Exhibit 10.49  
  
 FRANCHISE AGREEMENT  
  
THIS AGREEMENT made this day of <>, \_\_\_\_\_\_, by and between Smoothie  
Island Co., an unincorporated division of Maui Tacos International, Inc., a  
Georgia corporation, located at 0000 Xxx Xxxxxxxx, Xxxxxxx Xxxxxxx, 00000 (the  
"Franchisor"), and <> located at <> (the  
"Operator," as also defined in Article 10):  
  
 DEFINITIONS  
  
 In this Agreement the following capitalized terms shall have the meanings  
set forth below, unless the context otherwise requires:  
  
 (i) A SMOOTHIE ISLAND EXPRESS(TM) Branded Product is any product now  
existing or developed in the future that bears Franchisor's Marks and is sold by  
some or all SMOOTHIE ISLAND EXPRESS Franchisees or Franchisor or other entities  
such as supermarkets, grocery stores or convenience stores.  
  
 (ii) A Smoothie Island Express Distribution Point or Distribution Point is  
any system other than a SMOOTHIE ISLAND EXPRESS juice bar, where Authorized  
Smoothie Island Express Products using Franchisor's Marks are sold, such as  
carts, kiosks, vending machines or other product distribution systems developed  
now or in the future and authorized by Franchisor.  
  
 (iii) A SMOOTHIE ISLAND EXPRESS juice bar is a retail installation,  
whether a Traditional or a Nontraditional juice bar, that specializes in the  
sale of Authorized Smoothie Island Express Products, as defined below, is  
operated under Franchisor's Marks, as defined below, and is authorized by a  
Franchise or License Agreement made or approved by Franchisor.  
  
 (iv) A Nontraditional SMOOTHIE ISLAND EXPRESS juice bar is located within  
another primary business or in conjunction with other businesses, some of which  
may be other fast-food type operations. A Nontraditional SMOOTHIE ISLAND EXPRESS  
Juice bar will likely be installed within other primary businesses or within a  
multi-branded facility where other branded or nonbranded businesses share common  
space.  
  
 (v) A Traditional SMOOTHIE ISLAND EXPRESS Juice bar is a retail business  
premises that exists primarily as a SMOOTHIE ISLAND EXPRESS juice bar. However,  
it may also have other types of businesses located in it, but in such case the  
SMOOTHIE ISLAND EXPRESS juice bar is the primary business.  
  
 (vi) A Smoothie Island Express "System Operation" is a traditional or  
non-traditional SMOOTHIE ISLAND EXPRESS juice bar from which Smoothie Island  
Express Authorized Products are sold for on-premises and off-premises  
consumption and from which Authorized Smoothie Island Express Products may be  
delivered for off-premises consumption.  
  
 (vii) Authorized Products or Smoothie Island Express Authorized Products  
are products approved or authorized by Franchisor in accordance with the  
provisions of this  
  
  
Agreement.  
  
 (viii) UFOC is the uniform franchise offering circular received by the  
Operator at least 10 business days prior to the execution of this agreement.  
  
 WHEREAS, Franchisor is the owner of the trademark "SMOOTHIE ISLAND", which  
has been filed for registration with the United States Patent and Trademark  
Office of the United States of America, and may, in the future become the owner,  
licensee and/or authorized distributor for other trademarks, including logos and  
designs, related or unrelated to Franchisor's Marks (referred to in this  
Agreement as "Franchisor's Marks"); and  
  
 WHEREAS, Franchisor has developed and continues to develop a system for  
merchandising Smoothie Island Express authorized products, which system includes  
distinctive signs, recipes, uniforms, various trade secrets and other  
confidential information, and in some cases also includes architectural designs,  
equipment specifications, layout plans, inventory, record-keeping and marketing  
techniques (the "System") which are materially reflected in Franchisor's  
Operations Manual and other manuals disseminated by the Franchisor  
(collectively, the "Manuals"). Franchisor identifies the System by Franchisor's  
Marks, and such other Trademarks, service marks, trade names, logos and designs  
as may be designated by Franchisor in writing as being authorized for use in the  
System. Franchisor's Marks identify for the public the source of the services  
rendered in accordance with the standards and specifications established by  
Franchisor; and  
  
 WHEREAS, the System as used in existing and future Traditional and  
Nontraditional SMOOTHIE ISLAND EXPRESS juice bars and Distribution Points have  
established or will establish a reputation for quality, cleanliness, appearance  
and service, and through such operations and continued marketing and advertising  
efforts, have created demand and goodwill for the authorized Smoothie Island  
Express food products sold as a result of which the System has acquired valuable  
goodwill and a favorable reputation; and  
  
 WHEREAS, Operator desires to enjoy the benefits of (i) operating under the  
System and using Franchisor's Marks, and (ii) being authorized and licensed to  
operate one System Operation as set forth below within the System in strict  
accordance with the standards and specifications established by Franchisor; and  
  
 WHEREAS, Franchisor is willing to grant Operator a license under  
Franchisor's Marks and the System, subject to Operator's strict compliance with  
the terms and conditions of this Agreement;  
  
 NOW, THEREFORE, the parties agree as follows:  
  
 ARTICLE 1. FRANCHISE RIGHT GRANTED, LOCATION.  
  
1.1 GRANT.  
  
 In consideration of the issuance of the franchise granted herein, Operator  
shall pay to  
  
  
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Franchisor the non-refundable sum of $<> (the "Initial Fee"). In  
exchange, Franchisor hereby awards Operator the exclusive right to open and  
operate, under the terms of this Agreement, one System Operation specializing in  
selling high quality limited and specific food items as specified by Franchisor  
in Franchisor's Operations Manual, or subsequently added in accordance with  
Operations Manual amendments, under the name "SMOOTHIE ISLAND EXPRESS" at a  
location to be mutually agreed upon by both parties. No exclusive or protected  
market is granted by this Article. The Initial Fee shall be deemed fully earned  
by Franchisor upon the execution of this Agreement by Franchisor and Operator  
and shall not be refunded, in whole or in part, upon any termination of this  
Agreement, or at any other time or under any other circumstances.  
  
1.2 LICENSE.  
  
 Franchisor hereby grants and awards to Operator, for the term set forth in  
this Agreement, and any renewal term, beginning on the date of this Agreement,  
the right and license, and Operator hereby undertakes the obligation, to operate  
the business described in this Agreement under Franchisor's Marks and such other  
of Franchisor's Marks as may be designated by Franchisor, to operate such  
business solely in accordance with the System, and only at the specific location  
to be agreed upon by Franchisor and Operator (the "Location").  
  
1.3 LOCATION.  
  
 No Location has been agreed upon at the time of the execution of this  
Agreement. Upon the leasing of the Location, Operator agrees to sublet the  
Location from an independent corporation designated by Franchisor, on the  
approved sublease form annexed to Franchisor's UFOC, as further defined in  
Article 18. Any material violation of the sublease that is not cured after  
notice is given and within the applicable grace periods, as required by the  
terms of the sublease for the Location, is a violation of this Agreement. The  
signing of the sublease for the Location, or Operator's or any of its principle  
stockholder's or officer's written approval of the master lease for the  
Location, shall constitute Operator's approval of the Location. Operator shall  
engage only in the business of operating a System Operation at the Location and  
no other, except with Franchisor's prior written consent. Operator acknowledges  
its sole responsibility for finding the Location and that Franchisor is not  
obligated to directly or indirectly obtain an approved location for Operator.  
Franchisor's area subfranchisor, if any, as identified herein, however, may  
voluntarily (without obligation) assist Operator in obtaining an approved  
location, as well as other approved locations for other System Operation  
operators who have executed existing franchise agreements.  
  
 ARTICLE 2. INSTALLATION AND COMMENCEMENT OF BUSINESS.  
  
 Operator, at its own expense, shall (i) renovate the Location into a  
System Operation; (ii) obtain all necessary governmental permits and licenses  
prior to beginning the renovation of its Location into a System Operation and  
Operator shall fully complete the renovation, construction and equipping within  
a reasonable time thereafter. Operator shall commence operation of each System  
Operation no later than thirty (30) days following substantial completion of the  
renovation and equipment installation at the Location, and shall give Franchisor  
ten (10) days  
  
  
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written notice prior to commencing operations. In no event shall Operator  
construct or remodel the interior or exterior of any System Operation or make  
any improvements which vary from the then-current standards, plans, and  
specifications approved by Franchisor, without first obtaining Franchisor's  
prior written approval. Operator, at its own expense, shall obtain all municipal  
and state licenses necessary to operate Operator's System Operation prior to  
commencing business at its System Operation and shall maintain all licenses in  
full force and effect during the term of this Agreement.  
  
 ARTICLE 3. TRAINING.  
  
3.1 Operator will designate individuals (up to 4 persons) as trainee(s) to  
attend Franchisor's training school in Atlanta, Georgia (the "Smoothie Island  
Express Training School") or at another training location selected by  
Franchisor. Franchisor will offer initial training programs for Operator and its  
management employees at times selected by Franchisor. Franchisor will bear the  
costs of providing training programs, including the overhead costs of training,  
staff salaries, materials, and all technical training tools. Operator shall pay  
all traveling, living, compensation, and other expenses incurred by Operator  
and/or Operator's employees in connection with attendance at training programs.  
The training program and manner of conducting such program shall be at  
Franchisor's sole discretion and control. The training course will be structured  
to provide practical training in the implementation and operation of a System  
Operation as described in the UFOC.  
  
3.2 Operator will not allow any System Operation to be opened or managed by any  
person who has not attended and successfully completed the management training  
course designated by Franchisor. If Operator is an individual, and does not  
manage its System Operation on a day-to-day basis, and in the event its  
designated System Operation manager resigns or is terminated, Operator must  
arrange to have the successor juice bar manager (i) begin the required training  
course within forty-five (45) days of first assuming the duties of a juice bar  
manager and (ii) successfully complete the course. If Operator successfully  
completes the training program, the required training course conducted at  
Franchisor's facilities will not extend beyond two (2) weeks. However, the  
course conducted at Franchisor's facilities, requires an additional 40 hours of  
operational training in a Franchisor approved System Operation as a  
prerequisite.  
  
3.3 If at any time the trainee voluntarily withdraws from, or is unable to  
complete its training, or fails to demonstrate an aptitude, spirit or ability to  
comprehend and carry out the course of study to the reasonable satisfaction of  
Franchisor, then Franchisor shall have the right to require Operator's trainee  
to attend other training class(es) or to perform additional operational training  
until Franchisor is reasonably satisfied that Operator's trainee has  
satisfactorily completed the training course. Operator may not open its System  
Operation until training is completed to Franchisor's reasonable satisfaction.  
  
