

**EXHIBIT C TO THE  
GYMBOREE PLAY PROGRAMS, INC.  
OFFERING CIRCULAR**

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**FRANCHISE AGREEMENT**

**GYMBOREE PLAY PROGRAMS, INC.**  
**FRANCHISE AGREEMENT**

\_\_\_\_\_  
Franchisee

\_\_\_\_\_

\_\_\_\_\_  
Location

\_\_\_\_\_

Date of Agreement

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EXHIBITS

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Exhibit C to Offering Circular

FRANCHISE AGREEMENT

BETWEEN

GYMBOREE PLAY PROGRAMS, INC.

AND

\_\_\_\_\_

Gymboree Play Programs, Inc., hereinafter sometimes called "Gymboree," and \_\_\_\_\_, hereinafter called the "Franchisee," in consideration of promises made herein and intending to be legally bound, agree as follows:

**In a number of places in this Franchise Agreement, you're asked to initial certain items. Initialing by you confirms, without lessening the importance or binding nature of each of the provisions of this Franchise Agreement, that you recognize the special significance of those items and the fact that they've been fully discussed with you, and read, understood and agreed to by you. Please initial below and at all other points indicated.**

Your Initials: \_\_\_\_\_ / \_\_\_\_\_

**1. RECITALS**

**1.1 Legal Status of Gymboree.** Gymboree is a California corporation with its principal office and place of business at 700 Airport Blvd., Suite 200, Burlingame, California 94010.

**1.2 Legal Status of Franchisee.** Franchisee is a \_\_\_\_\_ with its principal office and place of business at \_\_\_\_\_

**1.3 Definitions.** For purposes of this Franchise Agreement, the following terms have the meanings listed below. Other terms used in this Agreement are defined and construed in the context in which they occur.

**"Affiliate"** - Any person, company or other entity which controls, is controlled by or is under common control with another person, company or other entity, as well as any spouse, parent, child and/or sibling and any entity controlled by any spouse, parent, child and/or sibling.

**"Agreement"** - This Franchise Agreement.

**"Days"** - Unless indicated to the contrary, all references to a number or a period of days in this Agreement shall mean that number or period of calendar days and not business days. When any such number or period of days ends or expires on a weekend or holiday, the number or period of days should be extended to the next following day which is not on a weekend or a legal holiday.

**"Design Standards"** - Standards, specifications and other requirements for design, decoration, layout, equipment, furniture, fixtures, signs and other items for a Gymboree Play Center.

**"Designated Equipment"** - Equipment that meets our requirements and is to be obtained and used by you in the operation of your Gymboree Play Center.

**"Franchise"** - The right to operate a single Gymboree Play Center at the Premises pursuant to the terms and conditions of this Agreement.

**"Franchisor"** - Gymboree Play Programs, Inc.

**"Franchisor-Related Persons/Entities"** - Gymboree Play Programs, Inc., the Marketing Fund (and its members), and each and all of the following, whether past, current and/or future: each and all company(ies)/person(s) acting by, through, under, in concert, affiliated and/or associated in any way, with us and/or any of the foregoing, together with each and all of the partners, shareholders, officers, directors, agents, attorneys, accountants, and/or employees of us and/or any of the foregoing, as well as each and all of the successors and/or assigns of us and/or any of the foregoing, as well as Gymboree Corporation and each of its shareholders, officers, directors, agents, attorneys, accountants, and/or employees.

**"Good Standing"** - You are in "Good Standing" if you (and each of your owners and Affiliates) are not in default of any obligation to us and/or any of the Franchisor-Related Persons/Entities, whether arising under this Agreement or any other agreement between you (and each of your owners and Affiliates) and us (and/or any of the Franchisor-Related Persons/Entities), the Manuals or other System requirements (collectively, the "Obligations"); provided that you are not in Good Standing if you have been in default of any Obligations and such defaults are incurable by nature and/or part of a series of repeated defaults as defined in this Agreement.

