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EXHIBIT D
FRANCHISE AGREEMENT

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SMOOTHIE KING FRANCHISES, INC. FRANCHISE AGREEMENT

TABLE OF CONTENTS

ARTICLE I.<->[.]GRANT OF FRANCHISE; PROTECTED TERRITORY.....	<-2>[1]
ARTICLE II.<->[.]TERM AND RENEWAL.....	<->3
ARTICLE III.<->[.]FEES AND PAYMENTS	<->4
ARTICLE IV.<->[.]SERVICES PROVIDED BY FRANCHISOR	<->5
ARTICLE V.<->[.]FRANCHISEE'S FORM OF ORGANIZATION	<->6
ARTICLE VI.<->[.]CONFIDENTIALITY	<->7
ARTICLE VII.<->[.]CONFIDENTIAL OPERATIONS	<->8
ARTICLE VIII.<->[.]PROPRIETARY MARKS	<->9
ARTICLE IX.<->[.]MANAGEMENT AND TRAINING	<->11
ARTICLE X.<->[.]DUTIES OF FRANCHISEE	<-44>[12]
ARTICLE XI.<->[.]ACCOUNTING AND RECORDKEEPING	<-46>[17]
ARTICLE XII.<->[.]ADVERTISING, PROMOTION, AND MARKETING	<->18
ARTICLE XIII.<->[.]INSURANCE	<-20>[21]
<FA-3/2005>	
ARTICLE XIV.<->[.]DEFAULT AND TERMINATION	<-24>[22]
ARTICLE XV.<->[.]TRANSFER OF INTEREST	<-23>[24]
ARTICLE XVI.<->[.]OBLIGATIONS UPON TERMINATION OR < >EXPIRATION <-27>[28]	
ARTICLE XVII.<->[.]COVENANTS NOT TO COMPETE	<-29>[30]
ARTICLE XVIII.<->[.]TAXES, PERMITS, INDEBTEDNESS	<-30>[31]

ARTICLE XIX.<->[.]INDEPENDENT CONTRACTOR <-31>[32]

ARTICLE XX.<->[.]INDEMNIFICATION <-31>[32]

ARTICLE XXI.<->[.]APPROVALS AND WAIVERS <-32>[33]

ARTICLE XXII.<->[.]NOTICES <-32>[33]

ARTICLE XXIII.<->[.]ENTIRE AGREEMENT; MODIFICATIONS <-32>[34]

ARTICLE XXIV.<->[.]SEVERABILITY AND INTERPRETATION <-33>[34]

< >ARTICLE XXV.< ARBITRATION;>
ENFORCEMENT<..... 34>[35]

ARTICLE XXVI.<->[.]APPLICABLE LAW.....<-35>[36]

ARTICLE XXVII.<->[.]ACKNOWLEDGMENTS <-35>[36]

ATTACHMENT A<->[.]PROTECTED TERRITORY[38]

ATTACHMENT B<->[.]AUTOMATIC BANK DRAFT CONSENT<->[39]

ATTACHMENT C<->[.]ACKNOWLEDGMENT[40]

SMOOTHIE KING
FRANCHISE AGREEMENT

This Agreement is made and entered into this ____ day of _____, 200__, between Smoothie King Franchises, Inc., a Louisiana corporation having its principal place of business in Kenner, Louisiana, with a mailing address of 2400 Veterans Memorial Boulevard, Suite 110, Kenner, Louisiana 70062, (<">[Smoothie King<">["] or <">[Franchisor<">["]), and _____, a _____, with a mailing address of _____ (<">[Franchisee<">["]).

RECITALS

A. WHEREAS, Franchisor, ~~<as the result of the expenditure of time, skill, effort and money>~~ has developed and owns a ~~<unique and distinctive>~~ system for the establishment and operation of businesses offering ~~<unique>~~ nutritional drinks and general nutrition products (~~<hereinafter referred to as>~~ the <">[System<">["] and offers franchises to persons whose primary business will be the sale of products under Franchisor's System and Proprietary Marks from a specific retail location ~~<-(hereinafter referred to as>~~ [the] "Unit" or "Franchised Business");

B. WHEREAS, the ~~<distinguishing>~~ characteristics of the System include ~~<, without limitation, unique and>~~ specialized training, management, and marketing techniques and materials; procedures and methods of operation; ~~<unique and>~~ confidential recipes and formulas, uniform standards, specifications, and procedures for products, equipment and services; distinctive appearance; and advertising and promotional programs, all of which may be changed, improved, and further developed by Franchisor from time to time;

C. WHEREAS, Franchisor identifies the System by means of certain trade names, service marks, trademarks, logos, emblems, and indicia of origin (<">[Proprietary Marks<">["]), including ~~<but not limited to>~~ the name and mark <">[SMOOTHIE KING®<">["], and such other names, marks and indicia as may now or hereafter be designated by Franchisor in writing for use in connection with the System;

D. WHEREAS, Franchisor continues to develop, use, and control the use of the Proprietary Marks in order to identify for the public the source of products and services marketed thereunder and to represent the high standards of quality associated therewith;

E. WHEREAS, Franchisee desires to establish and operate a business in accordance with the System and for that purpose wishes to obtain a franchise from Franchisor and to receive the training and other assistance provided in connection therewith; and

F. WHEREAS, Franchisee understands and acknowledges the importance of Franchisor<=>[']s ~~<high>~~ standards of quality and service and the necessity of operating the business franchised hereunder in conformity with Franchisor<=>[']s standards and specifications.

NOW, THEREFORE, in consideration of the premises and mutual undertakings and commitments set forth herein, Franchisor and Franchisee agree as follows:

<

>ARTICLE I. GRANT OF FRANCHISE; PROTECTED TERRITORY

1.1 Subject to the terms and conditions of this Agreement, Franchisor grants to Franchisee a personal right and license, and Franchisee undertakes the obligation, to operate one SMOOTHIE KING® Franchised Business and to use the Proprietary Marks and the System solely in connection therewith.

1.2 Franchisee shall locate and lease or acquire a site that has been approved by Franchisor. If at the time of execution of this Agreement, Franchisee has not secured a site for the Franchised Business, Franchisee shall immediately begin to locate a site within the following general area (<">[]General Area<">[]): _____ - General Area.<->[]
The General Area is described solely <for the purpose of limiting>[to limit] the area within which Franchisee may seek a site location for the Unit. Until Franchisee secures a lease and a Protected Territory is designated, nothing in this Agreement shall be deemed to prevent Franchisor from granting franchises to others for site locations within the General Area at any time.
<->

[]1.3 Franchisee shall operate the Franchised Business only at and from the location approved in writing by Franchisor (the <">[]Location<">[]), which approval shall not be unreasonably withheld. Franchisor shall evaluate Franchisee<->[]s proposed location(s) as soon as reasonably possible in accordance with the procedures set forth in the <Smoothie King><®><- Confidential Pre-Opening Manual>["Manuals" (as defined in Section 7.1 below)] or as otherwise set forth in writing by Franchisor.

1.4 Upon Franchisee securing a lease for the Location and prior to the store opening, Franchisor shall designate a geographical area surrounding the Franchised Business, to be described in Attachment A (the <">[]Protected Territory<">[]). Subject to the following, Franchisor will not establish or operate [full-service] Smoothie King® Units, nor grant a franchise to any person other than Franchisee to establish or operate [full-service] Smoothie King® Units[] under the System and Proprietary Marks in the Protected Territory. Franchisor may establish, operate or grant a franchise or license to others to operate Smoothie King® Units under the System and Proprietary Marks at any "Special" location, as defined below, or sell product or service lines through other channels of distribution, within and outside the Protected Territory at any time, including those activities described in Section 8.3.6. Special locations are defined as locations that Smoothie King determines have a restricted trade area ("Special" locations). Examples of Special locations include locations in the following types of environments: malls, universities, schools, hospitals, military bases, casinos, convention centers, arenas, stadiums, airports, health and fitness facilities, office buildings, theme parks, amusement facilities and other locations that are not located on the street and the primary trade area is restricted to certain trade generators. For Smoothie King® Units that are not located at Special locations, the Protected Territory will be defined by identifiable boundaries and include a business, seasonal and/or residential population count of approximately fifteen thousand (15,000) people, based upon then-current Smoothie King site selection data. The boundaries of the Protected Territory may be shaped, at Franchisor<->[]s sole discretion, to match the population criteria, street or walk by traffic patterns and natural geographic features, such as bodies of water, interstate highways and other features that normally define guest trip patterns. The Protected Territory may include a business, seasonal and/or residential population count of less than fifteen thousand (15,000) people where there is less than 15,000 people within a two mile natural trade area of the location, based upon the criteria above, such as in suburban, rural, or beach communities.

1.5 Franchisee shall construct, furnish and equip <a>[the] Unit in accordance with <the provisions of>this Agreement and such other<-reasonable> terms and specifications as Franchisor may

provide in writing to Franchisee. The rights and privileges granted to Franchisee under this Agreement are personal in nature, and may not be used at any other location other than the Location. Franchisee will not have the right to subfranchise or sublicense any of its rights under this Agreement.

1.6<————>[]If Franchisee's lease for the Location expires or terminates without it being Franchisee's fault, or if in the judgment of Franchisor and Franchisee, there is a change in the character of the Location sufficiently detrimental to the Franchised Business' potential to warrant its relocation, Franchisor will grant Franchisee permission to relocate the Franchised Business to a location approved by Franchisor. Any relocation will be at Franchisee's sole expense. Except as provided herein or in Section 15.7.1 below, Franchisee must pay Franchisor a fee of One Thousand Dollars (\$<4000>[1,000]) for services Franchisor will provide in connection with the relocation of the Franchised Business before Franchisor will review a proposed new site for the Franchised Business. If Franchisor requires Franchisee to upgrade the store upon relocation, Franchisor will, for an additional fee provide Franchisee with a site package and plan.<->[]

ARTICLE II. TERM AND RENEWAL

2.1 The term of this Agreement shall commence on the date first written above (<">[]Effective Date<">[]) and shall expire ten (10) years from the date the Unit opens for business, unless sooner terminated under the terms hereof.

2.2 Franchisee may, at its option, renew this Agreement for up to three (3) additional terms of five (5) years each, provided that respecting each renewal:

2.2.1 Franchisee has been and is in compliance with the mandatory provisions contained in the<Smoothie King><®><Confidential> Manuals and with all material terms and conditions of this Agreement throughout the current term and, at the time of renewal, is not in default of any material term or condition of this Agreement, any amendment hereof, or any other agreement between Franchisee and Franchisor, or its subsidiaries, affiliates or divisions;

2.2.2 Franchisee has given Franchisor written notice of Franchisee<->[]s election to renew not less than six (6) months nor more than nine (9) months prior to the end of the current term;

[]2.2.3 At the time of renewal, Franchisee has satisfied all monetary obligations owed by Franchisee to Franchisor and its subsidiaries, affiliates, and divisions;

[]2.2.4 Franchisee presents evidence satisfactory to Franchisor that Franchisee has the right to remain in possession of the Location for the duration of the renewal term or, in the alternative, obtains Franchisor<->[]s acceptance of a new location for the Franchised Business;

[]2.2.5 Franchisee makes or commits to provide for, in a manner satisfactory to Franchisor, such renovation and modernization of the Unit premises as Franchisor may <reasonably>require, including but not limited to signs, equipment, technological advances, furnishings and decor, to reflect the then-current standards and image of the System;

[]2.2.6 Franchisee complies with Franchisor<->[]s then-current qualification and training requirements for Franchisee and its employees;

[]2.2.7 Franchisee and Franchisor execute a mutual release, in a form prescribed by Franchisor, of any and all claims against each other and their subsidiaries, affiliates, and divisions, and their respective officers, directors, shareholders, employees, and agents; provided

that this release shall not affect claims or obligations relating to confidentiality and covenants not to compete; and

[2.2.8 Franchisee executes Franchisor's then-current form of franchise agreement, which agreement shall supersede this Agreement, except this Section 2.2 as it relates to the number of renewal terms available. Franchisor's then-current form of franchise agreement may contain terms that differ from these provided in this Agreement, including fees and the size of Franchisee's Protected Territory; provided that Franchisee will pay the then current renewal fee charged by Franchisor in lieu of the initial franchise fee, and if the Unit is being relocated, a standard Relocation Fee as described under ~~Article XV.~~ [Section 1.6.]

2.3 If Franchisor determines that Franchisee has not met the conditions set forth above and the Franchise Agreement will not be renewed, Franchisor will provide written notice to Franchisee ~~as soon as reasonably possible after the determination has been made~~ along with the reasons for the decision not to renew the Franchise Agreement.

ARTICLE III. FEES AND PAYMENTS

3.1 Upon execution of this Agreement, Franchisee shall pay to Franchisor an initial franchise fee of Twenty-Five Thousand Dollars (~~\$25,000.00~~ [25,000]).

3.2 If Franchisee has entered into a Development Agreement with Franchisor, the terms of such Development Agreement relating to initial franchise fees shall supersede the provisions relating to initial franchise fees set forth above.

3.3 The initial franchise fee is deemed paid to Franchisor upon Franchisor's acceptance and execution of this Agreement. Thereafter, the initial fee shall be deemed fully earned and nonrefundable, except as set forth below, in consideration of administrative and other expenses incurred by the Franchisor in granting this franchise and for the Franchisor's lost or deferred opportunity to franchise others.

3.4 Franchisee shall obtain financing within six (6) months and open for business within one (1) year from the Effective Date of this Agreement. If this Agreement is terminated for Franchisee's failure to obtain financing or open for business within the time periods set forth above, Franchisor shall refund to Franchisee ~~the lesser of Twelve Thousand Five Hundred Dollars (\$12,500.00) or~~ fifty percent (50%) of the initial franchise fee. Franchisee's refund shall be paid to Franchisee within forty-five (45) days from the date this Agreement is terminated. The initial franchise fee is not refundable, in whole or in part, under any other circumstances.

3.5 During the term of this Agreement, Franchisee shall pay to Franchisor an operating fee equal to six percent (6%) of the monthly "Gross Sales" of the Franchised Business (See Section 3.9 for definition of "Gross Sales").

< >3.6 During the term of this Agreement, Franchisee shall pay to Franchisor or its designee ~~advertising~~ [marketing and promotional] fees, as designated by Franchisor from time to time, as follows: (i) for Franchisor's system ~~advertising~~ [marketing and promotional] fund a fee of up to three percent (<->3%) of the monthly Gross Sales of the Franchised Business; and (ii) for Franchisor's "National Fund" and "Regional Fund," such fees as further described in Section 12.1 below. In addition to the fees set forth above, Franchisee shall reserve and expend on a continuing monthly basis a minimum of two percent (2%) of the monthly Gross Sales of the Franchised Business on local advertising and marketing as provided in Article XII. At any time and from time to time, Franchisor may direct Franchisee to pay all or any part of the amount reserved for local advertising and

marketing to one or more advertising funds organized under the System or may otherwise place reasonable conditions upon the use of such funds.