3.4 In the event of a sale to a third party of Operator's System Operation after  
opening, the transferee must be trained in the Smoothie Island Express Training  
School as a condition of Franchisor's consent to such transfer. All tuition  
costs for such training shall be deemed paid upon receipt by Franchisor of five  
percent (5%) of the sales price of operator's System Operation due in accordance  
with Article 14 herein. In the event of an approved non-sale management  
  
  
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transfer to a third party of Operator's System Operation, the transferee shall  
attend the Smoothie Island Express Training School and pay to Franchisor the  
training fee, which fee shall not exceed $1,500. No System Operation shall open  
or re-open until the Smoothie Island Express Training School certifies that the  
transferee is approved to operate the respective System Operation.  
  
3.5 Additional training sessions are available at Operator's request and  
expense, and at Franchisor's request, at Operator's expense, except for the  
initial training course itself. Operator's attendance at additional training  
sessions is mandatory if they are scheduled in Operator's state. For this  
additional training, Franchisor will provide the instructors and instructional  
materials, but Operator must arrange for transportation, lodging and food for  
itself and/or its manager. The cost will depend on distance Operator must travel  
and the type of accommodation chosen. Additionally, Operator must attend  
regional meetings, when and if established by Franchisor, and must attend annual  
national conventions, when and if scheduled.  
  
 ARTICLE 4. MANUALS AND STANDARDS OF OPERATOR QUALITY, CLEANLINESS AND SERVICE.  
  
4.1 STANDARDS.  
  
 In order to promote the value and goodwill of Franchisor's Marks and the  
System and to protect Franchisor's Marks and the other SMOOTHIE ISLAND EXPRESS  
operators who comprise the Smoothie Island Express franchise system, Operator  
agrees to conduct its business in accordance with the standards promulgated by  
Franchisor as follows:  
  
4.2 MANUALS.  
  
 4.2.1 In the Manuals and other publications, Franchisor will list  
authorized products to be sold by Operator, and promulgate standards of  
operation for System Operations, including standards of quality, cleanliness,  
and service for all product line items, furnishings, interior and exterior  
decor, supplies, fixtures, and equipment used in connection with each System  
Operation. Operator agrees to operate its System Operation in accordance with  
the standards, specifications and procedures set forth in the Manuals, this  
Agreement and the sublease for the Location. Operator further agrees that  
changes in the menu, or the standards, specifications and procedures may become  
necessary from time to time and agrees to accept as reasonable all  
modifications, revisions and additions to the Manuals as authorized by  
Franchisor. The sale of any product or service at the Operator's Location,  
without Franchisor's prior written approval shall constitute a material  
violation of this Agreement.  
  
 4.2.2 The Manuals and all amendments to the Manuals (and copies thereof)  
are copyrighted and remain Franchisor's property. They are loaned to Operator  
for the term of the Agreement, and must be returned to Franchisor upon the  
Agreement's termination, expiration or nonrenewal. The Manuals are highly  
confidential documents which contain certain trade secrets of Franchisor, and  
Operator shall never reveal, and shall take all reasonable precautions, both  
during and after the term of this Agreement, to assure that its employees or any  
other party under Operator's control, shall never reveal any of the contents of  
the Manuals or any other publication, recipe or secret provided by Franchisor,  
except as is necessary for the operation of  
  
  
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Operator's System Operation.  
  
4.3 HOURS.  
  
 Franchisor and Operator agree that the hours of operation of Operator's  
System Operation are at a minimum, 10:00 am. to 12:00 p.m. (midnight), seven  
days per week, and Operator agrees to operate its System Operation during such  
hours. If the Location is in a mall or shopping center, the hours of the mall or  
shopping center shall control. Operator shall diligently and efficiently  
exercise its best efforts to achieve the maximum gross sales possible from its  
location, and will be open for business not less than 14 hours per day, seven  
days per week, unless additional opening hours are reasonably required to  
maximize operations and sales. If such hours are incorrect in relation to the  
sales potential of Operator's System Operation, then Franchisor and Operator  
shall reasonably adjust such hours by jointly establishing new hours of  
operation. It is acknowledged that the hours of other operators will vary in  
relation to each respective location, and local legal restrictions, if any.  
  
4.4 APPEARANCE.  
  
 From time to time, Operator's System Operation may need a cosmetic  
improvement or equipment change or addition in order to comply with the Manuals  
and/or to maintain proper operations and an aesthetic appearance and  
professional image. Accordingly, Franchisor may require remodeling and  
renovation, and modifications to existing equipment and improvements as is  
reasonably necessary. Franchisor shall not require any such work at a particular  
System Operation less than three (3) years after the opening of the System  
Operation except: (i) for additional equipment if authorized product line  
preparation methods or products are developed and authorized by Franchisor; (ii)  
if repairs or repainting are necessary to maintain the appearance of the  
interior and exterior of the Location in a clean and orderly condition  
satisfactory to Franchisor; or (iii) upon the sale of the Operator's System  
Operation. Within ninety (90) days after receipt of written notice, Operator  
shall fully implement and complete such changes to its System Operation  
operating under this Agreement.  
  
4.5 PRODUCT LINE AND SERVICE.  
  
 Operator agrees to only serve the approved limited product line items  
specified by Franchisor in this Agreement or in the Manuals and to follow all  
specifications and formulas of Franchisor as to specifications, contents, weight  
and quality of products served to its customers from Operator's System  
Operation.  
  
4.6 CONTAINERS, FIXTURES AND OTHER GOODS.  
  
 4.6.1 Operator agrees that all authorized product line items will be  
served in containers bearing accurate reproductions of Franchisor's Marks. All  
containers, bags, cups, menus and other packaging and like articles used in  
connection with Operator's System Operation shall conform to Franchisor's  
specifications, shall be imprinted with Franchisor's Marks and shall be  
purchased by Operator from a distributor or manufacturer approved in writing by  
Franchisor, as provided in Article 8, which approval will not be unreasonably  
withheld.  
  
  
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 4.6.2 No item of merchandise, furnishings, interior and exterior decor  
items, supplies, fixtures, equipment or utensils bearing any of Franchisor's  
Marks shall be used in or upon any System Operation unless the same shall have  
been first submitted to and approved in writing by Franchisor.  
  
 ARTICLE 5. MENUS, UNIFORMS, INSPECTIONS, SIGNS.  
  
5.1 MENUS.  
  
 5.1.1 Operator shall not manufacture, advertise for sale, sell or give  
away any product unless such product has been approved in the Manuals as an  
authorized product for sale in Operator's System Operation and not thereafter  
disapproved in writing by Franchisor. All approved products shall be distributed  
under the specific name designated by Franchisor. Operator shall establish all  
menu prices in its sole discretion. Operator shall offer for sale in its System  
Operation only those food products which Franchisor designates as "approved  
and/or authorized" or which Franchisor has made available as a "regionalized"  
menu or has otherwise specifically approved in writing (each, "Authorized  
Product"). No standard product will be removed from the menu unless Operator is  
so instructed by Franchisor.  
  
 5.1.2 Such "Authorized" and/or "Approved" Products shall be marketed by  
approved menu formats to be utilized in Operator's System Operation. The  
approved and authorized menu and menu format(s) may include, in Franchisor's  
discretion, requirements concerning organization, graphics, product  
descriptions, illustrations, and any other matters (except prices) related to  
the menu, whether or not similar to those listed. In Franchisor's discretion,  
the menu and/or menu format(s) may vary depending upon region, market size, and  
other factors. Franchisor may change the menu and/or menu format(s) from time to  
time or region to region or authorize tests from region to region or authorize  
non-uniform regions or non-uniform System Operation(s) within regions, in which  
case Operator will be given a reasonable time (not longer than thirty (30) days)  
to discontinue use of any old menu format(s) and implement use of the new menu  
format(s).  
  
 5.1.3 Operator shall, upon receipt of notice from Franchisor, add any  
Authorized Product to its menu according to the instructions contained in the  
notice. Operator shall have a minimum of thirty (30) days after receipt of  
written notice in which to fully implement any such change. Operator shall cease  
selling any previously approved product within thirty (30) days after receipt of  
notice that the product is no longer approved.  
  
 5.1.4 The Authorized Products sold by Operator shall be of the highest  
quality, and the ingredients, composition, specifications, and preparation of  
such food products shall comply with the instructions and recipes provided by  
Franchisor or contained in Franchisor's Operations Manual, and with the further  
requirements of Franchisor as they are communicated to Operator from time to  
time.  
  
  
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5.2 COMPLIANCE.  
  
 Operator shall operate each of its System Operation as a clean, orderly,  
legal and respectable place of business in accordance with Franchisor's business  
standards and merchandising policies, and shall comply with all applicable  
ordinances, laws, statutes and regulations governing the operation of such  
premises, including all disability, food and drug laws and regulations. Operator  
shall not allow any Location or part of a Location to be used for any immoral or  
illegal purpose.  
  
5.3 SIGNS, DESIGNS AND FORMS OF PUBLICITY.  
  
 5.3.1 Operator shall maintain a suitable sign or awning at, on, or near  
the front of the Location, identifying the Location as a "SMOOTHIE ISLAND  
EXPRESS Juice Bar". Such sign shall conform in all respects to Franchisor's  
requirements and in accordance with the layout and design plan approved for the  
Location, except to the extent prohibited by local legal restrictions.  
  
 5.3.2 No exterior or interior sign or any design, advertisement, internet  
address, "web page" or world wide web home page, sign, or form of publicity,  
including form, color, number, location, and size, shall be used by Operator or  
any Association (as defined below) unless first submitted to Franchisor and  
approved in writing (except with respect to prices). Any request by Operator for  
such approval shall be properly submitted in duplicate to: (i) Franchisor's  
Legal Department, Attention: General Counsel, 000 Xxxxxxxx, Xxx Xxxx, Xxx Xxxx  
00000; and (ii) Franchisor's President, 0000 Xxx Xxxxxxxx, Xxxxx 000, Xxxxxxx,  
Xxxxxxx, 00000. Franchisor shall respond to such request within thirty (30) days  
of its receipt. Whenever Operator elects to utilize, in the form supplied,  
advertising supplied by Franchisor or any promotional item specifically approved  
by Franchisor, no further approval for use of such material is required. Upon  
written notice from Franchisor, Operator shall discontinue and/or remove any  
objectionable advertising materials or any other materials not suitable for  
display, in Franchisor's sole discretion.  
  
5.4 UNIFORMS AND EMPLOYEE APPEARANCE.  
  
 Operator shall cause all employees, while working in System Operation, to:  
(i) wear uniforms of such color, design, and other specifications as Franchisor  
may designate from time to time, and (ii) present a neat and clean appearance.  
If the type of uniform utilized by Operator is removed from the list of approved  
uniforms, Operator shall have sixty (60) days from receipt of written notice of  
such removal to discontinue use of its existing inventory of uniforms and  
implement the approved type of uniform.  
  