**"General Release"** - A general release, in the then-current form prescribed by us at the time such release is to be delivered, of any and all claims, liabilities and/or obligations, of any nature whatsoever, including those existing as of, and/or arising before, the date of any such release, however arising, known or unknown, whether against us and/or any or all of the Franchisor-Related Persons/Entities, and whether by you, any owner of you (if you are or become a Business Entity) and/or any Affiliate of any of the foregoing. A copy of our general releasing language as currently used by us (which is subject to change) is attached as Exhibit H and is approved by you.

~~**"Good Standing"** - "Good Standing" includes (but is not limited to) you and each affiliate of yours (a) not being in default or threat of default under this Agreement and/or any other agreement, or any other legal obligation, to us and/or any affiliate of ours and (b) operating each Gymboree Franchise, in which you and/or any affiliate of yours has any ownership or other interest, in full compliance with the System and Manuals and all of our other requirements, in each case as they may be modified by us from time to time in our sole and absolute discretion.~~

**"Gymboree Play Center"** - The Gymboree Play Center which you're franchised to operate at the Premises pursuant to this Agreement.

**"Manuals"** - One or more handbooks, manuals, bulletins and/or volumes, other written materials, and video, audio and/or software media, (including materials distributed electronically or otherwise) regardless of title, containing (among other things) specifications, standards, policies and procedures prescribed from time-to-time by us and to be followed by you in connection with your operation, marketing or otherwise of your Gymboree Play Center and your performance under this Agreement, including (but not limited to) all goods and services to be sold and/or provided at or from your Gymboree Play Center and/or in association with the Marks. The Manuals include all changes and supplements issued by us in the future, each of which you'll promptly comply with.

**"Gymboree Marks" or "Marks"** - The trademarks, service marks and other commercial symbols now and/or in the future owned by us and which we designate, from time-to-time, to be used to identify the services and/or products offered by Gymboree Play Centers, including (but not limited to) the mark "Gymboree™", the Trade Dress and certain associated logos.

**"Premises"** - The physical location leased, rented or owned by you at which you will operate a single Gymboree Play Center and as accepted by us pursuant to this Agreement.

**"Products" and "Services"** - Products and services designated by us from time-to-time for use, sale, lease, rental or to be otherwise used and/or provided at or from your Gymboree Play Center, and/or in association with the Marks.

**"Similar Business"** - Any business, or not-for-profit activity, offering or involved with (and any business or not-for-profit activity similar to and/or competitive with businesses offering or involved with) non-therapeutic sensory-motor child-parent play programs, including any business or not-for-profit activity awarding franchises or licenses to others to operate or be involved with such programs, as well as any business or not-for-profit activity that now and/or in the future offers, sells, distributes, provides or is otherwise involved or deals with, whether at wholesale, retail or otherwise, any goods and/or services (including, among others, the Products) now or in the future authorized by us to be offered at or from Gymboree Play Centers, or similar products, including any business or not-for-profit activity awarding franchises or licenses to others to operate or be involved with any such business or not-for-profit activity.

**"Site" or "Play Center"** - The fixed location at which you will operate a single Gymboree Play Center and its service to the public and as accepted by us pursuant to this Agreement.

**"System"** - The distinctive format and method of doing business now or in the future developed, used and/or modified by us in our sole and absolute discretion for the operation of a non-therapeutic sensory-motor, child-parent play program [and/or other program(s) designated by us] including (but not limited to) (a) distinguishing characteristics related to the image, design, appearance, layout and color scheme of a Gymboree Play Center, (b) design, style, color and other distinguishing characteristics of fixtures, showcases, signs and furnishings, (c) layout, design and selection of equipment, (d) specifications used in preparing Products for sale, (e) methods used for selecting, purchasing, marketing, displaying and selling Products, (f) operating, marketing and other systems, procedures and standards and (g) the standards of quality, service and cleanliness used in the operation of a Gymboree Play Center.

**"Territory"** - The geographical area described in Exhibit A.



**"Trade Dress"** - The Gymboree Play Center design and image developed and owned by us for Gymboree Play Centers, as it currently exists and as it may be revised and further developed by us from time-to-time in our sole and absolute discretion.