3.7 To enable Franchisor to operate its System in the most efficient manner, all continuing payments required under this Article III, including payments to one or more ~~advertising~~ **marketing and promotional** funds established from time to time, together with all other amounts due under this Agreement or in connection with the Franchised Business, shall be paid by automated bank draft or another payment method elected by Franchisor. ~~Franchisee agrees to execute any necessary documents that may be required to pay Franchisor by automated bank draft or other method of payment which is in the sole discretion of Franchisor.~~ Franchisee shall provide such reports or statements as are required under Article XI hereof to Franchisor at its **corporate** offices ~~in Kenner, Louisiana,~~ or such other place as Franchisor may designate in writing. Any payment or report not actually received by Franchisor or its designee by the sixth (6th) day of any month (with respect to Gross Sales during the previous month) shall be deemed overdue and will be assessed a late fee of Fifty Dollars (~~\$50.00~~ **50**). Smoothie King ~~periodically may~~ **will have the right**, upon ~~a~~ sixty (60) days' written notice, ~~modify the reporting period to no less than a weekly reporting period~~ **to require Franchisee to make all payments required under this Article III and Section 12.1, and to comply with all reporting obligations under this Article and under Section 11.3, on a weekly basis**. If any payment check or draft is returned from Franchisor's bank for insufficient funds, Franchisee will pay \$50.00 for the first occurrence and \$75.00 for each occurrence thereafter. Franchisor will have the right to increase such fees upon reasonable written notice to Franchisee. If any payment is overdue, Franchisee shall pay Franchisor, in addition to the overdue amount, interest on such amount from the date it was due until paid at a rate equal to the lesser of eighteen percent (18%) per annum or the maximum rate permitted under applicable law. The foregoing shall be in addition to any other remedies Franchisor may have, including, without limitation, the right of set-off to withdraw or retain, from time to time and without notice to Franchisee, any amounts due and unpaid by Franchisee from any accounts or amounts otherwise payable to Franchisee.

>3.8 During the term of this Agreement, Franchisee agrees to obtain and maintain a separate line of credit in an amount equal to Twenty Thousand Dollars (\$20,000) or such greater amount as Franchisor reasonably determines in writing. Franchisee must forward all information requested by Franchisor, including verification and initial bank letters concerning funds availability, and activate such line of credit before executing a lease for the Unit premises or commencing construction at the Unit premises. Franchisee will maintain such line of credit to ensure that Franchisee has sufficient funds to meet to satisfy all operating fee and other monetary obligations owing to Franchisor and its affiliates.

3.9 As used in this Agreement, the term "Gross Sales" shall mean the amount of sales of all products and services sold in, on, about, from, or from such other place on behalf of, the Unit, including, without limitation, concessions off premises or catering or delivery by Franchisee, whether for cash or on a charge, credit or time basis, including the reasonable market value of any goods or services sold or traded in any barter or trade transaction, without reserve or deduction for inability or failure to collect, and including income of every kind and nature related to the Franchised Business. Gross Sales shall not include the amount of any excise or sales tax levied on retail sales and actually paid to appropriate governmental authorities. In computing Gross Sales, Franchisee may deduct the amount of over rings, refunds, allowances, or discounts to guests (including coupon sales) provided that such amounts have been included in Gross Sales and provided that Franchisee complies with the requirements, including time limits, established by Franchisor from time to time in writing, relating to reporting and taking credits against Gross Sales.

ARTICLE IV. SERVICES PROVIDED BY FRANCHISOR

<FA-3/2005>[-] 5[-]

4.1 Franchisor agrees to provide to Franchisee, or assist Franchisee in obtaining, the following:

[4.1.1 Such standard construction plans, specifications and layouts for the buildout which includes: floor plan layout which shows equipment, furnishings, decor and signs identified with Smoothie King® Units and approved suppliers for the products and supplies as Franchisor makes available to all franchisees from time to time.

[4.1.2 General site selection criteria and guidance in the selection of an acceptable site and review of the lease for the location of the Unit.

[4.1.3 Review of site plans and final construction plans and specifications provided to Franchisor for conformity to the construction standards and specifications of the System, whether the Unit will be a remodel or otherwise.

[4.1.4 Initial, advanced training, and regional management training in the System, including but not limited to Manual updates, policy notices, intranet information, newsletters, phone consultations, store visits, and Smoothie King® standards, methods, procedures and techniques, at such times and places as Franchisor may designate for its training program, in its discretion, and subject to the other terms of Article IX.

[4.1.5 Such assistance as Franchisor may provide in connection with the opening of the Unit by Franchisee, including assistance by Franchisor<*>[?]'s personnel.

[4.1.6 The use of the <Smoothie King>*><Confidential>Manuals and training aids, as revised by Franchisor from time to time when, in Franchisor<*>[?]'s discretion, modifications are necessary.

[4.1.7 Such merchandising, marketing and other data and advice as may from time to time be developed by Franchisor, its subsidiary, affiliate or other entity or fund established for such purposes, and deemed by Franchisor to be helpful in the operation of the Franchised Business.

[4.1.8 Such periodic individual or group advice, consultation, and assistance, rendered by personal visit or telephone, by newsletters or bulletins made available from time to time to all Smoothie King® franchisees, or by internet or intranet, as Franchisor may deem necessary or appropriate.

[4.1.9 Such bulletins, brochures, Manuals, intranet updates, and reports as may from time to time be published by or on behalf of Franchisor, regarding its plans, policies, research, developments and activities.

[4.1.10 Such other resources and assistance as may hereafter be developed and offered by Franchisor to all Smoothie King® franchisees.

4.2 All or a portion of the obligations to be performed by Franchisor may be performed on behalf of Franchisor by a third party designated by Franchisor, as Franchisor deems appropriate.

ARTICLE V. FRANCHISEE'S FORM OF ORGANIZATION

5.1 If Franchisee is or becomes a corporation, partnership, limited liability company or other entity, Franchisee shall comply with the following requirements:

<FA-3/2005>[?] 6[?]

[] 5.1.1 Franchisee shall confine its activities to the establishment and operation of the Franchised Business.

[] 5.1.2 Franchisee<>[]s articles of incorporation and bylaws, partnership agreement or articles of organization or operating agreement (or comparable governing documents) shall at all times provide that its activities are confined exclusively to the operation of the Franchised Business and that the issuance and transfer of voting stock, or other ownership interest therein, is restricted by the terms of this Agreement.

[] 5.1.3 Franchisee shall furnish Franchisor promptly, upon request, copies of Franchisee<>[]s articles of incorporation, bylaws, partnership agreement, articles of organization, operating agreement and other governing documents, and any other documents Franchisor may reasonably request, and any amendments thereto.

[] 5.1.4 Franchisee shall maintain stop-transfer instructions against the transfer on its records of any equity securities except in accordance with the provisions of Article XV. All securities issued by Franchisee shall bear the following legend, which shall be printed legibly and conspicuously on each stock certificate or other evidence of ownership interest:

The transfer of these securities is subject to the terms and conditions of a Franchise Agreement with Smoothie King Franchises, Inc. dated ≤ ≥[]. Reference is made to said Agreement and to the restrictive provisions of the Articles and Bylaws of this Corporation.

5.2 Franchisee shall furnish Franchisor promptly, upon request, copies of any other documents, including trust or other documents which ~~<may reasonably>~~ relate to the operation of the Franchised Business, as Franchisor may ~~<reasonably>~~ request, and any amendments thereto.

5.3 Franchisee shall maintain a current list of all general and limited partners, managers and members, and all owners of record and all beneficial owners of any class of voting stock of Franchisee, and any other persons having an ownership interest in Franchisee, and shall furnish the list to Franchisor promptly upon request.

5.4 Each individual holding in excess of fifteen percent (15%) of the total voting power in Franchisee (including each individual holding in excess of twenty percent (20%) of the total voting power in any corporation, partnership or limited liability company having a controlling interest in Franchisee) shall, upon the request of Franchisor, execute this Agreement or enter into a continuing guaranty agreement ~~<under seal>~~, in a form satisfactory to Franchisor, assuming and agreeing to discharge all of the obligations of Franchisee under this Agreement; provided, however, that each individual who has executed this Agreement shall continue to be bound by this Agreement or enter into a continuing guaranty agreement ~~<under seal>~~, in a form satisfactory to Franchisor, assuming and agreeing to discharge all of the obligations of Franchisee under this Agreement, regardless of that individual<>[]s ownership interest in the new entity.

5.5 The corporation, partnership, limited liability company or other entity shall be newly organized unless Franchisor, in its sole discretion, is satisfied that there are no outstanding obligations which could adversely affect the Franchised Business.

ARTICLE VI. CONFIDENTIALITY<>

<FA 3/2005>[] 7[]

6.1 Franchisee expressly understands and agrees that a confidential relationship is established between Franchisor and Franchisee under this Agreement, and that Franchisor will be disclosing to Franchisee certain confidential and proprietary information in connection with the System and Franchisee's operation of the Franchised Business. Franchisee agrees that:

[] 6.1.1 Franchisee shall treat and maintain such information as confidential during the term of this Agreement and thereafter;

[] 6.1.2 Franchisee shall use such information only for its operations under this Agreement;

[] 6.1.3 Franchisee shall disclose such information only to its employees or agents and not to anyone else;

[] 6.1.4 Franchisee shall restrict disclosure of such information to only those of its employees or agents who are directly connected with the performance of work requiring knowledge thereof and shall disclose only as much information as is required to enable those employees or agents to carry out their assigned duties;

[] 6.1.5 Franchisee shall advise its employees and agents of the confidential nature of such information and the obligation not to disclose it;

[] 6.1.6 Franchisee shall obtain and deliver to Franchisor signed confidentiality agreements from any or all of Franchisee's principals, employees, agents or other persons who may have access to confidential information. Such agreements shall be in a form satisfactory to Franchisor and shall identify Franchisor as a third-party beneficiary with the independent right to enforce them.

6.2 Any and all recipes, ingredients or proprietary products, formulas, guest and supplier lists, product specifications and other information, knowledge, techniques, and know-how, including any and all records and copies thereof in any form, which Franchisor designates as confidential shall be deemed confidential for purposes of this Agreement.

6.3 It is understood and agreed that recipes, formulas, guest and supplier lists, product specifications, information, techniques and know-how developed, compiled or prepared by Franchisee, its employees or agents during the term of this Agreement and relating to the System or the operation of the Franchised Business shall be deemed a part of the confidential information protected hereunder.

6.4 Franchisee acknowledges that any failure to comply with the requirements of this Article VI will cause Franchisor irreparable injury, and Franchisee agrees to pay all court costs and reasonable legal and accounting fees incurred by Franchisor in obtaining specific performance of, or an injunction against violation of the requirements of this Article VI.

ARTICLE VII. CONFIDENTIAL OPERATIONS

7.1 To protect the reputation and goodwill of Franchisor and to maintain high standards of operation under the Proprietary Marks, Franchisee shall conduct its business in accordance with the standards and procedures set forth in Franchisor's confidential operations ~~manuals including but not limited to the Smoothie King~~ Confidential Operations manual and such other manuals issued by Franchisor from time to time (~~"~~collectively, the "Manuals"). Franchisor shall loan to Franchisee, during the term of this Agreement, either one ~~manual~~ hard copy of or electronic (internet) access to each of the Manuals.

7.2 Franchisee shall at all times treat the Manuals and the information contained therein as confidential and shall ~~use all reasonable efforts to~~ maintain such information as secret and confidential. Franchisee shall not at any time copy, duplicate, record, or otherwise reproduce such materials, in whole or in part, nor otherwise make them available to any unauthorized person.

7.3 The Manuals shall at all times remain the sole property of Franchisor, shall be kept in a secure place at the Unit premises, and shall be returned to Franchisor promptly upon termination or expiration of this Agreement.

7.4 Any revisions to the contents of the Manuals shall be deemed effective upon receipt, unless otherwise specified by Franchisor.

7.5 Franchisee shall at all times ensure that its copy of the Manuals is kept current and up-to-date. In the event of any dispute as to the contents of the Manuals, the terms of the master copy of the Manuals maintained by Franchisor at its headquarters shall be controlling.

ARTICLE VIII. PROPRIETARY MARKS

8.1 Franchisor warrants with respect to the Proprietary Marks that:

[8.1.1 Franchisor is the owner of all right, title, and interest in and to the Proprietary Marks.

[8.1.2 Franchisor has taken and will take all steps reasonably necessary to preserve and protect the ownership and validity of the Proprietary Marks.

[8.1.3 Franchisor will use and will permit Franchisee and other Smoothie King® franchisees to use the Proprietary Marks only in accordance with the System and the standards and specifications which underlie the goodwill associated with and symbolized by the Proprietary Marks.

8.2 With respect to Franchisee's licensed use of the Proprietary Marks pursuant to this Agreement, Franchisee covenants that:

[8.2.1 Franchisee shall use only the mark <">[SMOOTHIE KING®<">[["], and such other Proprietary Marks as are designated in writing by Franchisor for Franchisee's use, and shall use them only in the manner authorized and permitted by Franchisor.

[8.2.2 Franchisee shall use the Proprietary Marks only for the operation of the Franchised Business and only at the location authorized hereunder, or in advertising for the Franchised Business conducted at such location.

[8.2.3 Unless otherwise authorized or required by Franchisor, Franchisee shall operate and advertise the Franchised Business under the name of <">[SMOOTHIE KING®<">[[" without prefix or suffix.

[8.2.4 Franchisee shall not use the Proprietary Marks as part of its corporate or other legal name. Franchisee shall comply with Franchisor's instructions in filing and maintaining requisite trade name or fictitious name registrations. Franchisee agrees to execute, during or after the term of this Agreement, upon Franchisor's request, any consents

necessary for the registration of Franchisor's corporate name in the state where Franchisee conducts the Franchised Business.

8.2.5 Franchisee shall execute any documents deemed necessary by Franchisor or its counsel to obtain protection for the Proprietary Marks or to maintain their continued validity and enforceability.

8.2.6 In the event that litigation involving the Proprietary Marks is instituted or threatened against Franchisee, Franchisee shall promptly notify Franchisor and shall cooperate fully with Franchisor in defending or settling such litigation. Franchisor shall defend and hold Franchisee harmless from any claims of trademark infringement for the use of the Proprietary Marks, provided that Franchisee promptly gives written notice to Franchisor and tenders the full defense of such claim to Franchisor. Franchisor shall have the complete control and direction of any such legal action, including the settlement thereof, without providing notice to Franchisee and shall bear all cost of defense of any such claim or suit.