5.5 VENDING OR OTHER MACHINES.  
  
 Operator shall not permit vending or game machines or any other mechanical  
device to be installed or maintained in its Location without Franchisor's prior  
written approval.  
  
5.6 INSPECTION.  
  
 5.6.1 Franchisor's authorized representatives shall have the right to  
enter upon the  
  
  
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entire main floor and basement of Operator's System Operation during business  
hours, without disrupting Operator's business operations, for the purposes of  
examining same, conferring with Operator's employees, inspecting and checking  
operations, beverages, furnishings, interior and exterior decor, supplies,  
fixtures, and equipment, and determining whether the business is being conducted  
in accordance with this Agreement, the System and the Manuals.  
  
 5.6.2 In the event any such inspection indicates any deficiency or  
unsatisfactory condition with respect to any matter required under this  
Agreement or the Manuals, including but not limited to quality, cleanliness,  
service, health and authorized product line, Franchisor will notify Operator in  
writing of Operator's non-compliance with the Manuals, the System, or this  
Agreement. Operator shall have twenty-four (24) hours after receipt of such  
notice, or such other greater time period as Franchisor in its sole discretion  
may provide, to correct or repair such deficiency or unsatisfactory condition,  
if it can be corrected or repaired within such period of time. If not, Operator  
shall within such time period commence such correction or repair and thereafter  
diligently pursue it to completion.  
  
 ARTICLE 6. ADVERTISING.  
  
6.1 Operator and Franchisor acknowledge the value of advertising and accordingly  
Operator agrees to pay 2% of its gross sales for each and every week of its  
operations to Franchisor (the "Advertising Fee"). These funds will be deposited,  
at Franchisor's sole discretion, into a segregated advertising account (with  
other advertising collections) controlled by Franchisor. Advertising payments  
will then be spent for advertising to benefit Operator and/or all or regional  
operators of System Operations. The Advertising Fee shall be paid in accordance  
with the procedure described in Article 9.  
  
6.2 Franchisor, at its sole discretion, may spend the collected fees directly,  
or may authorize payment of the advertising collections for media time,  
production of media materials, whether for radio, television, newspapers or  
store level materials such as flyers, or posters, or for any other type of  
advertising or marketing use. Franchisor is not, under any circumstances,  
obligated to contribute to any national or local advertising fund, program or  
other organization, any advertising fees or contributions.  
  
6.3 Operator acknowledges receipt of Franchisor's UFOC which refers to (a)  
Smoothie Island Express Brand Building Fund, Inc. ("SIBBF"); (b) the Council of  
Smoothie Island Express Suppliers; (c) a research and development fund; and (d)  
the Grand Opening event as explained below.  
  
6.4 As described in the UFOC, SIBBF is the non-profit entity authorized to  
receive marketing allowances and payments from Smoothie Island Express  
distributors, manufacturers and other entities that are associated in business,  
directly or indirectly, with Franchisor or the System or its operators or any  
part thereof. The activities of SIBBF are controlled by the Franchisor subject  
to the advice and counsel of the Smoothie Island Express Operator Advisory  
Board. By this Agreement, Operator consents to the receipt of such funds by  
SIBBF or its successors, as well as the expenditure thereof for advertising and  
marketing expenses. These expenses may include costs for personnel, management  
fees, advertising agencies, operating  
  
  
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expenses, matching fund programs, research and development, administrative  
expenses, production of educational or training materials, production of  
commercials, focus groups or other studies, the purchase of television or radio  
or other media time, print advertising, facility design studies or  
modifications, consultants and such other marketing and advertising uses as may  
be authorized by the Franchisor.  
  
6.5 By execution of this agreement Operator consents to the formation and  
existence of the Smoothie Island Express Brand Building Fund, Inc., its right  
and privilege to seek voluntary contributions of 1% to 3% of gross sales, or any  
higher fee or a flat fee if a sales percentage is not practical, from all  
Smoothie Island Express manufacturers, distributors, vendors and purveyors who  
sell products or provide services to the Smoothie Island Express System or  
Smoothie Island Express Brand Building Fund, Inc., and the system of authorizing  
utilization of these collections and any resulting expenditures thereafter.  
  
 6.5.1 The Council of Smoothie Island Express Suppliers is an association  
composed of approved manufacturers, distributors and the Franchisor, established  
for the purposes of improving communication between manufacturers and  
distributors, and improving distribution and development of improved Authorized  
Products. This Council reimburses Franchisor for employee and other expenses  
involved in the distribution and manufacturing of Raw Materials. Operator  
consents to the receipt of such funds by Franchisor;  
  
 6.5.2 Franchisor and certain manufacturers have agreed to established a  
research and development fund for improvement of specific Authorized Products  
and Operator consents to Franchisor's receipt of reimbursement funds arising  
from expenses incurred in such research and development.  
  
 6.5.3 In addition to the Advertising Fee, Operator agrees to spend a  
minimum of $1,000 for its "Grand Opening" promotion as designated by Franchisor.  
The "Grand Opening" event is required for all operators and functions to  
introduce Operator's System Operation to the public. The application and use of  
the "Grand Opening" funds shall be controlled by Franchisor's marketing  
department.  
  
 ARTICLE 7. COMPANY MARKS AND ADDITIONAL MARKS.  
  
7.1 The license and related rights to use the System, the Manuals, Franchisor's  
Marks and any other proprietary products granted by this Agreement are  
applicable only with respect to Operator's System Operation at the Location, and  
not elsewhere, except in the event of a relocation approved in writing by  
Franchisor. This Agreement does not authorize the use of mobile vending  
vehicles, carts, kiosks or any other non-traditional delivery systems.  
  
7.2 Operator shall not interfere in any manner with, or attempt to prohibit, the  
use of Franchisor's Marks and/or the System by any other Operator of Franchisor  
or in connection with Nontraditional SMOOTHIE ISLAND EXPRESS locations,  
distribution points or any other system used to distribute Smoothie Island  
Express authorized or branded products.  
  
7.3 Franchisor may, from time to time, in Franchisor's sole discretion, obtain  
additional  
  
  
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trademark and/or service xxxx rights in words and/or designs. In the event of  
any of these occurrences, Franchisor may license Operator to use those  
trademarks or service marks by giving written notification to Operator that such  
marks now form part of Franchisor's Marks. The term of such license will be  
coextensive with the term of this Agreement or as otherwise established by  
Franchisor, and will be subject to all restrictions with respect to the use of  
those rights as set forth in this Agreement and in the notice granting Operator  
the license.  
  
7.4 Franchisor is not obligated by this Agreement or otherwise, to protect  
Operator's right to use the trademarks, service marks, etc., or to protect  
Operator against claims of infringement or unfair competition of the  
trademarks/service marks .  
  
 ARTICLE 8. DISTRIBUTION, MANUFACTURE, AND PURCHASE OF EQUIPMENT,  
 SUPPLIES, AND OTHER PRODUCTS.  
  
 Operator agrees to use only Franchisor's approved products and portion  
control formulas in the preparation of Authorized Products. Operator further  
agrees to only buy Raw Materials, as defined below, manufactured in accordance  
with Franchisor's specifications from approved manufacturers, distributed by  
approved distributors, and sold to Operator as follows:  
  
8.1 DEFINITIONS.  
  
 8.1.1 For the purpose of this Agreement, "distributor" is defined as any  
entity, except a manufacturer, that directly or indirectly delivers raw  
materials to the Operator. A "manufacturer" is defined as the entity that  
manufactures and/or sells the Raw Materials to a distributor. Raw Materials  
means all of the products purchased from distributors, and/or manufactured or  
sold by manufacturers or production entities which are used in the creation of  
Authorized Products. Raw Materials include, but are not limited to, sorbets,  
yogurt, supplements, cups, printed paper goods (the "Raw Materials").  
"Authorized" means approved by Franchisor in accordance with the procedures  
established in this Agreement.  
  
8.2 DISTRIBUTORS.  
  
 8.2.1 Operator acknowledges that it is generally unrealistic from a cost  
and service basis to have more than one distributor in the market area of  
Operator's System Operation, and that to obtain the lowest distribution costs,  
all regional operators should only purchase from one authorized Smoothie Island  
Express distributor. Operator agrees to only purchase all equipment, supplies,  
Raw Materials and other products and materials necessary for the operation of  
its System Operation solely from Authorized distributors, and other authorized  
sources who demonstrate, to the continuing reasonable satisfaction of  
Franchisor, the ability to meet Franchisor's then-current standards and  
specifications for such items; who possess adequate quality controls and  
capacity to supply Operator and all other System operators needs promptly and  
reliably; who demonstrate the ability and willingness to work with Franchisor to  
provide the assistance needed by the those operators in the region and all other  
System Operators; who agree to distribute all authorized Smoothie Island Express  
products; who comply with Franchisor's reasonable requirements; and who have  
been approved in writing by Franchisor and not thereafter disapproved.  
  
  
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 8.2.2 If Operator desires to purchase any items from an unapproved  
distributor, whom Operator desires to become an Authorized distributor, Operator  
shall first submit a written request, in duplicate, for such approval to  
Franchisor, addressed to (i) President, 0000 Xxx Xxxxxxxx, Xxxxx 000, Xxxxxxx,  
Xxxxxxx and (ii) to Xxxxx X. Xxxxxx, Esq., General Counsel, 000 Xxxxxxxx, Xxx  
Xxxx, Xxx Xxxx 00000, accompanied by a similar written request for approval from  
the proposed distributor. Franchisor shall have the right to require that the  
proposed distributor provide reasonable financial, operational and economic  
information regarding its business and that Franchisor's representatives be  
permitted to inspect the proposed distributor's facilities and establish  
economic terms, delivery, service and other requirements consistent with other  
distribution relationships for other System Operations. The proposed distributor  
shall pay to Franchisor in advance all of Franchisor's reasonable costs in  
review of the application of the distributor to service the Operator as well as  
all current and future reasonable costs related to inspecting and reinspecting  
the distributor's facilities, equipment, Raw Materials in the distributor's  
possession at any time. Franchisor may revoke its approval upon the  
distributor's failure to continue to meet any of Franchisor's criteria. Nothing  
in this article shall require Franchisor to approve any distributor. Upon the  
receipt by Franchisor of Operator and the proposed distributor's request for  
approval in full compliance of this article, Franchisor will notify Operator of  
its decision within 90 days after receipt thereof. In the event an alternate  
approved distributor to the recommended distributor is used by Operator, as a  
condition thereof Operator and all other operators shall authorize the alternate  
distributor to provide to Franchisor duplicate purchase invoices for  
Franchisor's records and inspection purposes and to otherwise comply with  
Franchisor's reasonable requests.  
  