**"Us," "We," "Our," "Franchisor" or "Gymboree"** - Gymboree Play Programs, Inc., a California corporation.

**"You," "Your" or "Franchisee"** - The individual(s) signing this Agreement as Franchisee. (If there's more than one Franchisee, each is jointly and severally obligated under this Agreement and all other agreements with us.)

**1.4 Business of Gymboree.** Gymboree has expended considerable time, effort, and money in the creation and development of a "play center" business involving non-therapeutic sensory-motor, child-parent play programs, **early childhood music and art programs**, birthday parties, theme parties, and story line parties for infants and children in Gymboree specified age ranges, using specially designed equipment and program aids and such other programs as Gymboree develops and/or designates from time to time (hereinafter called the "Gymboree Program") which it desires to establish at locations within the Territory. The Gymboree Program does not include, without limitation, programs for handicapped children, day-care programs, after-school programs, formal educational programs, exercise programs, programs for children and parents in age ranges other than those set forth as being within the Gymboree Program, programs for parents only, pre-natal care programs, or any other programs offering services other than the services specified in Sections 1.4 and 1.5 as the Gymboree Program. Anything not specifically included in the Gymboree Program, as described above and as Gymboree may change from time to time in our sole and absolute discretion, shall not be deemed part of the Gymboree Program.

Gymboree has expended considerable time, effort, and money in the creation and development of a mobile play program (the "Gymboree On The Go Program"). The Gymboree On The Go Program will bring a play program, which includes components of the Gymboree Program, directly to certain children's institutions, such as preschools. From time to time, Gymboree may design and/or designate additional programs or affiliations which must be offered to the public from the Site. Gymboree may, in our sole and absolute discretion, at any time upon written notice cancel, replace or modify any portions of the Gymboree Program, including the Gymboree On The Go Program. The Gymboree On The Go Program is incorporated by reference into the definition of the "Gymboree Program" throughout this Agreement. Gymboree may at any time upon written notice revise, modify, add or subtract programs from the Gymboree Program in our sole and absolute discretion and with which you'll comply.

**1.5 Objective of Franchisee.** Franchisee desires to become a licensed operator of the Gymboree Program, thus obtaining the benefits of the methods developed by Gymboree and the right to do business under the mark and name "Gymboree" in the Territory.

## **2. FRANCHISE AND SERVICES**

### **2.1 Franchise Territory.**

(a) The Territory awarded to Franchisee is described in Exhibit A, and is referred to herein as the "Territory." Gymboree awards Franchisee a license to operate the Gymboree Program and use the Gymboree Marks at the Site or Sites within the Territory while this Agreement is effective.

Franchisee shall not use the Gymboree Marks or Program at any location not expressly consented to in writing by Gymboree. Gymboree is also licensed to use certain other trademarks and service marks not included in the license granted hereunder and Franchisee acknowledges and agrees that Franchisee shall have no rights to use such trademarks and service marks.

~~All~~ Site ~~or~~ Sites must be located within the Territory. Franchisee is not authorized or permitted to market, offer or sell goods or services outside the Territory ~~(, except in accordance with Article 6 below)~~. If Franchisee and Gymboree mutually agree to change the Territory or Sites in the Market Plan, or ~~as if there is a result of a sale transfer~~ by Franchisee, or if Franchisee desires to open additional sites located either in or outside the Territory, Franchisee, at Gymboree's option, may be required to sign Gymboree's then-current form of franchise agreement, which may contain materially different economic and other terms and conditions from this Agreement, **together with a General Release**. The term of such franchise agreement shall be the unexpired term remaining under this Agreement, and Franchisee (and each affiliate) will sign a ~~general release~~ **General Release**, in form prescribed by Gymboree.

Franchisee may only offer the Gymboree Program (other than the On the Go Program) at the fixed Sites specified in the Market Plan or the Operations Manual. Franchisee must notify Gymboree in writing with respect to the location, dates and times for all authorized Gymboree On The Go Programs or any component thereof. Franchisee agrees to notify Gymboree of the addresses of its fixed Sites prior to opening.