8.2.7 Franchisee shall not directly or indirectly contest the validity or ownership of the Proprietary Marks.

8.2.8 Franchisor retains the sole right to advertise and promote the System on the Internet and to create, operate, maintain and modify or discontinue the use of, a web-site using the Proprietary Marks. Except as provided in Section 10.3.15 below or as Franchisor may authorize in writing, Franchisee will not: (1) link or frame Franchisor's web-site; (2) use the Proprietary Marks without Franchisor's prior written permission; (3) conduct any business or offer to sell or advertise any products or services on the internet or other on-line communication systems; and (4) create or register any Internet domain or e-mail addresses in connection with the Franchised Business. Franchisee will not register, as Internet domain names, any of the Proprietary Marks now or hereafter owned by Franchisor or any abbreviation, acronym or variation of the Proprietary Marks, or any other name that could be deemed confusingly similar.

8.3 Franchisee expressly understands and acknowledges that:

8.3.1 The Proprietary Marks are valid and serve to identify the System and those who are licensed or franchised under the System.

8.3.2 Franchisee's right to use the Proprietary Marks is limited to such uses as are authorized under this Agreement, and any unauthorized use thereof shall constitute an infringement of Franchisor's rights and a violation of this Agreement.

8.3.3 As between the parties hereto, Franchisor is the owner of all right, title, and interest in and to the Proprietary Marks and the goodwill associated with and symbolized by them.

8.3.4 Franchisee's use of the Proprietary Marks pursuant to this Agreement does not give Franchisee any ownership interest or other interest in or to the Proprietary Marks or System, except the non-exclusive license granted herein.

8.3.5 Upon transfer, expiration or termination of this Agreement and the license herein granted, any monetary amount assigned as "goodwill" shall not refer to goodwill inherent in the Proprietary Marks or System.

8.3.6 Notwithstanding anything in Section 1.4, Franchisor may:

(a) Establish Smoothie King® company owned Units and grant other licenses and franchises for Smoothie King® Units and the Proprietary Marks at any location outside of the Protected Territory, in addition to those licenses and franchises already granted, as Franchisor, in its sole and exclusive discretion, deems appropriate;

(b) License or sell, at both wholesale and retail, product or service lines that are being sold in Smoothie King® Units, including Franchisee's Smoothie King® Unit, under the same or similar Proprietary Marks or any other proprietary marks, at any location or distribution point within and outside the Protected Territory, without providing any rights therein to Franchisee.

8.4 Franchisor does not warrant or guarantee that it has the exclusive right to use the mark <">[“]SMOOTHIE KING®<">[“] or other Proprietary Marks of Franchisor. Franchisee agrees that if for any reason, by virtue of a court or administrative order or otherwise, it becomes necessary or desirable for Franchisor, in its discretion, to cease use of the mark “SMOOTHIE KING®” or any other Proprietary Marks of Franchisor (in whole or in part), Franchisor shall have the right to substitute different proprietary marks for use in identifying the System and businesses operating thereunder, and Franchisor and/or Franchisee may thereafter operate under such other proprietary marks. Such substitution shall be the sole remedy of Franchisee and shall not affect the validity of this Agreement. Franchisee shall hold Franchisor harmless from any claims with respect to substitution of any Proprietary Mark.

ARTICLE IX. MANAGEMENT AND TRAINING

9.1 Except as Franchisor may otherwise expressly permit in writing, Franchisee (or, if Franchisee is a corporation or partnership, a principal(s) of Franchisee) and its designated manager shall devote full time, energy, best efforts and direct on-premises supervision to the management and operation of the Franchised Business (and, if applicable, to other Smoothie King® franchised businesses owned and operated by Franchisee). Franchisor must be kept informed on a continuing basis of the identity of Franchisee<->[?]s manager and other personnel.

9.2 <->Franchisee's proposed designated Manager may, at Franchisor's sole discretion, be approved in advance by Franchisor. In such case as Franchisor, in its sole discretion, chooses to approve or disapprove Franchisee's manager, he/she must demonstrate, to Franchisor's satisfaction that he/she satisfies Franchisor's managerial and business standards, and has the aptitude and ability to operate and supervise the Franchised Business. Before Franchisee commences operating the Franchised Business, Franchisee (or, if Franchisee is a corporation or partnership, all principal(s) of Franchisee) and Franchisee<->[?]s designated Manager shall attend and complete, to Franchisor<->[?]s satisfaction, the initial franchise management training program that Franchisor offers at its offices in Louisiana, or at another site designated by Franchisor. Franchisee shall ensure that the Franchised Business is at all times under the management and supervision of a trained person acceptable to Franchisor. Franchisor may require any other principal or employee of Franchisee who is, or subsequently becomes, Franchisee's designated Manager/ Team Member(s) or otherwise is actively involved in the Franchised Business, to attend and satisfactorily complete Franchisor's initial franchise management training program and such other training programs as Franchisor may require. If Franchisee or any such person fails to attend and satisfactorily complete a required program, Franchisee may designate a substitute trainee acceptable to Franchisor.

9.3 Franchisee shall cause its managers and other employees to attend and satisfactorily complete all mandatory training programs, including basic, advanced training, and regional management training refresher courses, and business seminars, as Franchisor may require from time to time.

Franchisee shall ensure that all team members/employees are properly trained according to Franchisor's standards and that training certifications be available for review upon request by Franchisor.

9.4 Franchisee or its employees shall be responsible for all personal expenses incurred by them in connection with training programs, including, without limitation, costs and expenses of transportation, lodging, meals, wages, and employee benefits. Franchisor reserves the right to charge reasonable fees for materials and/or participation in any training courses or seminars offered by or on behalf of Franchisor, except that no fee shall be charged for the attendance by up to two (2) persons representing Franchisee at the initial franchise management training program. Franchisor may require Franchisee to make reservations for Franchisee or its employees in advance of attending any training courses or seminars. Franchisor may charge a deposit in connection with such reservations (which may be refunded or applied toward a course fee upon attendance) and may charge a cancellation fee if such reservations are canceled.

ARTICLE X. DUTIES OF FRANCHISEE

10.1 Franchisee understands and acknowledges that every detail of the System and the Franchised Business is important to Franchisee, Franchisor, and other Smoothie King® franchisees to maintain high and uniform operating standards, to increase the demand for the services and products sold by all franchisees, and to protect the reputation and goodwill associated with the Proprietary Marks.

10.2 Before commencing any construction or remodeling of the Unit, Franchisee shall comply, to Franchisor's satisfaction, with all of the following requirements:

[]10.2.1 Franchisee shall employ the Franchisor to prepare preliminary plans and specifications for site improvement and construction of the Unit.

[]10.2.2 Franchisee shall be responsible for obtaining all zoning and environmental classifications and clearances that may be required by state or local laws, ordinances, or regulations, or that may be necessary or advisable owing to any applicable restrictive covenants. After having obtained such classifications and clearances, Franchisee shall employ a qualified third party architect or engineer to review Franchisee's preliminary plans and specifications and finalize such plans and specifications for permit application and construction. Franchisee shall submit these plans to Franchisor for review and acceptance. Once accepted by Franchisor, the final plans may not be changed or modified without prior written consent of Franchisor.

[]10.2.3 Franchisee shall be responsible for obtaining all permits and certifications required for the lawful construction, remodeling, and operation of the Unit, and shall certify to Franchisor that all such permits and certifications have been obtained.

[]10.2.4 Franchisee shall employ a qualified licensed general contractor who is reasonably acceptable to Franchisor to complete all site improvements and construction of the Unit. Franchisee shall obtain and maintain, during the entire period of construction, liability insurance as provided under Article XIII of this Agreement. Franchisee shall begin construction as soon as reasonably possible and diligently pursue construction until completed.

10.3 Franchisee shall operate the Franchised Business in strict conformity with such methods, procedures, standards, and specifications as Franchisor may prescribe from time to time in the Manuals or otherwise in writing. Franchisee further covenants and agrees that:

[]10.3.1 Franchisee shall use the Unit solely for the operation of the Franchised Business, shall keep the Unit open and in normal operation for such minimum hours and days as Franchisor

may from time to time specify or approve in writing, and shall refrain from using or permitting the use of the Unit premises for any other purpose or activity at any time without the express prior written consent of Franchisor.

[10.3.2 Franchisee shall install and use in and about the Unit only such equipment, fixtures, furnishings, interior and exterior signs, and other items which strictly conform to the standards and specifications for Smoothie King® Units as set forth in the Manuals, construction drawings, or otherwise in writing and revised by Franchisor from time to time. Franchisee shall not locate or permit to be located on or about the premises any equipment or electronics including but not limited to gambling, amusement or vending machines, television or music systems, or other such equipment or devices, except as required by or with the express prior written permission of Franchisor.

[10.3.3 Franchisee shall maintain the Unit premises and all adjacent areas in good, clean, attractive and safe condition at all times. Franchisee shall, at its expense, undertake all maintenance and make all repairs, replacements, alterations, and additions as may be required for that purpose, including, without limitation, periodic cleaning, repainting, repairs, and replacement of obsolete signs, equipment, fixtures, and furnishings as Franchisor may require.

[10.3.4 Franchisee shall offer and sell from the Unit premises, for retail purposes only, all services and products, including any new services or products developed from time to time, as required or authorized by Franchisor, and shall not offer or sell any other services or products of any kind or character or in any manner without the express prior written consent of Franchisor. Franchisee shall discontinue offering any services or products (whether or not previously authorized by Franchisor) promptly upon notice from Franchisor. Franchisee shall provide for and install such equipment, furnishings or other items ~~reasonably~~ necessary to support new services or products introduced to enhance the value of the System.

[10.3.5 In offering and selling services and products to guests, Franchisee shall use only the standard forms approved by Franchisor and no other forms or documents except with the express prior written permission of Franchisor.

[10.3.6 Franchisee shall purchase or lease all equipment, inventory, supplies, and other products and materials required for the operation of the Franchised Business solely from suppliers (including distributors, manufacturers, and other sources) who demonstrate, to the continuing ~~reasonable~~ satisfaction of Franchisor, the ability to meet Franchisor's ~~reasonable~~ standards and specifications for such items; who possess adequate quality control and capacity to meet Franchisee's needs promptly and reliably; and who have been approved in writing by Franchisor and not thereafter disapproved (an "Approved Supplier"). Franchisor may impose limits on the number of suppliers and/or brands for any products and services to be used in the Franchised Business. Franchisee agrees that certain products, materials, and other items and supplies may only be available from one source, and Franchisor or its affiliates may be that source. Certain Approved Suppliers may require that Franchisee enter into agreements with them in connection with their designation or Franchisee's use of them as an Approved Supplier. If Franchisee desires to purchase any items from an unapproved supplier, Franchisee or the supplier shall submit to Franchisor a written request for approval. Franchisor's approval shall not be unreasonably withheld. Franchisor reserves the right to require that its representatives be permitted to inspect the supplier's facilities and that samples from the supplier be delivered to Franchisor or its designee for testing. Franchisor may impose a charge not to exceed ~~the reasonable~~ [its] costs of inspection and testing, which shall be paid by Franchisee or the supplier. Franchisor reserves the right from time to time to re-inspect the facilities and products of any previously Approved Supplier and to revoke its

approval upon the supplier's failure to continue to meet any of Franchisor's standards and specifications.

[10.3.7 If Franchisee obtains services from third-party providers, Franchisor shall have the right to review the terms and conditions of such arrangements and require additional information about the business background and qualifications of the providers, including (at Franchisor's option) personal interviews with individuals providing such services. If, in providing services to Franchisee, any third party may obtain access to confidential information as defined in Article VI above, Franchisor may require, as a condition of approval of such provider, the execution of covenants of non-disclosure and non-competition in a form satisfactory to Franchisor. Franchisor may disapprove any provider upon written notice to Franchisee who does not demonstrate, to Franchisor's continuing satisfaction, an ability to comply with the methods, procedures and standards established for the System and set forth in the Manuals or otherwise in writing and to meet Franchisee's needs promptly and reliably.

10.3.8 Franchisor has developed and will continue to develop certain proprietary food products and other menu items which will be prepared by or for Franchisor following Franchisor's proprietary recipes and formulas. Franchisor also has developed and will continue to develop standards and specifications for food products, flavorings, materials and supplies used in preparing, serving, and delivering prepared food products authorized for sale at Smoothie King Units. As described in Section 10.3.6 above, Franchisee must purchase such items from Approved Suppliers. Franchisor may designate one or more Approved Suppliers (including itself or an affiliate) as an exclusive supplier of types, models or brands of products and services that Franchisor approves for Smoothie King Units as meeting its specifications and standards. Such exclusive Approved Supplier, or other suggested or approved suppliers, may pay to Franchisor fees or rebates for such purchases.

[10.3.9 Franchisee shall maintain at all times such minimum stock levels of inventory, ingredients and supplies as Franchisor may prescribe from time to time in the Manuals or otherwise in writing.

[10.3.10 Franchisee shall use and display sales, marketing, and promotional materials provided by Franchisor from time to time, in the manner and for the time periods designated by Franchisor. Franchisee shall ensure that all uniforms, clothing, forms, stationery, signs, and other materials used in connection with the Franchised Business bear the Proprietary Marks in the form, colors, location and manner prescribed by Franchisor and otherwise comply with the standards and specifications prescribed by Franchisor from time to time in the Manuals or otherwise in writing.

[10.3.11 Franchisee shall hire and maintain a competent, conscientious, trained staff, including a Manager, if Franchisee is not the owner/manager, as required under Article IX hereof, and shall take such steps as are necessary to ensure that all laws, ordinances, regulations, and the like, are followed and that its employees/ team members preserve good guest relations and comply with such codes for dress and appearance as Franchisor may prescribe from time to time in the Manuals or otherwise in writing.

[10.3.12 Franchisee shall permit Franchisor or its agents to enter and inspect the Unit premises ~~at any reasonable time~~ during regular business hours. Franchisee shall cooperate fully with Franchisor and its agents in such inspections and render such assistance as they may ~~reasonably~~ request. Immediately upon notice of any deficiencies detected in such inspections by Franchisor or its agents, Franchisee shall take such steps as may be necessary to correct such deficiencies, including, in extreme cases, the temporary closing of the Unit if so

directed by Franchisor. Without limiting Franchisor's other rights and remedies, Franchisor shall have the right, if Franchisee fails or refuses to act promptly, to make or cause to be made such corrections as may be required and to collect the costs and expenses of correction from Franchisee.