8.3 MANUFACTURERS.  
  
 8.3.1 The parties agree that Franchisor's product specifications and  
portion control system are highly confidential information and are trade secrets  
of Franchisor. In order to (i) achieve appropriate pricing, (ii) obtain those  
specially formulated Smoothie Island Express authorized Raw Materials for  
Operator and all of Franchisor's System Operation, and (iii) establish  
consistent uniformity of Smoothie Island Express products, Operator acknowledges  
that purchasing by all System or regional operators from approved manufacturers  
or raw material is a necessity. Because of the importance of quality and  
uniformity of product and the significance of product specifications and portion  
control in the preparation of Authorized Products to achieve and maintain such  
quality and uniformity, it is to the mutual benefit of the parties that  
Franchisor closely control the production and distribution of the Raw Materials  
used to produce authorized products sold by Operator. Similar considerations may  
also apply to other products which Franchisor may develop in the future.  
Operator therefore agrees to purchase only Raw Materials manufactured in  
accordance with Franchisor's specifications and quality standards by approved  
manufacturers who demonstrate, to the continuing reasonable satisfaction of  
Franchisor, the ability to meet Franchisor's then-current standards and  
specifications for such items; who possess adequate quality controls and  
capacity to meet the needs of Operator and all other System Operators in a given  
region or territory promptly and reliably; who demonstrate the ability and  
willingness to work with Franchisor and to provide the assistance needed by the  
Smoothie Island Express System and who have been approved in writing by  
Franchisor and not thereafter disapproved.  
  
  
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 8.3.2 If Operator desires to purchase any items from an unapproved  
manufacturer, who Operator desires to become an Authorized manufacturer,  
Operator (i) shall first submit a written request, in duplicate, for such  
approval to Franchisor, addressed to President: 0000 Xxx Xxxxxxxx, Xxxxx 000,  
Xxxxxxx, Xxxxxxx 00000 and (ii) to General Counsel, 000 Xxxxxxxx, Xxx Xxxx, Xxx  
Xxxx 00000 accompanied by a similar written request for approval from the  
proposed manufacturer. Franchisor shall have the right to require that the  
proposed manufacturer provide reasonable financial, operational and economic  
information regarding its business and that Franchisor's representatives be  
permitted to inspect the proposed distributor's facilities and establish  
economic terms, delivery, service and other requirements consistent with other  
with other manufacturing relationships for other System Operations. The proposed  
manufacturer shall pay to Franchisor in advance all of Franchisor's reasonable  
costs in review of the application of the manufacturer to service the Operator  
as well as all current and future reasonable costs related to inspecting and  
reinspecting the manufacturer's facilities, equipment and Raw Materials at any  
time. Franchisor may revoke its approval upon the manufacturer's failure to  
continue to meet any of Franchisor's criteria. Nothing in this article shall  
require Franchisor to approve any manufacturer. Upon the receipt by Franchisor  
of Operator and the proposed manufacturer's request for approval in full  
compliance of this article and the completion of all of the inspections needed  
by Franchisor to evaluate the manufacturer, Franchisor will notify Operator of  
its decision within 90 days after completion of such application and  
inspections. If an alternate approved manufacturer to the recommended  
manufacturer is used by Operator, as a condition thereof Operator and all other  
operators shall authorize the alternate manufacturer to provide to Franchisor  
duplicate purchase invoices for Franchisor's records and inspection purposes and  
to otherwise comply with Franchisor's reasonable requests.  
  
8.4 PURCHASE OBLIGATIONS.  
  
Operator agrees to purchase the following items from the approved distributor  
and manufacturer designated by Franchisor:  
  
 8.4.1 Cups, frozen fruits (strawberries, blackberries, pineapples,  
peaches, etc.), cream branded sorbets, yogurt, Smoothie Island Express-branded  
supplements and other branded supplements. Franchisor reserves the right to  
authorize exceptions as circumstances warrant.  
  
 8.4.2 All Branded Smoothie Island Express Products that bear Franchisor's  
Xxxx; Franchisor has a long term strategic plan to create another profit center  
for Operator and itself by the sale of Smoothie Island Express branded products  
in System Operations, supermarkets, grocery stores, etc. To accomplish this  
goal, Franchisor intends to develop such products. To effectuate this long term  
strategy, Operator agrees to cooperate with Franchisor with respect to the  
purchase, display and sale of any Branded Products authorized for sale by  
Franchisor. Operator consents to the receipt by Franchisor of licensing fees  
from manufacturers who manufacture Branded Products which will compensate  
Franchisor for such use of Franchisor's Marks.  
  
 8.4.3 Certain Smoothie Island Express standard exterior and interior  
signs; These signs require the prior fabrication of sign molds or advance  
production in quantity to be either  
  
  
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affordable or promptly available. If Franchisor has entered into an agreement  
with approved sign manufacturer(s), granting rights to use Franchisor's Marks in  
connection with the signs and to sell such signs to SMOOTHIE ISLAND EXPRESS  
operators, Operator agrees to purchase its signs from the authorized sign  
manufacturer(s).  
  
 8.4.4 Coca-Cola fountain service products: Franchisor has entered into a  
five (5) year agreement with the Coca-Cola Company to be the only approved  
fountain service beverage supplier to the Smoothie Island Express System. In  
Franchisor's judgment, the Coca-Cola Company offered the best economic terms  
available for the Smoothie Island Express franchise system. Operator agrees to  
only use the fountain service Coca-Cola products authorized by Franchisor and no  
other beverages unless approved in writing by Franchisor.  
  
 8.4.5 Operator agrees that at such times that Franchisor establishes a  
regional or national purchasing program for any of the Raw Materials, which may  
benefit Operator by reduced price, lower labor costs, production of improved  
Authorized Product(s), increased reliability in supply, improved distribution,  
Raw Material cost control (establishment of consistent pricing for reasonable  
periods to avoid market fluctuations), improved operations by Operator or other  
tangible benefits to Operator, Operator will participate in such purchasing  
program in accordance with the terms of such program.  
  
 ARTICLE 9. CONTINUING FRANCHISE FEES, REPORTS, BOOKS AND RECORDS.  
  
9.1 CONTINUING FRANCHISE FEES.  
  
 9.1.1 Operator shall pay to Franchisor weekly during the term of this  
Agreement and any renewals or extensions thereof, 8% of the weekly gross sales  
of Operator's System Operation. For the purposes of this Agreement, "gross  
sales," means gross revenues (excluding price discounts and allowances) received  
by Operator as payment, whether in cash or for credit (and, if for credit,  
whether or not payment is received therefor), for all beverages and other goods,  
services, and supplies including all sales from approved co-brands as described  
in Article 23 sold in or from each of Operator's System Operation, and gross  
revenues received by Operator from any other business (including, but not  
limited to, all revenues from any mechanical or other device, such as vending or  
game machines installed at the Location) operated at the Location, excluding  
sales taxes.  
  
 9.1.2 At Franchisor's request, Operator shall promptly execute or  
re-execute within five (5) days after Franchisor's request, and deliver to  
Franchisor appropriate pre-authorized check forms or such other instruments or  
drafts required by Franchisor's bank, payable against Operator's bank account,  
to enable Franchisor to electronically (draft on Operator's account by  
electronic withdrawal), collect the 8% and 2% (see Article 6) of gross sales  
payable under the terms of this Agreement. At Franchisor's request, Operator  
shall within 5 days from such request promptly perform such acts as to enable  
Franchisor or its designee to connect its computers to Operator's computer(s) or  
Operator's POS System, so that Franchisor or its designee may electronically  
obtain statistical information regarding Operator's business activities that  
Franchisor may in its sole discretion request. Operator agrees to not disconnect  
Franchisor or its designee from such connection or phone line at any time, for  
any reason, without Franchisor's  
  
  
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prior written approval. Operator specifically authorizes Franchisor to either  
"upload" or "download" information in and from or to its computers, cash  
registers or other such devices as allowed by law, as it relates to the System  
Operation by internet, intranet, and other networks or other means as it becomes  
available.  
  
 9.1.3 Operator shall report its gross sales by telephone within two (2)  
days after the end of each business week (currently Tuesday) or at such other  
times as are established by Franchisor in its sole discretion. Operator shall  
submit written weekly summaries showing results of its operations by the  
following Saturday. If Operator fails to report its sales on a timely basis,  
Franchisor may estimate the amount of Operator's sales. Franchisor will then  
deposit or transfer the reported, or in the absence of a report, the estimated,  
amounts due into its own account, using the System Operator's pre-authorized  
checks or other instruments. If any draft, electronic or otherwise, is unpaid  
because of insufficient funds or otherwise, then Operator shall pay Franchisor's  
expenses arising from such non-payment, including bank fees in the amount of at  
least $30.00, hourly staff charges arising from such default, and any other  
related expenses incurred by Franchisor. By the 5th day of each month Operator  
shall pay to Franchisor any sums unpaid for the prior month to adjust for sales  
owed for any partial week or sales that were unpaid, improperly recorded or not  
credited on Operators books and records. Operator hereby agrees to pay any  
sales, use or other tax now or hereinafter imposed on franchise fees,  
advertising fees or any additional rental collected under the sublease for the  
Location, imposed by any Federal, state or local governmental authorities.  
Franchisor, at its sole discretion, may collect the taxes in the same manner as  
franchise fees are collected herein and if Franchisor collects such taxes,  
Franchisor shall promptly pay the tax collections to the appropriate  
governmental authority.  
  
9.2 REPORTS AND INSPECTION OF RECORDS.  
  
 9.2.1 Operator shall submit to Franchisor a quarterly Profit and Loss  
Statement, signed and certified by Operator. The Profit and Loss Statement shall  
be prepared by a Certified or Public Accountant, in accordance with generally  
accepted accounting principles, and shall provide Operator's sales, expenses and  
financial status with respect to Operator's System Operation. Operator shall  
submit to Franchisor a copy of the original signed 1120 or 1120S tax form each  
and every year or any other forms which take the place of the 1120 or 1120S  
forms. Operator shall also provide Franchisor with copies of signed original  
sales and use tax forms contemporaneously with their filing with the appropriate  
state or local authority. Franchisor reserves the right to require such further  
information concerning Operator's System Operation as Franchisor may from time  
to time reasonably request.  
  
