legitimate policy decisions will  
 10 cause immediate harm to the citizens of Seattle and the democratic process. *See Planned*  
 11 *Parenthood of the Blue Ridge v. Camblos*, 116 F.3d 707, 721 (4th Cir. 1997) (noting that state  
 12 “has an interest in ensuring that the laws enacted by the General Assembly and signed into law  
 13 by the Governor are implemented”).

14 Plaintiffs’ argument that the standard for issuing the preliminary injunction they seek is  
 15 lower because they attempt to maintain the status quo is off-base. Dkt. 37 at 29 (quoting *Rodde*  
 16 *v. Bonta*, 357 F.3d 988, 999 n.14 (9th Cir. 2004)). The Ordinance has been enacted and the  
 17 implementation schedule is set. No further City action is necessary and under the current status  
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19 <sup>20</sup> In *Microsoft Corp. v. Mai*, No. C09-0474RAJ, 2009 WL 1393750 (W.D. Wash. May 15, 2009), this Court found  
 20 that a corporation’s violation of a contractual agreement allowed it to “undercut” legitimate distributors who were  
 21 not parties to the action. *Id.* at \*4, ¶14. Because of the competitive harm to *non-parties*, the Court found that it was  
 in the *public interest* to issue an injunction; it did not rely on this competitive advantage in finding irreparable harm,  
 which was addressed in different paragraphs of the decision. *Id.*

22 <sup>21</sup> *See Stuhlberg Int’l Sales Co., Inc. v. John D. Brush and Co., Inc.*, 240 F.3d 832, 840-41 (9th Cir. 2001); *Knudsen*  
*Corp. v. Nevada State Dairy Comm’n*, 676 F.2d 374, 378 (9th Cir. 1982) (“Knudsen’s combined contentions  
 23 establish *possible* irreparable injury . . .”) (emphasis added).

24 <sup>22</sup> *See Pac. Radiation Oncology, LLC v. Queen’s Med. Cntr.*, 555 F. App’x 730, 732 (9th Cir. 2014) (plaintiff  
 25 doctors denied privileges to perform certain medical procedures at hospital were completely unable to provide  
 necessary services to two groups of patients); *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 423 (9th Cir. 1991) (ban on  
 26 type of gold club would have “detrimental effect on [professionals’] golf game” and cause manufacturers significant  
 costs to redesign clubs, retool its manufacturing process, and abandon market on which its reputation was built);  
*Microsoft Corp. v. Motorola, Inc.*, 871 F. Supp.2d 1089 (W.D. Wash. 2012) (plaintiff would be required to  
 completely remove certain products from entire national market).

1 quo the minimum wage in Seattle will increase as provided in the Ordinance. It is Plaintiffs who  
2 seek to alter the status quo by excising a portion of an enacted law and upsetting the currently  
3 operative timetable. The situation here is similar to that in *Planned Parenthood of Blue Ridge*, in  
4 which the Fourth Circuit issued an emergency stay of a district court's injunction blocking  
5 implementation of a state statute prior to its effective date. The appellate court rejected the  
6 district court's reasoning that an injunction was necessary to preserve the status quo, explaining  
7 "[i]n this context, the status quo is that which the People have wrought, not that which  
8 unaccountable federal judges impose upon them." 116 F.3d at 721.

9 Most importantly, granting Plaintiffs' request for a preliminary injunction will harm the  
10 public interest by depriving thousands of low-wage Seattle workers of the higher wages  
11 mandated by the Ordinance. Those workers who are employed by franchises that have more  
12 than 500 employees in the franchise network but fewer than 500 employees at their particular  
13 location, will be subject to the slower Schedule 2 schedule rather than the more accelerated  
14 Schedule 1 rate called for by the Ordinance. Over just the first six months the Ordinance is in  
15 effect, this means an employee working 40 hours a week would earn \$10,400 instead of \$11,440.

16 The harm of enjoining these enacted wage increases substantially outweighs the  
17 speculative and contingent loss of business assertions by Plaintiffs. In balancing the respective  
18 hardships to the parties, "preventable human suffering," or "deprivation of life's necessities,"  
19 weighs more heavily than financial loss or administrative inconvenience. *Lopez v. Heckler*, 713  
20 F.2d 1432, 1437 (9th Cir. 1983); *see also United States v. Midway Heights Cnty. Water Dist.*,  
21 695 F.Supp. 1072, 1077 (E.D. Cal. 1988) (balancing "financial difficulties" against "preventable  
22 human suffering" and resolving stay application in favor of the latter). The Ninth Circuit has  
23 recognized that "[o]ur society as a whole suffers when we neglect the poor, the hungry, the  
24 disabled, or when we deprive them of their rights or privileges." *Lopez*, 713 F.2d at 1437.

25 As the Seattle City Council found, "minimum wage laws promote the general welfare,  
26 health, and prosperity of Seattle by ensuring that workers can better support and care for their

1 families and fully participate in Seattle’s civic, cultural, and economic life.” Dkt. 38-1 at 4.  
2 Individual Seattle workers who would be impacted by Plaintiffs’ requested preliminary  
3 injunction provide the most powerful evidence of the public interest in denying the injunction  
4 and allowing workers’ wages to rise as called for by the ordinance. Brittany Phelps, a  
5 McDonald’s worker who currently lives with family members and supports herself and her  
6 daughter on her \$9.32/hr wage explains, “[e]ven this modest increase will make a difference in  
7 my ability to live independently and have a stable income. The new minimum wage will make it  
8 easier for me to keep food in the refrigerator and to pay for living expenses for me and my  
9 daughter. I also believe it will help me to save money to get my own apartment and to  
10 eventually pursue my life goal of opening my own restaurant.” B. Phelps Decl. ¶6. Similarly,  
11 Jason Harvey, who earns \$9.32/hr working at Burger King explains that the wage increase called  
12 for by the ordinance will help him afford better food, improve his apartment, and seek previously  
13 unaffordable reconstructive dental care for damage to his teeth. Harvey Decl. ¶¶3-6; *see also*  
14 Dkt. 19 (M. Phelps Decl. ¶¶4-5) (explaining that Ordinance will help her pay down medical debt  
15 and live on her own); Dkt. 23 (Thompson Decl. ¶¶7-9) (explaining that ordinance will help her  
16 move to a safe neighborhood and get an apartment big enough for her two children).

17 **CONCLUSION**

18 For the reasons discussed, Plaintiffs’ motion for a preliminary injunction should be  
19 denied.

20 RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of October, 2014.

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