[10.3.13 Except as otherwise set forth herein, after five (5) years from the date the Franchised Business opens for operation, ~~Franchisor may make reasonable requests that~~ Franchisee shall, at its expense, refurbish the Unit to conform to the building design, trade dress, color schemes, and presentation then being used in connection with new Smoothie King® Units. Franchisor may direct that such refurbishment ~~may~~ include, without limitation, structural changes, remodeling, redecoration, and modifications to existing improvements; however, Franchisee shall not be required to expend an amount in excess of Sixty Thousand Dollars (~~\$60,000.00~~ 60,000) during the term of this Agreement.

[10.3.14 If Franchisee occupies the Unit premises under a lease and if the lease expires and Franchisee, through no fault of its own, is unable to renew the lease, Franchisee shall have the right to relocate the Franchised Business within a reasonable time period not to exceed ninety (90) days, provided that Franchisee, at least thirty (30) days before vacating the Unit, shall notify Franchisor in writing of its desire to relocate. Franchisee shall obtain a site approved by Franchisor and construct, furnish and equip the Unit in accordance with such terms and specifications provided to Franchisee in writing by Franchisor, which terms may require Franchisee to ~~reasonably~~ conform to the design and presentation then being used in connection with new Smoothie King® Units.

[10.3.15 Upon sixty (60) days written notice from Franchisor, Franchisee will, at its expense, participate in and maintain a separate page on Franchisor's Smoothie King® website on the internet or other online communications and participate in any Franchisor-controlled intranet system. Franchisor has the right to determine the content and use of its website and intranet system, and will establish the rules under which franchisees must participate. Franchisor retains all rights relating to Franchisor's website and intranet system and may alter or terminate Franchisor's website or intranet system upon thirty (30) days' notice to Franchisee. Franchisor will provide at no cost to Franchisee a template for the separate page Franchisee must maintain on Franchisor's website. Franchisee's general conduct on Franchisor's website and intranet system, or other online communications, and specifically Franchisee's use of the Proprietary Marks or any advertising is subject to the provisions of this Agreement. Franchisee agrees to comply with each provision of Franchisor's Smoothnet Terms of Use agreement, as Franchisor periodically may modify. Franchisee acknowledges that certain information related to Franchisee's participation in Franchisor's website or intranet system may be considered confidential information (as further described in Articles VI and VII above), including access codes and identification codes. Franchisee's right to participate in Franchisor's website and intranet system, or otherwise use the Proprietary Marks or Business System on the internet or other online communications, will terminate when this Agreement expires or terminates.

[10.3.16 ~~<->~~ Upon sixty (60) days written notice from Franchisor, Franchisee will use in the Franchised Business the software and/or cash register system, including all existing or future communication or data storage systems, components thereof and associated service, which Franchisor has developed or selected for the Business System (the "POS System"). The POS System developed for use in Smoothie King® units may include a proprietary software program developed for Franchisor (the "Proprietary Software"). Franchisee must lease any Proprietary Software from Franchisor or a designated third party supplier, which software will remain the confidential property of Franchisor or its third party supplier. Franchisee agrees to sign all computer software access or license agreements and related documents required by Franchisor in

connection with Franchisee's use of any Proprietary Software. Franchisor reserves the right to charge Franchisee a reasonable monthly fee for computer software support provided by Franchisor or its designee. Franchisor reserves the right to assign its rights, title and interest in any Proprietary Software or related software license agreement to a third party designated by Franchisor. In such event, Franchisee may be required to enter into a separate computer software license agreement specified by the third party supplier of the Proprietary Software. Franchisor also may access information and data produced by or otherwise located on Franchisee's POS System (collectively the "<->Sales and Marketing Data"). Franchisor will own the Sales and Marketing Data that is stored on the POS System, and Franchisor periodically will establish policies respecting the use of the Sales and Marketing Data. Franchisee will have a license to use the Sales and Marketing Data during the term and subject to the restrictions of this Agreement. Franchisee will have at the Franchised Business Internet access with a form of high-speed connection as Franchisor requires, and Franchisee will use an e-mail address or the designated intranet system that Franchisor selects for communication with Franchisor. The computer hardware component of the POS System must comply with specifications Franchisor develops. Franchisor may designate a single source from whom Franchisee must purchase the POS System, any software or hardware components thereof or associated service, and Franchisor or its affiliates may be that single source. Franchisee must use and, at Franchisor's discretion, pay for all future updates, supplements and major modifications to the POS System.

10.3.17 <—> Franchisee shall not engage or cooperate in any conduct that reflects unfavorably on the reputation of Franchisee, Franchisor, or the System or <impairs>[injures or is prejudicial to] the goodwill associated with the Proprietary Marks, including conduct which jeopardizes Franchisee's good relations with guests and creditors of the Franchised Business, or which constitutes a deceptive or unfair trade practice or otherwise violates applicable law or regulations.

10.3.18 Franchisee must, at its expense, install at the Unit premises, a security system, including all existing or future components thereof and associated service, which Franchisor has selected for the Business System. Franchisor will have access to the information and data collected by such security system, and will have the right to monitor such system.

10.4 If Franchisee will occupy the Unit premises under a lease, Franchisee shall, prior to the execution of the lease, submit such lease to Franchisor for its written approval, which approval shall not be unreasonably withheld. Franchisor<>[]s approval of the lease may be conditioned upon the inclusion in the lease of such provisions as Franchisor may reasonably require, including, without limitation:

[]10.4.1 That the lease term extend for the unexpired term under the Franchise Agreement;

[]10.4.2 The landlord shall not prohibit Franchisee<>[]s use of Franchisor<>[]s Proprietary Marks in the manner prescribed by Franchisor;

[]10.4.3 Franchisor shall have the right to enter the premises to take any action necessary to protect the Proprietary Marks or the System;

[]10.4.4 Franchisor shall have the right, at its election and upon notice to the lessor, to receive an assignment of the leasehold interest, with the right to sublease, upon Franchisee<>[]s default under the lease or termination or expiration of the Franchise Agreement;

<10.4.5>[10.4.5]The landlord shall enter into the Contingent Assignment of Lease Document.

~~<10.4.6>~~[10.4.6]The use of the premises shall be restricted solely to the operation of the Franchised Business;

[10.4.7 Franchisee shall be prohibited from subleasing or assigning all or any part of its occupancy rights or extending the term of or renewing the lease, without Franchisor~~<>~~[]s prior written consent;

[10.4.8 The lessor shall provide to Franchisor any and all notices of default under Franchisee~~<>~~[]s lease; and

[10.4.9 Franchisor shall have the right to enter the premises to make any modification necessary to protect Franchisor~~<>~~[]s Proprietary Marks and the System, or to cure any default under the Franchise Agreement or under the lease. Upon termination or expiration of the Franchise Agreement, Franchisor may make such~~<reasonable>~~ modifications or alterations to the interior and exterior of the Unit premises as Franchisor may deem necessary to prevent confusion, mistake, or deception if the premises are thereafter used by Franchisee or others.

10.5 Franchisee hereby acknowledges that complete and detailed uniformity among Smoothie King® Units under varying conditions may be inadvisable, impractical or impossible and accordingly agrees that Franchisor, at its sole discretion, may modify or vary aspects of the System with respect to any franchisee or group of franchisees based on (by way of example and not limitation) local site conditions, sales potential, demographics, competition, local business practices, or any other conditions or circumstances that Franchisor ~~<deems a reasonable basis for such variances>~~ **[determines]**. Franchisee further agrees that Franchisor shall have no obligation to disclose or offer the same or similar variances to Franchisee.

ARTICLE XI. ACCOUNTING AND RECORDKEEPING

11.1 Franchisee shall maintain during the term of this Agreement, and shall preserve for at least three (3) years after the dates of their preparation, full, complete, and accurate books, records, and accounts ~~<prepared in accordance with generally accepted accounting principles and>~~ **[relating to the Franchised Business (the "Records"),]** in the form and manner ~~<prescribed by>~~ Franchisor **[directs]** in the Manuals or otherwise in writing from time to time. **The Records will include the following: (i) daily cash reports; (ii) cash receipts journal and general ledger; (iii) cash disbursements journal and weekly payroll register; (iv) monthly bank statements and daily deposit slips and canceled checks; (v) all tax returns of the Franchised Business and each of Franchisee's shareholders (or members or partners, as applicable); (vi) suppliers' invoices (paid and unpaid); (vii) dated cash register tapes (detailed and summary); (viii) semi-annual balance sheets and monthly profit and loss statements; (ix) weekly inventories; (x) records of promotion and coupon redemption; and (xi) such other records and information as Franchisor periodically may request. Franchisee shall be permitted to preserve Records and submit reports electronically, consistent with Franchisor's requirements. During the term of the Agreement, Franchisee shall preserve and make available to Franchisor all Records for no less than the current fiscal year and the three (3) immediate past fiscal years.**

< 11.2 During the period commencing on the Effective Date and ending on the first anniversary of the Unit opening date, Franchisee will use, at its expense, Franchisor's designated independent certified public accountant in preparing and submitting information required by this Article XI. Following the initial twelve (12) month period of the term of this Agreement, Franchisor reserves the right to review or require submission of financial statements prepared, at Franchisee's expense, by an independent certified public accountant acceptable to Franchisor.

11.3 Franchisee shall submit to Franchisor, <-> within six (6) days after the end of each month during the term of this Agreement beginning after the opening of the Unit, a remittance report, in the form prescribed by Franchisor, accurately reflecting all <-> Gross Sales during the preceding reporting period, together with such other data or information as Franchisor may require. Franchisor ~~<periodically shall determine in writing the applicable reporting period for purposes of this Section 11.2 and Articles III (Fees and Payments) and XII (Advertising, Promotion and Marketing), provided the length of such reporting period shall not be less than one (1) week no more than one month>~~ [will have the right, upon sixty (60) days written notice, to require Franchisee to submit all applicable monthly reports on a weekly basis. In such event, Franchisor also will have the right to require Franchisee to pay all monthly fees due under Article III and Section 12.1 on a weekly basis]. If Franchisee fails to timely submit any such required monthly remittance reports, Franchisee will pay Franchisor a late fee as further described in Section 3.7 above for each occurrence in addition to all other applicable charges or obligations.

11.4 Within ninety (90) days after the end of each fiscal year of Franchisee during the term of this Agreement, Franchisee, at its expense, shall submit to Franchisor a financial statement consisting of a profit and loss statement showing the results of operations of the Franchised Business during said fiscal year, income tax returns, and a balance sheet as of the end of the fiscal year, prepared in accordance with generally accepted accounting principles. Each financial statement shall be accompanied by a sworn statement signed by Franchisee or by Franchisee <-> [?]s treasurer or chief financial officer attesting that the items contained therein are true and accurate, that they completely and fully describe and disclose the information sought in such statement, and that the signer has made diligent and careful efforts to ascertain the truth, accuracy and completeness of such information.

11.5 Franchisee shall also submit to Franchisor, for review or auditing, such other forms, reports, records, statements, information, and data as Franchisor may ~~<reasonably>~~ require, including monthly profit and loss statements, in the form and at the times and places ~~<reasonably>~~ specified by Franchisor, upon request and as specified from time to time in the Manuals or otherwise in writing. Franchisee agrees that all financial and business data submitted by Franchisee to Franchisor may be used by Franchisor as it deems appropriate. Franchisor reserves the right to charge a reasonable fee, as further described in the Manuals, the UFOC, or as otherwise in writing by Franchisor, if Franchisor must correct any of Franchisee's financial reports required under this Article XI that do not meet Franchisor's designated form.

11.6 Franchisor or its designated agents shall have the right ~~<at all reasonable times>~~ [during regular business hours] to examine and copy at Franchisor <-> [?]s expense, the books, records, and tax returns of Franchisee and the Franchised Business. Franchisee agrees to execute, at Franchisor <-> [?]s request, a power of attorney, I.R.S. Form 4506 or similar document to authorize Franchisor to obtain copies of Franchisee <-> [?]s previous years <-> [?] tax filings. Franchisor shall also have the right, at any time, to have an independent audit made of the books of the Franchised Business. If the requested documentation cannot be provided during the audit, Smoothie King, in its sole discretion, may cause its independent auditors to use alternate testing methods to determine if any variance exists. If an examination or audit should reveal that any Gross Sales have been understated in any report or alternate test used to Franchisor, then Franchisee shall pay Franchisor the continuing operating and advertising fees due on such understated Gross Sales immediately upon demand, together with interest at the rate provided in Section 3.7 above. In addition, if an examination or audit reveals that Gross Sales of Franchisee were understated by two percent (2%) or more during the period audited, Franchisee shall reimburse Franchisor for all costs and expenses in connection with the audit. Franchisee agrees to pay for all costs of any audit that occurred due to franchisee's failure to produce its books and records at the time of the audit if franchisee was notified in writing of the audit. The foregoing remedies shall be in addition to any other remedies available to Franchisor.

ARTICLE XII. ADVERTISING, PROMOTION, AND MARKETING

12.1 Franchisor's ~~advertising~~ **[promotional and marketing]** program is structured as follows: (i) a minimum of two percent (2%) of Franchisee's monthly Gross Sales is reserved by Franchisee for local advertising and marketing provided, however, a portion of this two percent (2%) may be allocated to a local advertising cooperative as the cooperative may be established (as described below), (ii) an additional amount of up to three percent (3%), as designated by Franchisor from time to time, shall be contributed to a system ~~advertising~~ **[promotional and marketing]** fund to develop advertising, **[promotional]** and marketing programs for the benefit of all franchisees, and (iii) an additional amount of up to two percent (2%), as designated by Franchisor from time to time, shall be contributed to a "National Fund" and/or a "Regional Fund" as described below. The maximum Franchisee may be required to contribute or spend toward ~~advertising~~ **[promotional and marketing]** purposes is seven percent (7%) of its monthly Gross Sales. Franchisee shall specifically contribute or expend for advertising, promotion, and marketing purposes a percentage of its monthly Gross Sales, allocated as follows:

[12.1.1 If a national ~~advertising~~ **[promotional and marketing]** fund (~~"~~**[**"National Fund~~"~~**]**) is established at any time or from time to time under the System, Franchisee shall contribute an amount designated by Franchisor, but not to exceed ~~<->~~ one percent (1%) of monthly Gross Sales, to the National Fund.

[12.1.2 If both a National Fund and a regional ~~advertising~~ **[promotional and marketing]** fund (~~"~~**[**"Regional Fund~~"~~**]**) for the region in which the Franchised Business is located are established, Franchisee shall contribute such amounts as Franchisor may designate from time to time to each fund, but not to exceed a total of two percent (2%) of monthly Gross Sales for both.