 9.2.2 Upon 10 days prior written notice, Franchisor, its agents or  
representatives may audit Operator's books and records in accordance with  
generally accepted standards established by certified public accountants. In  
connection with such audit(s) or other operational visits, Operator agrees to  
keep its cash receipts records, weekly and monthly control forms, accounts  
payable records including all payments to Operator's suppliers in its System  
Operation or at its business office for three (3) years after their due date,  
which records shall be available for examination by Franchisor or its  
representative(s), at Franchisor's request. Without any prior written notice,  
Franchisor, its agents or representatives may inspect Operator's entire System  
  
  
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Operation and Operator's daily, weekly and monthly statistical information  
("Redbook Information") which is required under the Operational Manual. Operator  
shall make such Redbook Information available for such inspections in  
recognition that an operational inspection cannot succeed without review of  
essential statistical information.  
  
 9.2.3 If any audit or other investigation reveals an under-reporting or  
under-recording error of five (5%) percent or more, then in addition to any  
other sums due, the expenses of the audit/inspection shall be borne and paid by  
Operator upon billing by Franchisor, plus interest at the highest compound rate  
authorized by the state in which the System Operation is located, but not to  
exceed the rate of fifteen (15%) percent per annum.  
  
 9.2.4 Operator acknowledges that Franchisor's Operations Department  
regularly reviews ongoing operations at System Operation to ensure consistency  
of products and service and compliance with the Manuals and this Agreement.  
Operator therefore agrees to promptly complete and submit all forms requested by  
Franchisor's Operations Department, whether on a daily, weekly or monthly basis.  
Non-compliance with this obligation constitutes a material violation of this  
Agreement.  
  
 ARTICLE 10. COVENANT REGARDING OTHER BUSINESS INTERESTS.  
  
10.1 For purposes of this Article only, "Operator" shall mean and include the  
individual Operator; Operator's spouse and minor children; Operator's  
shareholders, officers, and directors, if Operator is a corporation; and any one  
or more partners or participants in Operator, if Operator is a partnership or  
joint venture, or members, if Operator is an LLC.  
  
10.2 Operator acknowledges that the Smoothie Island Express System is unique and  
distinctive and has been developed by Franchisor at great effort, time, and  
expense, and that Operator has regular and continuing access to valuable and  
confidential information, training, and trade secrets regarding the Smoothie  
Island Express System. Operator recognizes its obligations to keep confidential  
such information as set forth herein. Operator therefore agrees as follows:  
  
 10.2.1 During the term of this Agreement, except with Franchisor's prior  
written consent, Operator shall not, in any capacity whatsoever, either directly  
or indirectly, individually or as a member of any business organization, engage  
in the production or sale at retail or wholesale of any frozen beverage or any  
other main course item authorized by Franchisor, now or in the future approved  
by Franchisor for use in Operator's System Operation, or have any employment or  
interest in any firm engaged in the production or sale of such products.  
  
 10.2.2 Upon the termination, expiration or nonrenewal of this Agreement,  
or if Operator assigns or transfers its interest herein to any person or  
business entity, or if any person identified in the first paragraph of this  
Article terminates its relationship with Operator, then for a period of sixty  
(60) months thereafter such Operator shall not, in any capacity whatsoever,  
either directly or indirectly, individually or as a member of any business  
organization, engage in the production or sale at retail of any smoothie type  
food product, or have any employment or interest in any firm engaged in the  
production or sale at retail or wholesale of any such products, at a site within  
  
  
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a radius of five (5) miles of any of Operator's former System Operation or  
within five (5) miles of any other System Operation or Distribution Point then  
existing, unless Franchisor gives its prior written consent. If Operator  
violates the terms of this paragraph, Operator shall pay to Franchisor, as  
liquidated damages, an amount equal to $5,000 per month for each month this  
covenant is violated, plus 8% percent of the gross sales achieved at the site  
during the continuation of such violation.  
  
 10.2.3 In the event any portion of the above covenants violates laws  
affecting Operator, or is held invalid or unenforceable in a final judgment to  
which Franchisor and Operator are parties, then the maximum legally allowable  
restriction permitted by law shall control and bind Operator. Franchisor may at  
any time unilaterally reduce the scope of any part of the above covenants, and  
Operator shall comply with any such reduced covenant upon receipt of written  
notice.  
  
10.3 The provisions of this Article shall not limit, restrain or otherwise  
affect any right or cause of action which may accrue to Franchisor for any  
infringement of, violation of, or interference with, this Agreement, or  
Franchisor's Marks, System, trade secrets, or any other proprietary aspects of  
Franchisor's business.  
  
 ARTICLE 11. INTERFERENCE WITH EMPLOYMENT RELATIONS.  
  
 Without Franchisor's prior written consent, during the term of this  
Agreement, Operator shall not employ or seek to employ, directly or indirectly,  
any person serving in an executive, managerial or operational position who is at  
the time or was at any time during the prior six (6) months employed by  
Franchisor or any of its subsidiaries. Request for Franchisor's consent shall be  
sent in duplicate and addressed in writing to Franchisor's Vice-President of  
Operations and to its General Counsel.  
  
 ARTICLE 12. SUBFRANCHISORS, SALESMEN.  
  
 Inasmuch as this Agreement has not been executed by the Operator at the  
office of Franchisor, Franchisor requires certain assurances that this Agreement  
has been sold in accordance with applicable laws, rules and regulations.  
Accordingly, in order to induce Franchisor to execute this Agreement, Operator  
agrees to execute a Rider/Questionnaire to this Agreement that acknowledges that  
Franchisor is relying upon the acknowledgments, representations and commitments  
of Operator that no other salesman, staff member, entity, or associate of  
Franchisor has met Operator regarding this franchise sale or the offer and  
acceptance thereof other than those set forth therein. The rider shall identify  
all sales persons involved in the sales, negotiation and execution of this  
Agreement and shall identify the subfranchisor. Franchisor shall be entitled to  
rely on the Rider/Questionnaire, and Operator shall be bound by its contents.  
  
 ARTICLE 13. LOCAL MARKETING MANUAL.  
  
 Operator acknowledges that Franchisor's local marketing manual and other  
marketing and advertising materials emphasize the implementation of marketing  
efforts within a mile  
  
  
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radius of Operator's System Operation. Such references, suggestions and emphasis  
do not directly or indirectly grant to Operator a protected market or other  
exclusive right within such 3 mile marketing area, but rather reflects the  
reality that Operator's local marketing activities should initially be commenced  
in the area immediately adjacent to its System Operation.  
  
 ARTICLE 14. NATURE OF INTEREST AND TRANSFER.  
  
14.1 GENERAL PROVISIONS.  
  
 14.1.1 This Agreement shall inure to the benefit of the successors and  
assigns of Franchisor. Franchisor shall have the right to transfer or assign  
this Agreement to any person or legal entity who assumes its terms and agrees to  
comply with Franchisor's obligations contained herein. Franchisor shall have no  
liability for the performance of any obligations contained in this Agreement  
after the effective date of such transfer or assignment.  
  
 14.1.2 The rights and duties created by this Agreement are personal to  
Operator. Accordingly, except as otherwise permitted herein, neither Operator  
nor any person with an interest in Operator shall, without Franchisor's prior  
written consent, directly or indirectly sell, assign, transfer, convey, give  
away, pledge, mortgage, or otherwise encumber any direct or indirect interest in  
this Agreement or, if Operator is a partnership, joint venture, LLC or  
corporation, any direct or indirect interest in Operator. Any such purported  
assignment occurring by operation of law or otherwise without Franchisor's prior  
written consent shall constitute a default of this Agreement by Operator, and  
shall be null and void. Except in the instance of Operator advertising to sell  
its System Operation pursuant to the terms hereof, Operator shall not, without  
Franchisor's prior written consent, offer for sale or transfer at public or  
private auction or advertise publicly for sale or transfer, the furnishings,  
interior and exterior decor items, supplies, fixtures, equipment, Operator's  
sublease or the real or personal property used in connection with Operator's  
System Operation.  
  
14.2 CONSENT TO TRANSFER.  
  
 For all proposed transfers or assignments of this Agreement, and transfers  
of more than 51% of the outstanding and issued stock of Operator by one or more  
transfers or any transfer which, directly or indirectly, effectively changes  
management control of Operator, Franchisor will not unreasonably withhold its  
consent to any transfer or assignment which is subject to the restrictions of  
this Article, provided however, Franchisor shall not be required to give its  
consent unless all of the following conditions are met prior to the effective  
date of assignment:  
  
 14.2.1 Upon the execution of this Agreement and upon each direct or  
indirect transfer of an interest in this Agreement or in Operator and at any  
other time upon Franchisor's request, Operator shall, within five (5) days prior  
to such transfer or at any other time at Franchisor's request, furnish  
Franchisor with an estoppel agreement indicating any and all causes of action,  
if any, that Operator may have against Franchisor or if none exist and a list of  
all shareholders or partners having an interest in this Agreement or in  
Operator, the percentage interest of each shareholder or partner, and a list of  
all officers and directors, in such form as Franchisor may require.  
  
  
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 14.2.2 Operator's written request for transfer of either a partial or  
whole interest in this Agreement or Operator's System Operation must be  
accompanied by an offer to Franchisor of a right of first refusal at the same  
price offered by any bona fide buyer less five (5%) percent Franchisor shall  
have the right and option, exercisable within fifteen (15) days after receipt of  
such written notification, to send written notice to Operator or such person  
that Franchisor or its third-party designee, intends to purchase the interest  
which is proposed to be transferred, on the same terms and conditions offered by  
the third party. If Franchisor accepts such offer, the five (5%) percent  
transfer/administrative fee due by Operator in accordance with Article 3 shall  
be waived by Franchisor. Any material change in the terms of an offer prior to  
closing shall cause it to be deemed a new offer, subject to the same right of  
first refusal by Franchisor, or its third-party designee, as in the case of the  
initial offer. Franchisor's failure to exercise such option shall not constitute  
a waiver of any other provision of this Agreement, including any of the  
requirements of this Article with respect to the proposed transfer.  
  
 14.2.3 The Operator is not in default under the terms of this Agreement,  
the Manuals or any other obligations owed Franchisor, and all of its then-due  
monetary obligations to Franchisor have been paid in full.  
  
 14.2.4 The Operator and its shareholders or members, if the Operator is a  
corporation or limited liability company, have executed a general release under  
seal, in a form prescribed by Franchisor, of any and all claims against  
Franchisor, its affiliates, subsidiaries, shareholders, directors, officers,  
subfranchisors and employees.  
  
 14.2.5 The transferee/assignee has demonstrated to Franchisor's  
satisfaction that it meets all of Franchisor's then-current requirements for new  
operators or for holders of an interest in a franchise, including, without  
limitation, possession of good moral character and reputation, satisfactory  
credit ratings, acceptable business qualifications, and the ability to fully  
comply with the terms of this Agreement.  
  