~~<12.1.3>~~ **[12.1.3]** In addition to the amounts described above, Franchisee shall contribute an amount designated by Franchisor, but not to exceed ~~<->~~ three percent (3%) of its monthly Gross Sales, to a system ~~advertising~~ **[promotional and marketing]** fund (~~"~~**[**"System Fund~~"~~**]**) to develop advertising and marketing programs for the benefit of all franchisees.

12.2 Franchisee agrees that Franchisor shall have the right, in its sole discretion, to establish a System Fund, National Fund and any number of Regional Funds (collectively, the ~~"~~**[**"Funds~~"~~**]**), to be maintained and administered by Franchisor and/or its designees as follows:

[12.2.1 Franchisor shall direct all advertising, promotional, and marketing programs with sole discretion over the concepts, materials, and media used in such programs and the placement and allocation thereof. Franchisee agrees and acknowledges that the Funds are intended to maximize general public recognition and acceptance of the Proprietary Marks for the benefit of all Smoothie King® franchises, and that Franchisor and its designees are not obligated in administering the Funds to make expenditures for Franchisee which are equivalent or proportionate to Franchisee's contribution, or to ensure that any particular franchisee benefits directly or pro rata from expenditures by the Funds.

[12.2.2 The Funds, all contributions thereto, and any earnings thereon shall be used exclusively to pay all expenses Franchisor incurs in connection with the general promotion of the Proprietary Marks and the System, including the cost of maintaining, administering, researching, directing, and preparing advertising, promotional and marketing activities. More specifically, such activities may include, among other things, the cost of creating, producing, placing, and conducting television, radio, and print advertising campaigns; creating, producing, and

distributing promotional materials for use on and off the Unit premises, including, but not limited to, signs and posters, direct mail, promotional brochures, and outdoor billboard advertising; marketing surveys and research; public relations activities; and employing advertising agencies and consultants to assist therein.

[12.2.3 Franchisee shall contribute to the System Fund, National Fund and any Regional Fund for Franchisee's region by separate checks made payable to each Fund or by preauthorized electronic funds transfer. All sums paid into the Funds shall be kept in accounts separate from the other monies of Franchisor and shall not be used to defray any of Franchisor's general expenses, except for such reasonable administrative costs and overhead as Franchisor may incur in activities ~~reasonably~~ related to the administration and direction of the Funds and ~~advertising~~ **[promotional and marketing]** programs for franchisees and the System. The Funds and their earnings shall not otherwise inure to the benefit of Franchisor. Franchisor or its designees shall maintain separate bookkeeping accounts for the Funds.

[12.2.4 ~~It is anticipated~~ **[Franchisor anticipates]** that all contributions to and earnings of the Funds will be expended for the purposes described above during the taxable year in which the contributions and earnings are received. If, however, excess amounts remain in any Fund at the end of such taxable year, all expenditures in the following taxable year(s) shall be made first out of accumulated earnings from previous years, next out of earnings in the current year, and finally from contributions.

[12.2.5 A statement of the operations of each Fund as shown on its books will be prepared annually by an independent certified public accountant selected by Franchisor and will be made available to Franchisee upon written request.

[12.2.6 Although each Fund is intended to be of perpetual duration, Franchisor maintains the right to terminate any Fund. No Fund shall be terminated, however, until all monies in the Fund have been expended for the purposes described above or returned to contributors on a prorated basis of their contributions.

12.3 Franchisee agrees that Franchisor shall have the right, in its discretion, to designate any geographical area (whose borders may be changed from time to time) for the purposes of establishing a Cooperative. If a Cooperative has been established for the local area in which the Unit is located at the time Franchisee commences operations (or otherwise becomes subject to paying advertising fees), Franchisee shall immediately become a member of such Cooperative and shall execute an advertising cooperative agreement in a form satisfactory to Franchisor. If a Cooperative in Franchisee's local area is established or reestablished at any later time, Franchisee shall become a member of such Cooperative by executing the appropriate advertising cooperative agreement no later than thirty (30) days after the date on which the Cooperative commences. In no event shall Franchisee be required to be a member of more than one Cooperative at one time. Franchisor reserves the right to establish the bylaws and other rules under which each Cooperative will operate. The following requirements shall apply to each Cooperative:

[12.3.1 Each Cooperative shall be organized and governed in a form and manner, and shall commence on a date, approved in advance by Franchisor in writing.

(a) Each Cooperative shall be organized for the exclusive purpose of placing advertising **[conducting marketing campaigns]** and administering local advertising programs in accordance with plans previously approved by Franchisor. []

(b) No advertising or promotional plans or materials may be used by a Cooperative or furnished to its members without the prior approval of Franchisor. All such plans and materials shall be submitted to Franchisor in accordance with the procedure set forth in Section 12.4.

(c) The members of a Cooperative may agree to contribute amounts in excess of the minimum designated by Franchisor, and new franchisees joining the Cooperative shall be bound by such prior agreements.

(d) Each Cooperative shall collect, disburse, and account for monies received in accordance with written requirements and standards established by Franchisor.

[12.3.2 Franchisor, in its sole discretion, may grant to any Smoothie King® franchisee an exemption for any length of time from the requirement of membership in a Cooperative, upon written request of such franchisee stating reasons supporting such exemption. Franchisor's decision concerning such request shall be final. Any exemption from Cooperative membership will be subject to the condition that the franchisee expends on approved local advertising any amounts that would have otherwise been paid into the Cooperative.

12.4 In addition to the National Fund, Regional Fund and System Fund described in Section 12.1 above, Franchisee will spend at least two percent (2%) of its monthly Gross Sales for the Franchised Business during each four (4) week period on advertising and promotional activities in Franchisee's local geographic area. Franchisee shall provide written confirmation of such expenditures as Franchisor may reasonably require. All advertising, promotional, and marketing activities conducted by Franchisee in its local market area shall be subject to the prior approval of Franchisor, which approval shall not be unreasonably withheld. Funds used to primarily promote or advertise catering activities will not qualify as a local advertising or marketing expense for purposes of satisfying Franchisee's obligations under this Section 12.4. Franchisee shall submit to Franchisor (by personal delivery, facsimile or certified mail, return receipt requested) for its prior approval (except with respect to prices to be charged) all local advertising, promotional and marketing plans and samples of all local advertising materials not prepared or previously approved by Franchisor or its designated agents. If written disapproval thereof is not received by Franchisee within fifteen (15) business days after the date of receipt by Franchisor, such plans and materials shall be deemed approved. If any plans or materials previously approved by Franchisor are later disapproved, Franchisee shall discontinue their use promptly upon notice from Franchisor.

12.5 Franchisee shall have the right to offer and sell its products and services at any prices Franchisee may determine and shall in no way be bound by any price which may be recommended or suggested by Franchisor. Subject to the foregoing, Franchisee agrees to honor coupons and price promotions issued or authorized by Franchisor unless Franchisee has posted a conspicuous sign on its premises and includes in its local advertising a statement that Franchisee will not honor such coupons or price promotions.

12.6 During a four-week period before and/or within three (3) months after the opening of the Unit, Franchisee shall conduct grand opening advertising, marketing and promotion using materials and media previously approved by Franchisor for such use. Franchisee shall be required to expend on grand opening advertising, marketing and promotion an amount to be determined in consultation with Franchisor. The required expenditure shall be not less than One Thousand Dollars (~~\$1,000.00~~ [1,000]).

ARTICLE XIII. INSURANCE

13.1 Franchisee shall acquire and maintain, at its own expense and throughout the term of this Agreement, insurance with an insurance company with an A.M. Best<>[?]s rating of <">["A<">[""] and an A.M. Best<>[?]s Class Rating of XIV. Such insurance shall:

[13.1.1 Be acceptable to Franchisor;

[13.1.2 Name the Indemnities identified in Article XX as "Additionally Insured" and provide that the liability coverage afforded applies separately to each insured against which a claim may be brought as though a separate policy had been issued to each insured;

[13.1.3 Provide coverages as specified by Franchisor from time to time in the Manuals or otherwise in writing, including property insurance, public liability insurance to include products liability and personal injury, non-owned automobile, worker<>[?]s compensation, unemployment compensation, disability, social security and other insurance coverages as required from time to time by any applicable law;

[13.1.4 Contain no provision that in any way limits or reduces coverage for Franchisee in the event of a claim by any one or more of the Indemnities;

[13.1.5 Extend to and provide indemnity for all obligations assumed by Franchisee hereunder and all other items for which Franchisee is required to indemnify Franchisor under the provisions of this Agreement;

[13.1.6 Be in amounts and forms and with a carrier or carriers satisfactory to Franchisor; but in no event in an amount less than One Million Dollars per occurrence, One Million Dollars aggregate; and

[13.1.7 Provide, by endorsement, that Franchisor is entitled to receive at least thirty (30) days prior written notice of any intent to reduce policy limits, restrict coverage, cancel or otherwise alter or amend said policy.

13.2 Franchisee shall not reduce the policy limits, restrict coverage, cancel or otherwise alter or amend said policy without Franchisor<>[?]s prior written consent.

13.3 As proof of such insurance, a certificate of insurance shall be submitted by Franchisee for Franchisor<>[?]s approval prior to Franchisee<>[?]s commencement of operations under this Agreement and upon each renewal or change of Franchisee<>[?]s insurance policy. Upon request, Franchisee shall deliver to Franchisor or its agent a complete copy of Franchisee<>[?]s then-prevailing policy of insurance at any time during or after the term of this Agreement.

<- >13.4 In the event of a claim by any one or more of the Indemnities against Franchisee, Franchisee shall, on request of Franchisor, assign to Franchisor any and all rights which Franchisee then has or thereafter may have with respect to such claim against the insurer(s) providing coverages described in this Article XIII.

ARTICLE XIV. DEFAULT AND TERMINATION

14.1 Franchisee shall be in default and this Agreement and all rights granted to Franchisee hereunder shall terminate immediately upon written notice from Franchisor if any of the following occur:

[14.1.1 If Franchisee becomes insolvent or makes a general assignment for the benefit of creditors; or if a petition in bankruptcy is filed by Franchisee or filed against Franchisee and not opposed by Franchisee;

[14.1.2 If Franchisee (or if Franchisee is a corporation, partnership or limited liability company, any ~~principal~~ **[officer, director, manager, shareholder/member or partner]** of Franchisee) is convicted of a felony, a fraud, a crime involving moral turpitude, or ~~found liable in a civil claim for fraud or any unfair or deceptive act or practice~~ **[any other crime or offense]** that Franchisor believes ~~is reasonably likely to have an adverse effect on~~ **[will injure]** the System, ~~the~~ Proprietary Marks ~~;~~ **[or]** the goodwill associated therewith, or **[if]** Franchisor ~~has an~~ interest therein **[has proof that Franchisee has committed such a felony, crime, or offense];**

[14.1.3 ~~– If a threat or danger to the public health or safety results from the construction, maintenance, or operation of the Franchised Business;~~ <14.1.4> If Franchisee (or if Franchisee is a corporation, partnership or limited liability company, any principal of Franchisee) fails to comply with the in-term covenants in Article XVII;

<14.1.5> **[14.1.4]** If contrary to the terms of Article VI or VII, Franchisee discloses, divulges or uses for any purpose not authorized herein the contents of the Manuals, any proprietary product recipes or any other confidential information provided to Franchisee by Franchisor;

<14.1.6> **[14.1.5]** If Franchisee knowingly maintains false books or records or knowingly submits any false reports (including Section 11.3 reports) to Franchisor, if there is at least a two percent (2%) variance in reporting discovered as per Section 11.5, or if Franchisee makes any false statements to Franchisor in connection with its application for the franchise;

<14.1.7> **[14.1.6]** If Franchisee voluntarily or otherwise “abandons” (as defined below) the Franchised Business. The term “abandon” means Franchisee’s failure to operate the Franchised Business during regular business hours for a period of ten (10) consecutive days without Franchisor’s prior written consent; provided, however, if such failure results from the governmental exercise of the power of eminent domain or if, through no fault of Franchisee, the premises are damaged or destroyed, then Franchisee shall be entitled, within thirty (30) days after such event, to apply for Franchisor’s consent to relocate or reconstruct the premises, which consent shall not be unreasonably withheld;

<14.1.8> **[14.1.7]** If Franchisee is involved in any act or conduct which materially impairs **[or otherwise is prejudicial to]** the goodwill associated with the name “SMOOTHIE KING®” or any of the Proprietary Marks or the System;

<14.1.9> **[14.1.8]** If Franchisee (or if franchisee is a corporation, partnership or limited liability company, any principal of Franchisee) violates any immigration laws or regulations or otherwise loses his/her right under any government immigration classification to reside in the United States, or to own, operate or have any interest in the Franchised Business;

<14.1.10> **[14.1.9]** If Franchisee commits any breach the nature of which makes it not curable; or

<14.1.11> **[14.1.10]** If Franchisee “repeatedly” is in default under Sections <14.2 or> **[14.2,] 14.3 [or 14.4]** for failure substantially to comply with any of the requirements imposed under this Agreement, whether or not cured after notice. The term <“repeatedly”> **[“]** is defined as three (3) or more times during any three (3) year period.

~~14.2~~ [Franchisee shall be in default, and Franchisor may at its option terminate this Agreement, effective twenty-four (24) hours after receipt of written Notice of Termination from Franchisor, if any of the following occur, and Franchisee does not cure such default within the twenty-four (24) hour period (or such longer period as applicable law may require):]

[14.2.1 If Franchisee refuses to permit Franchisor or its agents entry to inspect the Franchised Business; or]

[14.2.2 If Franchisee violates any law, regulation, order or System standard or specification relating to health, sanitation or safety.]

[14.3]Franchisee shall be in default, and Franchisor may at its option terminate this Agreement, effective ten (10) days after receipt of written Notice of Termination from Franchisor, if any of the following occur, and Franchisee does not cure such default within the ten (10) day period (or such longer period as applicable law may require):

~~<14.2.1>~~ [14.3.1] If Franchisee fails, refuses, or neglects promptly to pay when due any operating or advertising fees, or any other amounts owing to Franchisor, its subsidiaries, affiliates, or divisions; or

~~<14.2.2>~~ [14.3.2] If Franchisee fails to observe or maintain any of the standards, recipes, ingredients, or procedures prescribed by Franchisor in this Agreement, the Manuals, or otherwise in writing.

~~<14.3>~~ [14.4] Except as provided in Sections ~~<14.1>~~ [14.1, 14.2] and ~~<14.2>~~ [14.3] Franchisee will be in default, and Franchisor may at its option terminate this Agreement, effective thirty (30) days after receipt of written Notice of Termination from Franchisor, if any of the following occur, and Franchisee does not cure such default within the thirty (30) day cure period (or such longer cure period as applicable law may require) :

~~<14.3.1>~~ [14.4.1] If Franchisee fails to submit when due any reports, financial information, or other information or documents required by Franchisor under this Agreement;

~~<14.3.2>~~ [14.4.2] If Franchisee fails to obtain Franchisor~~<^>~~ [^]s prior approval or consent as required under this Agreement;

~~<14.3.3>~~ [14.4.3] If Franchisee fails to obtain execution of the agreements and covenants required under Sections 6.1.6 and 17.9;

~~<14.3.4>~~ [14.4.4] If Franchisee or any partner, member or shareholder in Franchisee purports to transfer any rights or obligations under this Agreement or any interest in Franchisee to a third party without Franchisor~~<^>~~ [^]s prior written consent when Article XV requires such consent;

~~<14.3.5>~~ [14.4.5] If Franchisee or its designee fails to attend and complete, to Franchisor~~<^>~~ [^]s satisfaction, the initial franchise management training program, regional training programs, or any other training programs required by Franchisor, as provided in Section 9.2;

~~<14.3.6>~~ [14.4.6] If Franchisee fails to obtain financing within six (6) months or open for business within one (1) year from the Effective Date of this Agreement;

<14.3.7>[14.4.7] If Franchisee otherwise fails substantially to comply with any of its obligations under this Agreement or to carry out the terms hereof in good faith.

<14.4>[14.5] If any party fails to perform any obligation under this Agreement due to a cause beyond the control of and without the negligence of such party, such failure will not be deemed a breach of this Agreement, provided such party uses reasonable best efforts to perform such obligations as soon as possible under the circumstances. Such causes include strikes, wars, riots, civil commotion, acts of God and acts of government, except as may be specifically provided for elsewhere in this Agreement.

<14.5>[14.6] If the provisions of this Article XIV are inconsistent with applicable law, the applicable law shall control.

ARTICLE XV. TRANSFER OF INTEREST

15.1 Franchisee understands and acknowledges that the rights and duties of Franchisee set forth in this Agreement are personal to Franchisee and the Franchisor has granted this franchise in reliance on the business skill, financial capacity, and personal character of Franchisee and Franchisee<>[']s principals. Accordingly, Franchisee agrees that Franchisor<>[']s express prior written consent shall be a necessary condition precedent to the sale, assignment, transfer, conveyance, gift, pledge, mortgage, encumbrance or hypothecation of any of the following:

[]15.1.1 Any direct or indirect interest in this Agreement or the franchise and license granted hereunder;

[]15.1.2 Any direct or indirect interest in Franchisee;

[]15.1.3 All or substantially all of the assets of the Franchised business.

15.2 If Franchisee is an individual or partnership, Franchisee shall be entitled to transfer the franchise and Franchisee<>[']s interest in this Agreement to a corporation, limited liability company or limited partnership formed for convenience of ownership. Franchisor will charge no transfer fee for the first such transfer; however, Franchisor<>[']s consent to any such transfer shall be subject to the following conditions:

[]15.2.1 Franchisee, or one or more trusts of which Franchisee is trustee, shall be the owner of at least a majority of the total voting power of the corporation or limited liability company or shall be a general partner of the limited partnership owning at least a majority of the total voting power of the general partners of the limited partnership;

[]15.2.2 Franchisee shall comply with the terms and conditions set forth in Article V.

15.3 Within six (6) months after the death or mental incapacity of Franchisee (or, if Franchisee is a corporation, partnership or limited liability company, a principal of Franchisee), the executor, administrator, or personal representative of such person shall transfer that person<>[']s interest, without having to obtain approval of Franchisor, to one or more heirs or beneficiaries of such person who agree in writing to be bound by the terms and conditions of this Agreement, or to a third party approved by Franchisor. All such transfers shall be subject to the conditions set forth in Sections 15.5.1 through 15.5.4 and 15.7 but shall not be subject to the conditions of Section 15.6.

15.4 Any person (<="["Seller<=">"]>) who receives and desires to accept a bona fide offer from a third party to purchase fifty percent (50%) or more of Seller<>[']s interest in (a)

Franchisee<>[]s voting securities or voting interests, if Franchisee is a corporation, partnership or limited liability company, or (b) this Agreement or, (c) the franchise, shall notify Franchisor in writing of each such offer. Franchisor shall have the right and option, exercisable within thirty (30) days after receipt of such written notice, to send written notice to Seller that Franchisor intends to purchase Seller<>[]s interest on the same terms and conditions offered by the third party. To enable Franchisor to determine whether it will exercise its option, Franchisee and Seller shall provide such information and documentation, including financial statements, as Franchisor may require. If the consideration, terms, or conditions offered by a third party are such that Franchisor may not reasonably be required to furnish the same, Franchisor may purchase the interest proposed to be sold for the <reasonable>equivalent in cash. If the parties cannot agree within a reasonable time on the cash consideration, Franchisor and Franchisee may appoint an independent appraiser, whose determination shall be binding, and the costs of such appraisal shall be divided equally between Franchisor and Franchisee. If Franchisee and Franchisor cannot agree on an appraiser, each party shall designate an appraiser and both appraisers will agree on and designate a third independent appraiser to make the determination of fair market value, whose determination shall be binding. The appraiser may recognize goodwill or other intangibles associated with the Franchised Business except any goodwill or value attributed to the Proprietary Marks. If Franchisor does not exercise its option as provided hereunder, Seller may sell the interest, subject to Franchisor<>[]s consent as otherwise required under this Article XV. Any material change in the terms of any offer prior to closing shall constitute a new offer subject to the same rights of first refusal by Franchisor as in the case of an initial offer. This Section 15.4 shall apply to any transfer if such transfer, alone or together with other previous, simultaneous or proposed transfers would have the effect of transferring financial or management control of Franchisee.

15.5 Franchisor will not unreasonably withhold its consent to a transfer of any interest in Franchisee, this Agreement, or in the franchise; provided, however, that Franchisor may, in its sole discretion, require any or all of the following as conditions of its approval:

[] 15.5.1 All of Franchisee<>[]s accrued monetary obligations and all other outstanding obligations to Franchisor, its subsidiaries, affiliates and divisions shall be satisfied;

[] 15.5.2 Franchisee shall have complied with all of the terms and provisions of this Agreement, any amendment hereof or successor hereto, the Manuals, and all other agreements between Franchisee and Franchisor, its subsidiaries, affiliates or divisions, and, at the time of transfer, shall not be in default thereof;

[] 15.5.3 If the obligations of Franchisee were guaranteed by the transferor(s), the transferee shall guarantee the performance of all such obligations in writing in a form satisfactory to Franchisor<, and Franchisor will not unreasonably withhold its consent to a release of the transferor(s) from the guarantee>;

[] 15.5.4 Franchisee, the transferor(s) and Franchisor shall execute a mutual release under seal, in a form satisfactory to Franchisor, of any and all claims against each other and their subsidiaries, affiliates, and divisions, and their respective officers, directors, shareholders, employees, and agents; provided that this release shall not affect claims or obligations relating to confidentiality and covenants not to compete; and

[] 15.5.5 Each Franchisee and the proposed transferee shall have complied with the obligations stated in Sections 6.1.6 and 17.9 herein, and will, upon Franchisor's request, make available signed copies of each required document.

15.6 If a transfer, alone or together with other previous, simultaneous, or proposed transfers, would have the effect of transferring financial or management control of Franchisee or the franchise,

Franchisor may require, in its sole discretion and in addition to the conditions provided in Section 15.5, any or all of the following as conditions of it~~<>~~[?]'s approval:

[]15.6.1 The transferee (or, if the transferee is a corporation, partnership or limited liability company, the principals of the transferee) shall demonstrate to Franchisor~~<>~~[?]s satisfaction that they meet Franchisor~~<>~~[?]s then-current standards for new franchisees under the System; possess good moral character, business reputation, and credit rating; have the aptitude and ability to conduct the Franchised Business (as may be evidenced by prior related business experience or otherwise); have any interests in a competitive business; and have adequate financial resources and capital to operate the Franchised Business;

[]15.6.2 The transferee shall execute, for a term ending on the expiration date of this Agreement, the standard form of franchise agreement then being offered by Franchisor and such other ancillary agreements (including guaranty agreements provided under Section 5.4) as Franchisor may require, which agreements shall supersede this Agreement in all respects and the terms of which agreements may ~~<reasonably>~~differ from the terms of this Agreement, including, without limitation, higher operating fees and advertising contributions; provided, however, that no initial franchise fee shall be required;

[]15.6.3 If requested by Franchisor, the transferee shall make or commit to provide for in a manner satisfactory to Franchisor, such renovation and modernization of the Unit premises as Franchisor may ~~<reasonably>~~require to reflect the then-current standards and image of the System;

[]15.6.4 The transferee shall complete, and/or cause its employees to complete, to Franchisor~~<>~~[?]s satisfaction, such initial and refresher training as Franchisor may require;

[]15.6.5 Franchisee and the transferor(s) shall remain liable for all obligations to Franchisor, its subsidiaries, affiliates, and divisions, in connection with the Franchised Business prior to the effective date of the transfer and shall execute any and all instruments reasonably required by Franchisor to evidence such liability.

15.7 Franchisee or the transferee shall pay to Franchisor a nonrefundable transfer fee to compensate Franchisor in connection with each proposed transfer subject to Sections 15.5 and 15.6, as follows:

[]15.7.1 for the transfer of a controlling interest to (i) a person whose full-time occupation during the two (2) years immediately preceding the proposed transfer has been serving as the manager of the Franchised Business, or (ii) a current Smoothie King franchisee who has satisfied all obligations and substantially complied with all material requirements under its agreements with Franchisor, its subsidiaries, affiliates, and divisions up to and including the time of the proposed transfer: a fee that is the lesser of Seven Thousand Five Hundred Dollars (\$7,500.00) or thirty percent (30%) of the then-current initial franchise fee if the transfer does not involve a relocation, or a fee that is the lesser of Ten Thousand Dollars (\$10,000.00) or forty percent (40%) of the then-current initial franchise fee if the transfer will require a new location for the Unit;

[]15.7.2 for any other transfer of a controlling interest to a person other than those specified in Section 15.7.1, a fee that is the lesser of Twelve Thousand Five Hundred Dollars (\$12,500.00) or fifty percent (50%) of the then-current initial franchise fee if the transfer does not involve a relocation, or a fee that is the lesser of Eighteen Thousand Seven Hundred Fifty

Dollars (\$18,750.00) or seventy five percent (75%) of the then-current initial franchise fee if the transfer will require a new location for the Unit.

15.8 If securities in Franchisee are offered to the public, by private offering or otherwise, all materials required for such offering by federal or state law shall be submitted to Franchisor for review prior to their use or filing with any government agency, and any materials to be used in any offering exempt from federal or state securities laws shall be submitted to review prior to their use. No such offering shall imply (by use of the Proprietary Marks or otherwise) that Franchisor is participating in underwriting, issuing or offering securities of Franchisee or Franchisor. Review by Franchisor of any offering shall be limited solely to the subject of the relationship between Franchisee and Franchisor. Franchisee and the other participants in the offering shall fully indemnify Franchisor in connection with the offering. For each proposed offering, Franchisee shall pay Franchisor a nonrefundable fee of Five Thousand Dollars (\$5,000.00) to compensate Franchisor for reviewing the proposed offering. Franchisee shall give Franchisor written notice at least thirty (30) business days prior to the date of commencement of any offering or other transaction subject to this Section 15.8.

15.9 Neither Franchisor's consent to any proposed transfer nor Franchisor's failure to exercise its options to purchase any interest of a seller shall be deemed to constitute a waiver of any claims Franchisor may have against any transferor, any right to demand exact compliance with any terms of this Agreement by any transferor or transferee, any future rights or options of Franchisor, or any provision of this Agreement.

15.10 This agreement shall inure to the benefit of Franchisor, its successors, and assigns, and Franchisor shall have the right to transfer and assign all or any part of its interest herein, including its rights under Section 15.4, to any person or legal entity.

15.11 Except as specifically provided in this Article XV, any purported assignment or transfer, by operation of law or otherwise, not having the express prior written consent of Franchisor shall be null and void and shall constitute a material breach of this Agreement. Franchisor's prior written consent shall not be required for transfer of an interest in a publicly held corporation. As used in this Agreement, the term "publicly held corporation" means a corporation registered under the Securities Exchange Act of 1934. Franchisee acknowledges and agrees that each condition required to be met by a proposed transferee hereunder is necessary to assure the transferee's full performance of its obligations as Franchisee hereunder.

15.12 Notwithstanding anything to the contrary in this Agreement, if Franchisee is a corporation, partnership or limited liability company, any one or more principals of Franchisee may sell, assign, transfer, convey, give, pledge, mortgage, encumber, or hypothecate any direct or indirect interest in Franchisee, this Agreement or the rights granted hereunder; provided that such principal or principals retain, in the aggregate, in excess of fifty percent (50%) of the total voting power of Franchisee, subject only to the following conditions:

[15.12.1 Franchisee shall give Franchisor reasonable prior written notice of the proposed transfer along with such background information on the proposed transferee that Franchisor may reasonably request so that Franchisor may investigate the personal character of the proposed transferee; determine whether the proposed transferee has any interests in a competitive business; or determine whether there is any other factor which may indicate that the proposed transfer has the potential to adversely affect the System;

[15.12.2 Franchisor will not unreasonably withhold its consent to such transfer and will provide Franchisee with written approval or disapproval of the transfer as soon as

reasonably possible. If written disapproval is not received by Franchisee within fifteen (15) business days after the date of receipt by Franchisor, such transfer shall be deemed approved;

[15.12.3 Franchisee shall obtain execution of the agreements and covenants of the transferee required under Sections 6.1.6 and 17.9, if requested by Franchisor.

ARTICLE XVI. OBLIGATIONS UPON TERMINATION OR EXPIRATION

16.1 Upon the expiration of this Agreement, or its termination for any reason, all of Franchisee's rights hereunder shall terminate, and Franchisee shall cease all operation of the Franchised Business and all use of the Proprietary Marks and System. In particular, Franchisee shall:

[16.1.1 Immediately cease to operate the Franchised Business and at no time thereafter represent itself, directly or indirectly, as a current or former franchisee of Franchisor.

[16.1.2 Immediately and permanently cease to use, in any manner whatsoever, any confidential recipes, formulas, Smoothie King® proprietary products and other ingredients, guest and supplier lists, product specifications lists, methods, procedures, or techniques associated with the System, the name and mark <"SMOOTHIE KING®>" and all other Proprietary Marks and distinctive names, symbols, logos, insignia, slogans, graphics, and devices associated with the System, including all signs, advertising materials, displays, stationery, forms, and any other articles that display any of the Proprietary Marks. Franchisee shall also immediately discontinue any telephone listing under the Proprietary Marks upon request of Franchisor. Franchisee shall immediately assign to Franchisor any rights it has in any telephone number from which Franchisee has done business under the Proprietary Marks or discontinue the use of the number upon request of Franchisor.