 14.2.6 The transferee/assignee has assumed this Agreement by a written  
assumption agreement approved by Franchisor, or has agreed to do so at closing,  
and at closing executes an assumption agreement approved by Franchisor.  
  
 14.2.7 The transferee/assignee, its manager or other employees responsible  
for the operation of the System Operation have satisfactorily completed  
Franchisor's training program.  
  
 14.2.8 The transferee/assignee executes such other documents as Franchisor  
may require, including a replacement franchise agreement on the then-standard  
franchise agreement form used by Franchisor, in order to assume all of the  
obligations of this Agreement, to the same extent, and with the same effect, as  
previously assumed by the assignor.  
  
 14.2.9 At the completion of Operator's sale transaction, Operator shall  
pay to Franchisor an administrative/transfer fee of five percent (5%) of the  
gross selling price of Operator's System Operation or in the event of a nonsale  
management transfer, a fee of $1,500 to cover Franchisor's training expenses.  
This five percent (5%) administrative transfer fee will not be due with respect  
  
  
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to any transfer that (together with all other related previous, simultaneous, or  
proposed transfers) does not result in the transfer of control of Operator.  
  
 14.2.10 Operator's rights may pass to Operator's next of kin or legatee if  
they assume Operator's obligations and attend and complete Franchisor's training  
program. Upon Operator's disability, Operator may sell the franchise or keep it,  
if operated by trained personnel.  
  
 14.2.11 Franchisor's consent to a transfer shall not constitute a waiver  
of any claims it may have against the transferring party arising out of this  
Agreement or otherwise.  
  
 14.2.12 If Operator is an individual, Franchisor hereby consents to the  
assignment of this Agreement and any and all obligations referable thereto  
without any fee charged by Franchisor to a corporation principally owned by  
Operator within ninety (90) days after the date hereof. Upon such assignment and  
assumption by the corporation along with delivery of executed originals of same  
to Franchisor, the individual Operator shall be released from any and all  
personal liability.  
  
 ARTICLE 15. TERM, DEFAULT AND TERMINATION.  
  
15.1 TERM.  
  
 15.1.1 Provided Operator is not in default of the terms and conditions  
contained in its Location sublease and this Agreement, this Agreement shall  
continue for a period of twenty (20) years or for any longer period coterminous  
with the term of the Location sublease.  
  
 15.1.2 Operator may renew the rights granted by this Agreement for four  
(4) additional terms of five (5) years each, subject to the following  
conditions:  
  
 15.1.2.1 Operator gives Franchisor written notice of Operator's  
election to renew not less than six (6) and not more than twenty-four (24)  
months before the end of the then current term;  
  
 15.1.2.2 Operator is not in default of any provision of this  
Agreement or any amendments to this Agreement, the Location sublease, the  
Manuals or any monetary obligation owed to Franchisor or its affiliates; and  
  
 15.1.2.3 At Franchisor's request, Operator shall undertake and  
complete the reasonable renovation or modernization of its System Operation.  
  
 15.1.2.4 Operator shall execute Franchisor's then-current franchise  
agreement and related agreements.  
  
15.2 DEFAULTS WITHOUT OPPORTUNITY TO CURE.  
  
Operator shall be in default and Franchisor may, at its option, upon thirty (30)  
days written notice to Operator, terminate this Agreement and all rights granted  
by it, without affording  
  
  
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Operator any opportunity to cure the default, upon the occurrence of any of the  
following events:  
  
 15.2.1 Operator's knowingly or intentionally maintaining false books or  
records, or submitting any false report or payment to Franchisor;  
  
 15.2.2 Operator's conduct of the System Operation licensed pursuant to  
this Agreement is so contrary to this Agreement, the System and the Manuals as  
to constitute an imminent danger to the public health (for example, selling  
spoiled food knowing that the food products are spoiled or allowing a dangerous  
condition arising from a lack of security for customers to continue despite  
Operator's knowledge of such condition), or selling regularly unauthorized  
products to the public after notice of default and continuing to sell such  
products whether or not Operator has cured the default after one or more  
notices;  
  
 15.2.3 The conviction of a felony, or a crime involving moral turpitude,  
or any other crime or offense that is reasonably likely, in the sole reasonable  
opinion of Franchisor, to adversely affect the System, Franchisor's Marks; the  
goodwill associated with the System or Franchisor's interest in each of them by  
Operator's, or its controlling or operating shareholders or members if Operator  
is a limited liability company, or Operator's partners if Operator is a  
partnership, excluding non-managing partners  
  
 15.2.4 Operator's intentional disclosure or use of the contents of the  
Manual, trade secrets or confidential or proprietary information provided to  
Operator by Franchisor in violation of this Agreement, excluding acts of  
independent employees or others not under Operator's control; or  
  
 15.2.5 If Operator repeatedly commits defaults under any provisions of  
this Agreement eight (8) or more occasions in any twelve (12) month period, or  
sixteen (16) or more occasions in any consecutive twenty-four (24) month period,  
even if Operator cured each such prior default, and even if Operator would  
otherwise be given an opportunity to cure the current default.  
  
 15.2.6 Operator's, without Franchisor's consent, ceasing to operate or  
otherwise abandoning its System Operation or, upon destruction of its System  
Operation, failure to rebuild and resume operation within a reasonable time.  
Cessation of the business shall not constitute a default under this Agreement if  
caused by condemnation, expiration of a Location lease pursuant to its terms at  
execution, natural, governmental or supplier related causes out of Operator's  
control, or when failure to rebuild following destruction of the System  
Operation is prohibited by law or the Location lease. In the event of  
termination pursuant to this subsection 15.2.6, the written notice period shall  
commence five days from the date Franchisor sends written notice to Operator. At  
the expiration of this time period, this Agreement shall be deemed terminated.  
For purposes of this article, ceasing to operate or otherwise abandoning its  
System Operation shall be defined as Operator's failure to open its System  
Operation for business for 5 consecutive days.  
  
15.3 DEFAULTS WITH OPPORTUNITY TO CURE.  
  
 15.3.1 Except as otherwise provided in this Agreement, Operator shall have  
ten (10) days after Franchisor's written notice of default within which to  
remedy any default under this  
  
  
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Agreement, and to provide evidence of such remedy to Franchisor. If any such  
default is not cured within that time period, or such longer time period as  
applicable law may require, Franchisor may, at its option, terminate this  
Agreement and all rights granted by it, by sending a five (5) day written notice  
of cancellation of this Agreement to Operator. Upon the expiration of such five  
(5) day period, this Agreement shall end and expire as if it were the day fixed  
for termination of this Agreement.  
  
 15.3.2 Operator shall be in material default under this Article for any  
failure to comply with any of the requirements imposed by this Agreement. Such  
material defaults shall include, without limitation, the occurrence of any of  
the following events:  
  
 15.3.2.1 Operator's failure, refusal, or neglect to promptly pay any  
monies owed to Franchisor, its subsidiaries or affiliates, when due, or to  
submit the financial or other information required by Franchisor under this  
Agreement.  
  
 15.3.2.2 Operator's failure to maintain the standards specified by  
Franchisor in the Manual or otherwise.  
  
 15.3.2.3 Operator's failure, refusal or neglect to obtain  
Franchisor's prior written approval or consent as required by this Agreement.  
  
 15.3.2.4 Operator's misuse or unauthorized use of Franchisor's Marks  
or other material impairment of the goodwill associated therewith or  
Franchisor's rights therein.  
  
 15.3.2.5 Operator's commencement or conducting of any business  
operation, or marketing of any product, under a name or xxxx which, in  
Franchisor's reasonable opinion, is confusingly similar to Franchisor's Marks.  
  
 15.3.2.6 Operator's default, without cure after the applicable grace  
period, under any lease, sublease, sub-sublease, mortgage, or deed of trust  
covering the Location.  
  
 15.3.2.7 Operator's failure to procure or maintain the insurance  
required by this Agreement or in the lease and sublease for the Location.  
  
 15.3.2.8 Operator's default in the performance of any term,  
condition or obligation in payment of any indebtedness to its landlord or  
sublandlord, distributors or suppliers or others arising out of the purchase of  
inventory, supplies or purchase or lease of equipment for operation of its  
System Operation, and if any such default is not cured within thirty (30) days  
after written notice by Franchisor to Operator, unless Operator is determined by  
a court of competent jurisdiction to be not in default.  
  
15.4 In the event of a default by Operator, all of Franchisor's costs and  
expenses arising from such default, including reasonable legal fees and  
reasonable hourly charges of Franchisor's administrative employees shall be paid  
to Franchisor by Operator within five (5) days after cure.  
  
15.5 Notwithstanding the obligations of Operator and Franchisor to arbitrate all  
disputes and  
  
  
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other conflicts, Operator and Franchisor acknowledge that certain defaults  
require immediate action to protect the appropriate party. Accordingly,  
Franchisor and Operator each hereby consent to and authorize the other party to  
apply to any court of competent jurisdiction for judicial assistance in  
restraining and enjoining violations of this Agreement. Both Franchisor or  
Operator are entitled to an injunction restraining Franchisor or Operator from  
committing or continuing to commit any default, breach or threatened breach of  
this Agreement, without showing or proving any actual damage sustained by the  
party seeking such relief.  
  
15.6 Non-enforcement by Franchisor of any violation of the terms of this  
Agreement by Operator shall not constitute a waiver of such violation by  
Franchisor nor shall Franchisor be deemed to have waived any of its rights to  
enforce compliance by Operator of such breach or any other breach of this  
Agreement.  
  
 ARTICLE 16. RIGHTS AND OBLIGATIONS UPON TERMINATION.  
  
Upon the termination of Operator's rights granted under this Agreement, (whether  
during the term of the Agreement or at its conclusion) the following apply:  
  
16.1 Upon termination of this Agreement by lapse of time or by default,  
Operator's right to use Franchisor's Marks, or any other xxxx distributed by  
Franchisor or insignia or slogan used in connection therewith, or any  
confusingly similar trademark, service xxxx, trade name or insignia shall cease.  
Operator shall immediately discontinue use of Franchisor's Marks, System, and  
color scheme. Operator shall at its own cost, make cosmetic changes to  
Operator's System Operation from Franchisor's proprietary designs including, but  
not limited to, the removal of all SMOOTHIE ISLAND EXPRESS identifying materials  
and distinctive Smoothie Island Express cosmetic finishes, tile walls, interior  
wall coverings and colors, exterior finishes and colors, signage and Smoothie  
Island Express counter equipment (which shall be deemed proprietary to  
Franchisor) from the Location as Franchisor may reasonably direct.  
  