[16.1.3 Take such action as may be necessary to cancel any assumed name or equivalent registration that contains the name <"SMOOTHIE KING®>" or any of the other Proprietary Marks or any other name or mark used by Franchisor, and submit to Franchisor proof of compliance with this obligation within thirty (30) days after termination or expiration of this Agreement.

[16.1.4 Immediately deliver to Franchisor or its designee the Manuals and all other materials relating to the operation of the Franchised Business, including, without limitation, plans, specifications, designs, records, data, samples, models, programs, training tapes, handbooks, drawings, records, recipe books, supplier lists, guest lists, product specification lists, files, invoices, instructions, correspondence, and all copies thereof, all of which are acknowledged to be Franchisor's property, and retain no copy or record of any of the foregoing except Franchisee's copy of this Agreement and such documents as Franchisee reasonably needs for compliance with any provision of law.

[16.1.5 Promptly pay all sums owing to Franchisor, its subsidiaries, affiliates, and divisions.

[16.1.6 Comply with all requirements under this Agreement which expressly or by reasonable implication apply to Franchisee's conduct after termination or expiration of this Agreement.

16.2 At Franchisor's option upon termination or expiration of this Agreement, Franchisee shall assign to Franchisor or its designee any interest which Franchisee has in any lease or sublease for the Unit premises. If Franchisor does not require the assignment of such lease or sublease, Franchisee

shall make such modifications or alterations to the interior and exterior of the Unit premises (including, without limitation, repainting and changing the telephone number) as Franchisor may deem necessary to prevent confusion, mistake, or deception if the premises are thereafter used by Franchisee or others. If Franchisee fails or refuses to comply with the requirements of this Article XVI, Franchisor and its agents shall have the right to enter upon the premises where the Franchised Business was conducted to make or cause to be made such changes as may be required, at Franchisee's expense, which Franchisee agrees to pay upon demand. Franchisee agrees that such entry and action by Franchisor or its agents shall not constitute trespass or any other offense, and Franchisee shall indemnify Franchisor and its agents against any claims by others relating to such entry or action.

16.3 Within fifteen (15) days after the date of termination or expiration of this Agreement, Franchisor may arrange for an inventory, at Franchisor's cost, of all personal property, fixtures, equipment, supplies and inventory including Smoothie King® proprietary product and all other items located at the Unit or used in connection with the Franchised Business bearing the Proprietary Marks. Franchisor shall have the option, exercisable within thirty (30) days after termination or expiration, to purchase any or all such items from Franchisee at fair market value. If Franchisor assumes Franchisee's lease for the store premises, the leasehold improvements and goodwill or value attributable to Franchisee's business, except any goodwill or value attributed to the Proprietary Marks, shall be included in the purchase price and determination of fair market value. If the parties cannot agree on fair market value within a reasonable time, Franchisor and Franchisee shall designate an independent appraiser, whose determination shall be binding, and the costs of such appraisal shall be divided equally between Franchisor and Franchisee. If Franchisee and Franchisor cannot agree on an appraiser, each party shall designate an appraiser and both appraisers will agree on and designate a third independent appraiser to make the determination of fair market value, whose determination shall be binding.

16.4 Termination or expiration of this Agreement shall not affect the rights of Franchisee to operate other Smoothie King® Units in accordance with the terms of any other franchise agreements then in effect between Franchisor and Franchisee. Notwithstanding the foregoing, termination of this Agreement or any default hereunder may constitute a default under the terms of development agreements or other agreements, if any, between Franchisor and Franchisee. Termination or expiration of this Agreement shall not affect the right of Franchisor to conduct audits of the Franchised Business under Section 11.6.

ARTICLE XVII. COVENANTS NOT TO COMPETE

17.1 During the term of this Agreement and for a period of two (2) years after its termination or expiration, Franchisee covenants that Franchisee shall not, either directly or indirectly, for itself, or through, on behalf of, or in conjunction with any person, persons, or legal entity, divert or attempt to divert any business or guest of the Franchised Business or any other Smoothie King® franchisee to any competitor, by direct or indirect inducement or otherwise, or do or perform, directly or indirectly, any other act injurious or prejudicial to the goodwill associated with the Proprietary Marks and the System.

17.2 During the term of this Agreement and for a period of two (2) years after its termination or expiration, Franchisee covenants that Franchisee shall not, either directly or indirectly, employ or seek to employ any person who is at that time (or was within the previous six (6) months) employed by Franchisor or by any other Smoothie King® franchisee without the prior express permission of such employer, or otherwise directly or indirectly induce any such employee to leave his or her employment.

17.3 Franchisee specifically acknowledges that, pursuant to this Agreement, Franchisee will receive valuable specialized training and confidential information, including, without limitation, information concerning the recipes, formulas and other operational, sales, promotional, and marketing

methods and techniques of Franchisor and the System. Franchisee acknowledges that Franchisor has a right to be protected against the potential for unfair competition by Franchisee's use of Franchisor's training, assistance and confidential information in competition with Franchisor and, therefore, Franchisee covenants as follows:

[17.3.1 During the term of this Agreement, except as otherwise approved in writing by Franchisor, Franchisee shall not, directly or as an employee, agent, consultant, partner, officer, director or shareholder of any other person, firm, entity, partnership or corporation, own, operate, lease, franchise, conduct, engage in, be connected with, have any interest in, or assist any person or entity engaged in any business that distributes, markets or sells, at wholesale or retail, any nutritional drinks or general nutrition products or any other related business that is competitive with or similar to a Smoothie King® Unit (except pursuant to other franchise or development agreements between Franchisee and Franchisor).

[17.3.2 Franchisee shall not, for a period of two (2) years after this Agreement expires or is terminated or the date on which Franchisee ceases to conduct the business franchised under this Agreement, whichever is later, directly or as an employee, agent, consultant, partner, officer, director or shareholder of any other person, firm, entity, partnership or corporation, own, operate, lease, franchise, conduct, engage in, be connected with, have any interest in, or assist any person or entity engaged in any business that distributes, markets or sells, at wholesale or retail, any nutritional drinks or general nutrition products or any other related business that is competitive with or similar to a Smoothie King® Unit that is located at the Unit location or within a five (5) mile radius of the Unit or any other Smoothie King® Unit in existence or planned as of the time of termination or expiration of this Agreement.

17.4 Section 17.3 shall not apply to ownership by Franchisee of less than a five percent (5%) beneficial interest in the outstanding equity securities of any publicly held corporation, as defined in Section 15.11.

17.5 The parties agree that each of the foregoing covenants shall be construed as independent of every other covenant or provision of this Agreement. If all or any portion of a covenant in this Article XVII is held unreasonable or unenforceable by a court or agency having valid jurisdiction in an unappealed final decision to which Franchisor is a party, Franchisee expressly agrees to be bound by any lesser covenant subsumed within the terms of such covenant that imposes the maximum duty permitted by law, as if the resulting covenant were separately stated in and made a part of this Article XVII.

17.6 Franchisee understands and acknowledges that Franchisor shall have the right, in its sole discretion, to reduce the scope of any covenant set forth in this Article XVII, or any portion thereof, without Franchisee's consent, effective immediately upon receipt by Franchisee of written notice thereof; and Franchisee agrees to comply with any covenant as so reduced, which shall be fully enforceable notwithstanding the provisions of Section 23.2.

17.7 Franchisee expressly agrees that the existence of any claims it may have against Franchisor, whether or not arising from this Agreement, shall not constitute a defense to the enforcement by Franchisor of the covenants in this Article XVII.

17.8 Franchisee acknowledges that Franchisee's violation of the terms of this Article XVII would result in irreparable injury to Franchisor for which no adequate remedy at law may be available, and Franchisee accordingly consents to the issuance of an injunction prohibiting any conduct by Franchisee in violation of the terms of this Article XVII.

17.9 At Franchisor's request, Franchisee shall obtain and deliver executed covenants similar to those set forth in this Article XVII from any or all persons who have or may have an ownership interest in Franchisee or in the franchise or who receive or have access to training and other information under the System. Such covenants shall be in a form satisfactory to Franchisor, including, without limitation, specific identification of Franchisor as a third party beneficiary of such covenants with the independent right to enforce them.

ARTICLE XVIII. TAXES, PERMITS, INDEBTEDNESS

18.1 Franchisee shall promptly pay when due all taxes levied or assessed, including without limitation, withholding, unemployment and sales taxes, and all accounts and other indebtedness of every kind incurred by Franchisee in the conduct of the Franchised Business. Franchisee shall pay to Franchisor an amount equal to any sales tax, gross receipts tax, or similar tax (other than income tax, or similar tax) imposed on Franchisor with respect to any payments to Franchisor required under this Agreement, unless the tax is credited against income tax otherwise payable by Franchisor. If Franchisor must make the payment to the taxing jurisdiction for any Sales Tax that is Franchisee's responsibility under this Agreement, Franchisor will pass the amount onto franchisee and franchisee will reimburse franchisor.

18.2 In the event of any bona fide dispute as to Franchisee's liability for taxes assessed or other indebtedness, Franchisee may contest the validity or the amount of the tax or indebtedness in accordance with procedures of the taxing authority or applicable law; however, in no event shall Franchisee permit a tax sale or seizure by levy or execution or similar writ or warrant, or attachment by creditor, to occur against the premises of the Franchised Business or any improvements thereon.

18.3 Franchisee shall comply with all federal, state and local laws, rules, and regulations, and shall timely obtain any and all permits, certificates, or licenses necessary for the full and proper conduct of the Franchised Business, including, without limitation, licenses to do business, fictitious name registrations, sales tax permits, and fire clearances. Franchisee shall not conduct any business activity or advertising practice which injures Franchisor's business, the System or the goodwill associated with the Proprietary Marks.

18.4 Franchisee shall notify Franchisor in writing within five (5) days of the commencement of any action, suit, or proceeding, and the issuance of any order, writ, injunction, award, or decree of any court, agency, or other governmental instrumentality, that may adversely affect the operation or financial condition of the Franchised Business.

ARTICLE XIX. INDEPENDENT CONTRACTOR

19.1 The parties hereto agree that this Agreement does not create a fiduciary relationship between them; that Franchisee shall be an independent contractor; and that nothing in this Agreement is intended to constitute either party as an agent, legal representative, subsidiary, joint venturer, partner, employee, or servant of the other.

19.2 During the term of this Agreement, Franchisee shall hold itself out to the public as an independent contractor operating the Franchised Business pursuant to a franchise from Franchisor. Franchisee agrees to take such action as may be necessary to do so, including without limitation, exhibiting a notice of that fact in a conspicuous place on the Unit premises and on stationery and written or graphic materials, the content and form of which Franchisor reserves the right to specify.

19.3 Nothing in this Agreement authorizes Franchisee to make any contract, agreement, warranty, or representation on Franchisor's behalf, or to incur any debt or obligation in

Franchisor's name; and that Franchisor shall in no event assume liability for, or be deemed liable hereunder as a result of any such action; nor shall Franchisor be liable by reason of any act or omission of Franchisee in its conduct of the Franchised Business or for any claim or judgment arising therefrom against Franchisee or Franchisor.

ARTICLE XX. INDEMNIFICATION

20.1 Franchisee shall indemnify and hold harmless Franchisor, its affiliates, successors and assigns and the respective directors, officers, employees, agents and representatives of each (collectively, the "Indemnitees"), from all losses and expenses, which shall include, without limitation, all losses, expenses, damages, costs, settlement amounts, judgments, and attorneys' fees, incurred in connection with any action, suit, proceeding, claim, demand, investigation or inquiry (formal or informal), or any settlement thereof (whether or not a formal proceeding or action has been instituted) which arises out of or is based upon any acts, errors or omissions, or breach of any contract or regulation, of Franchisee or any of its agents, servants, employees, contractors, partners, affiliates or representatives.

20.2 Notwithstanding anything to the contrary in this Article XX, nothing in this Agreement shall obligate Franchisee to indemnify any of the Indemnitees for losses and expenses arising out of or based upon such Indemnitees' gross negligence or intentional misconduct.

20.3 If any action, suit, proceeding, claim, demand, inquiry or investigation as described in Section 20.1 be commenced or asserted (a "Claim"), in respect of which one or more Indemnitees proposes to demand indemnification from Franchisee, Franchisee will be given notice thereof as soon as practicable and shall have the right, exercisable by written notice to the Indemnitee delivered within ten (10) days after Franchisee is notified of the Claim, to join in the defense, compromise, or settlement thereof through its own attorneys and at its own expense. If Franchisee exercises its right to join the defense, compromise, or settlement of a Claim as permitted above, decisions concerning strategy, procedure, defenses, cross-claims, counterclaims, compromise and settlement shall be made by mutual consent of the Indemnitee and Franchisee, provided that if such parties cannot agree between themselves on a decision that is material to the handling of the Claim, the Indemnitee shall have the option, exercisable by written notice to Franchisee, to either:

- [](a) Take over complete control of the Claim and release Franchisee from its indemnity liability to the Indemnitee with respect to that particular Claim, or
- [](b) Turn over complete control of the Claim to Franchisee and demand indemnification from Franchisee under the indemnity provisions of this Article XX.

20.4 Regardless of whether the defense of any Claim is being undertaken by the parties jointly or by either of them alone as provided in Section 20.3, the parties each agree with the other to aid in the conduct of such defense to any reasonable extent, including furnishing each other with records or documents related to the Claim, permitting employees connected with the Claim to testify at depositions or in court, and complying with any other reasonable request made by the other party in furtherance of the defense of the Claim.

ARTICLE XXI. APPROVALS AND WAIVERS

21.1 Whenever this Agreement requires the prior approval or consent of Franchisor, Franchisee shall make a timely written request to Franchisor therefore, and such approval or consent shall be obtained in writing.

21.2 Franchisor makes no warranties or guarantees upon which Franchisee may rely, and assumes no liability or obligation to Franchisee by providing any waiver, approval, consent, or suggestion to Franchisee in connection with any consent, or by reason of any neglect, delay, or denial of any request therefore.

21.3 No failure of Franchisor to exercise any power reserved to it under this Agreement, or to insist upon compliance by Franchisee with any obligation or condition in this Agreement, and no custom or practice of the parties at variance with the terms hereof, shall constitute a waiver of Franchisor's right to demand exact compliance with any of the terms of this Agreement. Waiver by Franchisor of any particular default shall not affect or impair Franchisor's rights with respect to and subsequent default of the same or a different nature; nor shall any delay, forbearance, or omission by Franchisor to exercise any power or right arising out of any breach or default by Franchisee of any of the terms, provisions, or covenants of this Agreement affect or impair Franchisor's rights; nor shall such constitute a waiver by Franchisor of any rights hereunder or rights to declare any subsequent breach or default.