16.2 Franchisor may retain all fees paid pursuant to this Agreement.  
  
16.3 Any and all obligations of Franchisor to Operator under this Agreement  
shall immediately cease and terminate.  
  
16.4 Any and all rights of Operator under this Agreement shall immediately cease  
and terminate.  
  
16.5 In no event shall a termination or expiration of this Agreement affect  
Operator's obligations to take or abstain from taking any action in accordance  
with this Agreement. The provisions of this Agreement which constitute  
post-termination covenants and agreements including the obligation of Franchisor  
and Operator to arbitrate any and all disputes shall survive the termination or  
expiration of this Agreement.  
  
16.6 Operator acknowledges and agrees that rights in and to Franchisor's Marks  
and the use thereof shall be and remain the property of Franchisor.  
  
  
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16.7 If Operator has registered any of Franchisor's Marks or the name "SMOOTHIE  
ISLAND" as part of Operator's assumed, fictitious or corporate name, Operator  
shall promptly amend such registration to delete Franchisor's Marks therefrom.  
  
16.8 Operator shall immediately pay any and all amounts owing to Franchisor, its  
subsidiaries and affiliates.  
  
16.9 Franchisor shall have the option, exercisable by written notice within  
thirty (30) days after the termination of this Agreement, to take an assignment  
of all telephone numbers (and associated listings) for Operator's System  
Operation. Operator is not entitled to any compensation from Franchisor, if  
Franchisor exercises this option.  
  
 ARTICLE 17. INSURANCE.  
  
17.1 Operator shall obtain and maintain insurance coverage which shall in each  
instance designate Franchisor, and its subsidiaries, as an additional named  
insured, with an insurance company approved by Franchisor, which approval shall  
not be unreasonably withheld as follows:  
  
 17.1.1 Comprehensive general liability insurance (including products  
liability and sexual harassment coverage); with coverage of $1,000,000 to  
$3,000,000 combined single limit for death, personal injury, and $100,000  
property damage coverage.  
  
 17.1.2 Business interruption insurance, including Location rentals and  
Additional Rentals for twelve (12) months after casualty, in amounts equal to at  
least $100,000.  
  
 17.1.3 Workers' compensation insurance (coverage B) as required by  
applicable law.  
  
 17.1.4 Fire, and extended coverage insurance, insuring the construction of  
improvements and completed System Operation operated by Operator, for the full  
replacement value thereof.  
  
 17.1.5 If Operator establishes a delivery service for Authorized Products,  
Operator shall obtain separate non-owned auto coverage insurance. Operator may  
not directly or indirectly deliver any Authorized Products until such insurance  
is obtained and Franchisor named as additional insured therein.  
  
17.2 In the event of damage to the System Operation covered by insurance, the  
proceeds of any such insurance shall be used to restore the System Operation to  
its original condition as soon as possible, unless such restoration is  
prohibited by the Location lease or Franchisor has otherwise consented to in  
writing. Upon obtaining such insurance, Operator shall promptly provide to  
Franchisor proof of such insurance coverage and/or at such other times upon the  
request of Franchisor.  
  
17.3 Operator shall, prior to opening its System Operation, file with  
Franchisor, certificates of such insurance and shall promptly pay all premiums  
on the policies as they become due. In addition, the policies shall contain a  
provision requiring thirty (30) days prior written notice to Franchisor of any  
proposed cancellation, modification, or termination of insurance. If Operator  
  
  
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fails to obtain and maintain the required insurance, Franchisor may, at its  
option, in addition to any other rights it may have, procure such insurance for  
Operator without notice and Operator shall pay, upon demand, the premiums and  
Franchisor's costs in taking such action.  
  
 ARTICLE 18. SOLE OBLIGATIONS OF FRANCHISOR.  
  
18.1 As described in Franchisor's UFOC, received by Operator at least ten (10)  
business days prior to the execution of this Agreement, Franchisor has obligated  
itself to provide specific services to Operator. Franchisor also provides other  
voluntary services at its sole discretion. Franchisor and Operator agree that  
the following are the only required obligations of Franchisor:  
  
 18.1.1 To approve the Location of Operator.  
  
 18.1.2 To reasonably assist Operator with any operational or financial  
problem encountered by Operator, after notice to Franchisor in duplicate sent  
to: (i) Franchisor c/o General Counsel, 000 Xxxxxxxx - 00xx Xxxxx, Xxx Xxxx, Xxx  
Xxxx 00000; and (ii) Vice President - Operations, 0000 Xxx Xxxxxxxx, Xxxxx 000,  
Xxxxxxx, Xxxxxxx 00000 by certified mail (return receipt requested) or at any  
subsequent addresses established by Franchisor, of Operator's problem and the  
type of assistance needed. At no time shall reasonable assistance be interpreted  
to require Franchisor to pay any money to Operator. Franchisor, in its sole  
discretion, may provide any assistance at Franchisor's designated office or  
where Operator is located, at a time to be determined by Franchisor.  
  
 18.1.3 To reasonably administer to the advertising program. Operator  
acknowledges that pursuant to the advice of advertising and marketing  
professionals, advertising collections will at times be aggregated until  
sufficient revenues are accumulated to commence or complete an advertising or  
marketing program. Reasonable administration shall be deemed to be good faith  
attempts to utilize the advertising funds in accordance with the advice and  
suggestions of the advertising and marketing staff or outside advertising and/or  
marketing companies, consultants or other entities retained for such purpose.  
  
 18.1.4 To assist Operator in arranging for the initial financing of its  
System Operation, if feasible and necessary (Franchisor is not directly or  
indirectly responsible for the failure of Operator to meet the qualifying  
standards of such independent financing sources).  
  
 18.1.5 To supply to Operator a set of standard decor and layout plans and  
to thereafter approve the initial decor and layout of Operator's System  
Operation.  
  
 18.1.6 To loan Operator a copy of its Operations Manual or computer  
diskette thereof which manual contains mandatory and suggested specifications,  
standards and procedures. This Manual is confidential and remains Franchisor's  
property.  
  
 18.1.7 To train Operator in accordance with Article 3 herein, and to  
provide representatives of Franchisor to assist in opening the System Operation.  
  
18.2 Franchisor shall not, and can not be held in breach of this Agreement until  
(i) Franchisor  
  
  
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has received notice of any alleged breach from Operator in duplicate, by  
registered mail, sent to the parties set forth in paragraph 18.1.2 of this  
Article; and (ii) Franchisor has failed to remedy the breach within a reasonable  
period of time after such notice, which period shall not be less than sixty (60)  
days. This is a material term of this Agreement and may not be modified or  
changed by any arbitrator in an arbitration proceeding or otherwise in any court  
of competent jurisdiction.  
  
 ARTICLE 19. POINT OF SALE SYSTEM, COLLECTION OF DATA.  
  
19.1 This Agreement and the Manuals require the submission of weekly statistical  
control forms as well as other financial, operational and statistical  
information required by Operator and Franchisor to: (i) assist Operator in the  
operation of its System Operation in accordance with the System; (ii) allow  
Franchisor to monitor the Operator's gross sales, purchases, costs and expenses;  
(iii) enable Franchisor to develop chainwide statistics which may improve bulk  
purchasing; (iv) assist Franchisor in the development of new authorized products  
or the removal of existing unsuccessful Authorized Products; (v) enable  
Franchisor to refine existing Authorized Products; (vi) generally improve  
chainwide understanding of the System; and (vii) obtain new types of information  
unknown at this time (collectively, the "Information"). To achieve these  
results, cash collection and data processing systems are necessary.  
  
19.2 Operator agrees to purchase and use the point of sale cash collection and  
data processing system (the "POS System") and only the specified software  
authorized by Franchisor, as specified in the Construction and Equipment Manual  
or otherwise by Franchisor in writing. The POS System includes a PC based cash  
register, register tape printer, magnetic stripe reader, cash drawer, defined  
Franchisor polling and register software and telecommunications equipment.  
  
19.3 Operator agrees to (i) connect the POS System to Operator's telephone  
line(s); (ii) maintain it in good working order; and (iii) not disconnect any  
POS System connection or phone line at any time, for any reason, without prior  
written approval. Operator agrees, at Franchisor's request, to maintain  
membership in a designated third party network (such as CompuServe, AOL,  
Prodigy, etc.) for the purpose of implementing, transmitting, collecting and  
maintaining any Information or data exchange system. Operator specifically  
authorizes Franchisor to either "upload" or "download" information in and from  
or to its computers, cash registers or other such devices as allowed by law, as  
it relates to the System Operation by internet, intranet, and other networks or  
other means as it becomes available.  
  
19.4 Operator agrees to pay to Franchisor up to $13 weekly (subject to  
reasonable annual increases), in the manner provided under Article 9 herein, for  
support service for the POS System software during the term of its franchise and  
any renewals. This fee will be collected by Franchisor for payment to 1 or more  
3rd party suppliers who are designated by Franchisor to provide the support  
service. The 3rd party suppliers will provide 24-hour telephone support and  
annual maintenance for any upgrades and enhancements that they make to the  
required POS System software. Franchisor may cancel this service on 30 days'  
written notice to Operator, and may resume these services at any time with any  
supplier Franchisor chooses. Franchisor may revise the POS specifications.  
Operator may be required to upgrade or update its POS System recording system.  
On Franchisor's request, Operator must apply for and maintain debit cards,  
credit cards  
  
  
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or other non-cash payment systems to enable customers to purchase products  
through these procedures. There is no contractual limitation on Franchisor's  
right to receive information through the POS System.  
  
 ARTICLE 20. RELATIONSHIP OF PARTIES, DISCLOSURE.  
  
20.1 Franchisor and Operator are not and shall not be considered joint ventures,  
partners, or agents of each other, or anything other than Franchisor and  
Operator, and neither shall have the power to bind or obligate the other except  
specifically as set forth in this Agreement. Franchisor and Operator agree that  
the relationship created by this Agreement is not a fiduciary relationship.  
Operator shall not, under any circumstances, act or hold itself out as an agent  
or representative of Franchisor. Operator agrees to indemnify and hold  
Franchisor harmless from any claims, demands, liabilities, actions suits or  
proceedings asserted by third parties arising out of the operation of Operator's  
System Operation or Operator's breach of any of the terms of this Agreement.  
Franchisor agrees to indemnify and hold Operator harmless from any claims,  
demands, liabilities, actions, suits or proceedings asserted by third parties  
and arising out of Franchisor's operations unless caused by Operator.  
  