ARTICLE XXII. NOTICES

22.1 All written notices and reports permitted or required to be delivered by the provisions of this Agreement are deemed so delivered at the time delivered by hand, one (1) business day after sent by a recognized overnight delivery service which requires a written receipt, or three (3) business days after placed in the U.S. Mail by registered or certified mail, return receipt requested, postage pre-paid and addressed to the party to be notified at the address stated herein or at such other address as may have been designated in writing to the other party.

ARTICLE XXIII. ENTIRE AGREEMENT; MODIFICATIONS

23.1 This Agreement and the attachments hereto constitute the entire, full and complete Agreement between Franchisor and Franchisee and any other parties hereto concerning the subject matter of this Agreement and supersede all prior agreements. If Franchisee is relying upon or has been induced by a representation to execute this Agreement that is not embodied in this Agreement, Franchisee is hereby expressly advised and agrees not to execute this Agreement unless the representation is included herein. By executing this Agreement, Franchisee expressly acknowledges that no other representations have induced Franchisee and/or any other parties to execute this Agreement. No representations, inducements, promises, or agreements, oral or otherwise, not embodied herein or attached hereto were made by any party, and none shall be of any force or effect with reference to this Agreement or otherwise.

23.2 Except for those permitted to be made unilaterally by Franchisor hereunder, no amendment, change, variance, or cancellation of this Agreement shall be binding on either party unless mutually agreed to by the parties and executed by their authorized officers or agents in writing.

ARTICLE XXIV. SEVERABILITY AND INTERPRETATION

24.1 Except as expressly provided to the contrary herein, each portion, section, part, term and/or provision of this Agreement shall be considered severable; and if, for any reason, a portion, section, part, term, and/or provision herein is determined to be invalid and contrary to, or in conflict with, any or existing future law or regulation by a court or agency having valid jurisdiction, such shall not impair the operation of, or have any other effect upon, such other portions, sections, parts, terms, and/or provisions of this Agreement as may remain otherwise intelligible; and the latter shall continue to be given full force and effect and bind the parties hereof; and said invalid portions, sections, parts, and/or provisions shall be deemed not to be a part of this Agreement.

24.2 Except as expressly provided to the contrary herein, nothing in this Agreement is intended, nor shall be deemed, to confer upon any person or legal entity other than Franchisee, Franchisor, Franchisor<>[]s officers, directors, and employees, and such of Franchisee<>[]s and Franchisor<>[]s respective successors and assigns as may be contemplated (and, as to Franchisee, permitted) by Article XV hereof, any rights or remedies under or by reason of this Agreement.

24.3 Franchisee expressly agrees to be bound by any promise or covenant imposing the maximum duty permitted by law which is subsumed within the terms of any provision hereof, as though it were separately articulated in and made a part of this Agreement, that may result from striking from any of the provisions hereof any portion or portions which a court may hold to be unreasonable and unenforceable in a final decision to which Franchisor is a party, or from reducing the scope of any promise or covenant to the extent required to comply with such a court order.

~~24.4 <If this Franchise Agreement has been entered into pursuant to the terms of a Development Agreement with Franchisor, the terms of such Development Agreement shall supersede and govern any provisions of this Agreement which are in conflict with the terms of the Development Agreement.>~~24.5 >All captions in this Agreement are intended solely for the convenience of the parties, and none shall be deemed to affect the meaning or construction of any provision hereof.

~~24.6~~[24.5] All references herein to the masculine, neuter, or singular shall be construed to include the masculine, feminine, neuter, or plural, where applicable; and all acknowledgments, promises, covenants, agreements, and obligations herein made or undertaken by franchisee shall be deemed to be solidarily and jointly and severally undertaken by all those executing this Agreement.

~~24.7~~[24.6] This Agreement shall be effective and binding on Franchisor only when executed on behalf of Franchisor by its President, or such other officer expressly authorized and designated by resolution of Franchisor<>[]s Board of Directors.

~~24.8~~[24.7] Whenever Franchisor reserves discretion in a particular area or where Franchisor agrees or is required to exercise its rights reasonably or in good faith, Franchisor will satisfy its obligations whenever it exercises "reasonable business judgment" in making its decision or exercising its rights. A decision or action by Franchisor will be deemed to be the result of "reasonable business judgment", even if other reasonable or even arguably preferable alternatives are available, if Franchisor's decision or action is intended to promote or benefit the System generally even if the decision or action also promotes a financial or other individual interest of Franchisor. Examples of items that will promote or benefit the System include enhancing the value of the Proprietary Marks, improving guest service and satisfaction, improving product quality, improving uniformity, enhancing or encouraging modernization, and improving the competitive position of the System. By establishing the reasonable business judgment standard, the parties hereto recognize that it is in the best interest of the System that Franchisor's exercise and discretion in making decisions concerning or that affect the System, be given the same latitude that corporate boards of directors are given respecting decisions concerning the direction of their companies. Neither Franchisee nor any third party (including a trier of fact) will substitute its judgment for Franchisor's reasonable business judgment.

~~24.9~~[24.8] Franchisor advises Franchisee that Franchisor and/or Franchisor's affiliates periodically may make available to Franchisee goods, products and/or services for use in the Unit on the sale of which Franchisor and/or its affiliates may make a profit. Franchisor further advises Franchisee that Franchisor and its affiliates periodically may receive consideration from suppliers and manufacturers respecting sales of goods, products or services to Franchisee or in consideration for

services provided or rights license to such persons. Franchisee agrees that Franchisor and its affiliates will be entitled to such profits and consideration.

ARTICLE XXV. <ARBITRATION;>ENFORCEMENT

~~25.1 Arbitration Process. Except to the extent Franchisor elects to enforce the provisions of this Agreement by judicial process and injunction as provided herein, all disputes, claims and controversies between the parties arising under or in connection with this Agreement or the making, performance or interpretation thereof (including claims of fraud in the inducement and other claims of fraud and the arbitrability of any matter) will be settled by arbitration in Jefferson Parish in the state of Louisiana under the authority of the Federal Arbitration Act. The arbitrator(s) will have a minimum of five (5) years experience in franchising or distribution law and will have the right to award specific performance of this Agreement. The proceedings will be conducted under the commercial arbitration rules of the American Arbitration Association; to the extent such Rules are not inconsistent with the provisions of this arbitration provision. The decision of the arbitrator(s) will be final and binding on all parties. This Section will survive termination or non-renewal of this Agreement under any circumstances. Judgment upon the award of the arbitrator(s) may be entered in any court having jurisdiction thereof. During the pendency of any arbitration proceeding, Franchisee and Franchisor will fully perform their respective obligations under this Agreement.>~~

~~< 25.2 Additional Proceedings. If, after Franchisor or Franchisee institutes an arbitration proceeding, one or the other asserts a claim, counterclaim or defense, the subject matter of which, under statute or current judicial decision is non-arbitrable for public policy reasons, the party against whom the claim, counterclaim or defense is asserted may elect to proceed with the arbitration of all arbitrable claims, counterclaims or defenses or to proceed to litigate all claims, counterclaims or defenses in a court having competent jurisdiction.>~~

~~< 25.3 Waiver of Punitive Damages. Franchisor and Franchisee acknowledge that judgment upon an arbitration award may be entered in any court of competent jurisdiction and will be binding, final and nonappealable. Franchisor and Franchisee (and their respective owners and guarantors, if applicable) agree to waive, to the fullest extent permitted by law, the right to or claim for any punitive or exemplary damages against the other and agree that in the event of a dispute between them, each will be limited to the recovery of actual damages sustained by it.>~~ ~~25.4 Enforcement of Franchise Agreement>[Specific Performance/Injunctive Relief]. Notwithstanding the other provisions of this Section 25, Franchisee recognizes that the failure of a single franchisee to comply with the terms of its Franchise Agreement could cause irreparable damage to Franchisor or to some or all other franchisees. Franchisor and Franchisee, therefore agree that, in the event of a breach or threatened breach of this Agreement by Franchisee or in the event of any conduct by Franchisee that is illegal or is dishonest or misleading to Franchisee's<-> guests or prospective<-> guests or may <impair>[be prejudicial to] the goodwill associated with the [Proprietary]Marks, Franchisor may seek an injunction restraining such breach or obtain a decree of specific performance, without showing or proving any actual damage, until such time as a final and binding determination is made by the <arbitrator>[court]. The foregoing equitable remedy will be in addition to, and not in lieu of, all other remedies or rights, which Franchisor might otherwise have by virtue of any breach of this Agreement by Franchisee.~~

[25.2 Waiver of Punitive and Consequential Damages. Franchisor and Franchisee (and their respective owners and guarantors, if applicable) agree to waive, to the fullest extent permitted by law, the right to or claim for any punitive or exemplary damages against the other and agree that in the event of a dispute between them, each will be limited to the recovery of actual damages sustained by it.]

~~<25.5>~~[25.3] Attorneys' Fees. The nonprevailing will pay all costs and expenses, including reasonable attorneys' fees, the prevailing party incurs in any action brought to enforce any provision of this Agreement, to enjoin any violation of this Agreement or to intervene in any action brought by the other party hereto.

[25.4 Jury Waiver. Franchisor and Franchisee hereby waive any and all rights to a trial by jury in connection with the enforcement or interpretation by judicial process of any provision of this Agreement and in connection with allegations of state or federal statutory violations, fraud, misrepresentation or similar causes of action or any legal action initiated for the recovery of damages for breach of this Agreement.]

[25.5 Venue. Any cause of action, claim, suit or demand allegedly arising from or related to the terms of this Agreement or the relationship of the parties will be brought in the Federal District Court for the Eastern District of Louisiana or in state court in the judicial district in which Franchisor has its principal place of business. Both parties hereto irrevocably admit themselves to, and consent to, the jurisdiction of such courts. The provisions of this subsection will survive the termination of this Agreement. Franchisee is aware of the business purposes and needs underlying the language of this subsection and, with a complete understanding thereof, agrees to be bound in the manner stated.]

ARTICLE XXVI. APPLICABLE LAW

[26.1 The parties agree that this Agreement takes effect upon its acceptance and execution by Franchisor in Louisiana and shall be interpreted and construed under the laws thereof, which laws shall prevail in the event of any conflict of law.

~~<26.2 The parties agree that any action brought by either party against the other in any court, whether federal or state, shall be brought within Louisiana in the judicial district in which Franchisor has its principal place of business and do hereby waive all questions of personal jurisdiction or venue for the purpose of carrying out this provision.>~~

ARTICLE XXVII. ACKNOWLEDGMENTS

[27.1 Franchisee acknowledges that it has conducted an independent investigation of the Smoothie King® System and recognizes that the business venture contemplated by this Agreement involves business risks and that its success will be largely dependent upon the ability of Franchisee as an independent businessperson. Franchisor expressly disclaims the making of, and Franchisee acknowledges that it has not received, any representation, warranty or guarantee, express or implied, as to the potential volume, profits, or success of the business venture contemplated by this Agreement.

[27.2 Franchisee acknowledges that it received a copy of the complete Franchise Agreement, the attachments thereto, and agreements relating thereto, if any, at least five (5) business days prior to the date on which this Agreement was executed. Franchisee further acknowledges that it received the disclosure document required by the trade regulation rule of the Federal Trade Commission entitled ~~<">~~[~~"~~]Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures~~<">~~[~~"~~] at least ten (10) business days prior to the date on which this Agreement was executed.

[27.3 Franchisee acknowledges that other franchisees of franchisor have or will be granted franchises at different times and in different situations, and further acknowledges that the provisions of such franchises may vary substantially from those contained in this Agreement.

[]27.4 Franchisee acknowledges that it has read and understood this Agreement, the attachments hereto, and any agreements relating thereto, and that Franchisor has accorded Franchisee ample time and opportunity to consult with advisers of Franchisee's own choosing about the potential benefits and risks of entering into this Agreement.

[]IN WITNESS WHEREOF, the parties have executed this Agreement as of the date stated in the first paragraph.

WITNESSES:

FRANCHISEE:

By: _____

Title: _____

By: _____

Date: _____

FRANCHISOR:

Smoothie King Franchises, Inc.

By: _____
Stephen C. Kuhnau, Sr., President and CEO

**SMOOTHIE KING FRANCHISES, INC.
FRANCHISE AGREEMENT**

**ATTACHMENT A<-->
PROTECTED TERRITORY**

<1-->[1.] Description of Protected Territory:

<2-->[2.] Address of Franchised Business

To be completed upon securing a lease for the location and prior to the store opening of the Franchised Business.

Initial: _____

[

<FA-3/2005->[-]39[-]

**ATTACHMENT B
AUTOMATIC BANK DRAFT CONSENT**

I authorize Smoothie King Franchises, Inc. ("Smoothie King") to initiate withdrawals from my account at the financial institution named below for the payment of operating fees and advertising contributions, as well as any other fees or payments due under this Agreement. If the sales and other reporting information that is required by Smoothie King is not submitted by the date due, I further authorize Smoothie King to withdraw from my account the same amount that was due for the payment of operating fees and advertising contributions for the most recent reporting period. Any difference in amounts owed will be adjusted and paid upon the submission of the reporting information for that period. This authorization will remain valid until further notice from Smoothie King.

I understand that the Direct Payment program is the required method of payment under my Smoothie King® Franchise Agreement and does not otherwise affect my rights or the rights of Smoothie King or my financial institution with respect to each other.

Account Title: _____

Store Number(s): _____

Authorized Signature: _____

Joint Account Signature: _____

Financial Institution Name: _____

Address: _____

Transit/ABA Number: _____

<Account Number: _____>

**ATTACHMENT C
ACKNOWLEDGMENT**

STATE OF _____

PARISH/COUNTY OF _____

BEFORE ME, the undersigned authority, duly commissioned, qualified and sworn within and for the State and Parish/County aforesaid, personally came and appeared _____ who being by me first duly sworn, did depose and say:

That appearer(s) is/are the identical person(s) who executed the foregoing **FRANCHISE AGREEMENT**; that appearer(s) executed said instrument of appearer<[]s(s<[]) own free will and accord for the uses, purposes and benefits therein expressed.

IN WITNESS WHEREOF, said appearer(s) has/have executed this acknowledgment in my presence and in the presence of the undersigned competent witnesses on this _____ day of _____, 20__.

BY: _____

BY: _____

NOTARY PUBLIC

My commission expires: _____

SEAL

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[2006 FTC FA - 03/08/06 DRAFT]

[GP:1921656v3]

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