20.2 As set forth in the UFOC delivered to Operator as described above, Operator  
acknowledges that Franchisor has entered into certain subfranchise agreements  
with subfranchisors and/or area developers in certain areas and territories.  
Pursuant to these contracts, the subfranchisors of Franchisor are obligated to  
provide certain sales, operational and support services for Franchisor. Operator  
acknowledges that the relationship between Franchisor and all of its  
subfranchisors and/or area developers is strictly contractual and that no  
subfranchisor and/or area developer is an agent of Franchisor. Accordingly,  
Operator acknowledges and agrees that any past, current or future subfranchisor  
is not the actual, express or implied agent of Franchisor, and has no power or  
authority to: (i) act on Franchisor's behalf; (ii) enter into or execute any  
agreement on Franchisor's behalf; (iii) make any representation or promise on  
Franchisor's behalf; or (iv) bind Franchisor in any way. Unless otherwise  
specifically agreed to in writing, Franchisor expressly disavows any acts by  
others, including subfranchisors, that purport to bind Franchisor in any way.  
Operator agrees to waive any claim or defense in any litigation or arbitration  
proceeding that a subfranchisor is the express or implied agent of Franchisor.  
Operator agrees that any attempt to raise, assert or justify such claim or  
defense in any proceeding constitutes a material default of this Agreement.  
  
 ARTICLE 21. DISPUTE RESOLUTION: ARBITRATION AND LEGAL PROCEEDINGS.  
  
21.1 Franchisor and Operator acknowledge that disputes or disagreements may  
arise during the term of this Agreement and any renewals thereto. Franchisor and  
Operator have elected to resolve such disputes or disagreements in a  
non-judicial alternative dispute resolution format ("ADR"). An ADR format  
minimizes the expense of dispute resolution and generally can be accomplished in  
a more expeditious and effective manner. By agreeing to an ADR format, both  
Operator and Franchisor are also waiving a number of rights, remedies and  
privileges which may arise in a judicial resolution format. In view, however, of  
the continuing relationship between Operator and Franchisor over the original  
and renewal terms of this Agreement, both Operator  
  
  
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and Franchisor agree that an ADR format is the most economical, efficient and  
practical way to resolve disputes and disagreements.  
  
21.2 Accordingly, except as otherwise provided in this Agreement, in the event  
of any dispute or disagreement between Franchisor and Operator with respect to  
any issue arising out of or relating to this Agreement, its breach, its  
interpretation or any other disagreement between Operator and Franchisor, such  
dispute or disagreement shall be resolved by arbitration. In the event of any  
dispute or disagreement, Operator and Franchisor both agree to submit the  
dispute to arbitration in accordance with the least expensive procedure of the  
American Arbitration Association ("AAA"), and the application for such  
arbitration shall be filed in the AAA's New York City office . Franchisor and  
Operator agree that the hearing(s) shall be held in the City of New York, State  
of New York , before one Arbitrator. This paragraph shall not apply to any  
monetary defaults of Operator, including Operator's obligation to pay franchise  
and advertising fees to Franchisor, and Franchisor shall be free to utilize any  
right or remedy it may have at law or equity.  
  
21.3 Franchisor and Operator agree that this Agreement evidences a transaction  
involving interstate commerce and that the enforcement of this arbitration  
provision and the confirmation of any award issued to either party by reason of  
an arbitration conducted pursuant to this arbitration provision is governed by  
the Federal Arbitration Act, 9 U.S.C. ss.1 et seq.  
  
21.4 Punitive or exemplary damages or attorney's fees may not be awarded by the  
arbitrator(s), and any such award shall not be enforceable or enforced by any  
court. Except as otherwise provided, each party shall bear its own attorney's  
fees, expert witness fees, and other court costs incurred in connection with any  
legal action or arbitration between Franchisor and Operator. If the waiver of  
punitive or exemplary damages or legal fees and related costs are in violation  
of the laws of the state where the Operator's System Operation is located, such  
claims may be awarded by the arbitrator(s), and any such award shall be  
enforceable or enforced in any court of appropriate jurisdiction. This agreement  
shall be strictly construed in the arbitration hearing. In no event can the  
material provisions of this Agreement including, but not limited to the method  
of operation, Authorized Product line or monetary obligations specified in this  
Agreement, amendments to this Agreement or in the Manuals be modified or changed  
by the arbitrator at the arbitration hearing.  
  
21.5 Except for injunctive relief (including temporary restraining orders,  
preliminary injunctions and injunctions or similar relief which must be brought  
in an appropriate local forum), any legal proceeding authorized by this  
Agreement shall be commenced only in the Federal District Court for the Southern  
District of New York and both Franchisor and Operator consent to the  
jurisdiction in the Federal District Court for the Southern District of New  
York. In the event the parties do not meet the jurisdictional requirements for  
Federal Court, the parties consent to jurisdiction in the Supreme Court, New  
York County, State of New York. Operator agrees that mailing to its last known  
address by certified mail of any process shall constitute lawful and valid  
process. In all cases, Operator and Franchisor each waives any right to a trial  
by jury. Notwithstanding the foregoing, if the laws of the state where  
Operator's System Operation is located requires jurisdiction of the courts of  
that state or control by the laws of that state, then this Agreement shall be  
deemed modified to comply with the applicable laws thereto.  
  
  
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21.6 The terms of this article shall survive termination, expiration or  
cancellation of this Agreement.  
  
 ARTICLE 22. EXECUTION, REQUESTS, CONSENTS AND WAIVERS.  
  
22.1 This Agreement takes effect upon its acceptance and execution by Operator  
and Franchisor, and shall be governed by and construed in accordance with the  
laws of the State of New York, USA. Franchisor will consider written requests by  
Operator for Franchisor's consent to a waiver of any obligation imposed by this  
Agreement. Operator agrees, however, that Franchisor is not required to act  
uniformly with respect to waivers, requests and consents as each request will be  
considered on a case by case basis, and nothing shall be construed to require  
Franchisor to grant any such request. Any waiver granted by Franchisor shall be  
without prejudice to any other rights Franchisor may have, will be subject to  
continuing review by Franchisor, and may be revoked, in Franchisor's sole  
discretion, at any time and for any reason, effective upon ten (10) days prior  
written notice to Operator. Franchisor makes no warranties or guarantees upon  
which Operator may rely, and assumes no liability or obligation to Operator by  
providing any waiver, approval, consent, assistance, or suggestion to Operator  
in connection with this Agreement, or by reason of any neglect, delay, or denial  
of any request.  
  
22.2 Unless otherwise provided, whenever this Agreement requires Operator to  
obtain Franchisor's prior written consent, Operator shall timely address its  
written request for such consent in duplicate to the parties set forth in  
paragraph 2 of Article 18 or such other persons as Franchisor may designate in  
writing. Franchisor will then consider such request and advise Operator of the  
decision, in writing, within forty-five (45) days. Franchisor's failure to  
advise Operator will constitute Franchisor's consent to such request. The  
forty-five (45) day period shall not begin to run, however, until Operator has  
provided Franchisor with all information and documentation requested by  
Franchisor. Neither Operator nor Franchisor shall be deemed to have waived or  
impaired any right, power or option reserved by this Agreement, including,  
without limitation, its right to demand strict compliance with every term,  
condition, and covenant herein, or to declare any breach thereof a default and  
to terminate this Agreement prior to the expiration of its term, by virtue of  
any custom or practice of the parties at variance with the terms hereof; by any  
forbearance, delay, failure, or omission to exercise any right, power, or  
option, whether of the same, similar, or different nature, against Franchisor,  
Operator, or any other operator; or by the acceptance of any payments due after  
any breach of this Agreement.  
  
 ARTICLE 23. MISCELLANEOUS PROVISIONS.  
  
23.1 This Agreement may be executed in any number of counterparts, each of  
which, when so executed and delivered, shall be deemed an original, but such  
counterparts together shall constitute but one and the same instrument.  
  
23.2 This Agreement (as further explained in the UFOC) contains the entire  
agreement of the parties and cannot be modified, changed or amended except in  
writing and signed by Franchisor.  
  
23.3 There is no other agreement, representation or warranty made by Franchisor  
or any other  
  
  
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entity or person associated with Franchisor other than contained in this  
Agreement. This Agreement is not subject to or conditioned upon the obtaining of  
a Location for Operator's System Operation.  
  
23.4 Except as otherwise provided, each party shall bear its own attorney's fees  
arising from the negotiations and execution or lack of execution of this  
Agreement, and any expert witness fees, and other court costs incurred in  
connection with any violation of this Agreement.  
  
23.5 Each article, paragraph, subparagraph, term, and condition of this  
Agreement shall be considered severable. If for any reason, any portion of this  
Agreement is determined to be invalid or in conflict with any law or rule in a  
final ruling issued by any court, agency, or tribunal with valid jurisdiction in  
a proceeding to which Franchisor is a party, that ruling shall not effect the  
validity or enforceability of any other portion of this Agreement.  
  
23.6 All notices to Franchisor required by the terms of this Agreement, unless  
otherwise provided, shall be sent by certified or registered mail or by  
overnight delivery service, addressed to the parties set forth in this  
Agreement, or at such other address as Franchisor designates. All notices to  
Operator required by the terms of this Agreement shall be sent by certified or  
registered mail or by overnight delivery service, addressed to Operator at the  
Location, or at such other or additional address as Operator designates in  
writing. If Operator refuses acceptance of any certified, registered or  
overnight delivery, acceptance shall be deemed to have occurred forty-eight (48)  
hours after rejection of such notice.  
  
23.7 Operator acknowledges that the evolution of the System requires the  
development of Nontraditional SMOOTHIE ISLAND EXPRESS juice bars, and Smoothie  
Island Express Distribution Points and Branded Products.  
  
23.8 For the purpose of this article, a co-brand shall be defined as an  
independent operating system owned by another entity (not Franchisor) that is  
incorporated as an operational part within the Operator's System Operation.  
Subject to Franchisor's prior written approval, Operator may install approved  
co-branding marketing systems to be operated in conjunction with Operator's  
System Operation. Franchisor shall not be required to approve any co-branding  
marketing system unless Franchisor has recognized that co-branding system as an  
approved co-brand for operation within its System Operation, either nationally  
or regionally. Inasmuch as Operator and its employees will be incorporating the  
co-brand within its System Operation, all sales of the co-brand shall be  
included within the definition of "gross sales" as defined in Article 9 herein  
and Operator shall pay to Franchisor franchise and advertising fees for such  
sales.  
  
  
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 IN WITNESS WHEREOF, the parties hereof have executed this Agreement as of  
the date of execution by Franchisor.  
  
 Smoothie Island Co.  
 an Unincorporated Division  
 of Maui Tacos International, Inc.  
  
  
 By:  
-------------------------------- -------------------------------------  
Date of Execution Vice President  
  
Executed as of the date first <>  
above written.  
  
 By:  
 -------------------------------------  
 <>, <