Except as provided in Section 2.2 below, Franchisee shall have no right or license to the following and all rights to each is reserved to Gymboree:

(1) Gymboree reserves the right to market **and/or distribute** (or license others to market **and/or distribute**) in or outside the Territory, by itself or through others, ~~consumer products~~ **goods and services** and other items using the Gymboree Marks **or otherwise**. ~~Franchisee acknowledges and agrees that it shall have no right or license to anything not specifically included in the Gymboree Program.~~

(2) Other types of programs which may be similar to or contain elements of the Gymboree Program. Gymboree may **market and/or** operate or license others to **market and/or** operate, in or outside the Territory, under the Gymboree Marks or ~~under other marks~~ **otherwise**, other types of programs which may **or may not** be similar to or contain elements of the Gymboree Program. Franchisee shall have no right ~~or licenses~~ to such programs.

(3) Gymboree further reserves all other rights to Gymboree's trade names, trademarks and service marks, including, without limitation, the right to market by itself or license others to market under the Gymboree Marks any services not included in the Gymboree Program, and the marketing of the Gymboree Program through alternative channels of distribution within or outside the Territory.

(b) Market Plan Requirements. Failure to open and operate all Sites in accordance with the Market Plan may result in termination of the Franchise Agreement by Gymboree. Alternatively, in Gymboree's sole and absolute discretion, (1) if Franchisee fails to open a Site in accordance with the Market Plan, or (2) if Franchisee abandons or closes a Site without Gymboree's consent, then the Site shall be deemed deleted from the Market Plan without refund of the initial franchise fee. **If, in our sole and absolute discretion, we determine at any time that it is in the best interests of the**

Gymboree system, Gymboree may modify the Territory to include "buffer zones" and Franchisee will not thereafter open any Play Centers within, or relocate any Sites to, locations within, such buffer zones.

~~If Gymboree determines prior to execution of this Agreement, or upon renewal, transfer or the acquisition of additional rights, in its sole and absolute discretion, that the location of Sites by Franchisee Sites in certain portions of the "Territory" would not maximize contribute sufficiently to the performance of the overall Gymboree system-wide performance of the Gymboree Program, then the Territory will be modified to include "buffer zones" will be included in the description of the Territory and within which Franchisee shall not open any Sites or be permitted to relocate within the described buffer zones.~~

(c) Other Reserved Rights. Notwithstanding the foregoing or anything else in this Agreement or otherwise, Gymboree (and those we may license and/or appoint) retains all rights to market and sell on any terms and conditions and in any format that that we deem appropriate, Gymboree brand (or any other brand) products and services (whether or not competitive), including without limitation the Gymboree Program and its components, to customers located anywhere (including within the Territory) using any channels of distribution other than a physical, "brick and mortar" Gymboree Play and Music Center located in the Territory (including but not limited to non-traditional Gymboree locations and/or other outlets located in or outside the Territory, and/or the Internet, other electronic means, mail order or otherwise). Franchisee acknowledges and agrees that there is no limitation on Gymboree's right to exercise any of such rights, or on those that Gymboree may license and/or appoint to exercise such rights, regardless of the impact on, or vicinity of, your Gymboree Play and Music Center or the number of Gymboree Play and Music Centers or any other outlets or channels of distribution operating in an area or market, and no matter how close to the boundaries of the Territory.

Gymboree retains any and all other rights in and to the Gymboree Marks and the Gymboree Program and except as expressly set forth above, and, if Franchisee is unable or unwilling to service any potential or existing customer(s) in the Territory, Gymboree (and/or its appointees) may service any such customer(s) as Gymboree deems appropriate without any obligation to Franchisee. Except as set expressly forth otherwise in this Agreement, Gymboree retains the right, in its sole and absolute discretion, to operate and/or award to others the right to operate Gymboree and any other businesses on such terms and conditions and at such locations and in any format and channel of distribution as it deems appropriate in its sole and absolute discretion.

Gymboree (and any of the Franchisor-Related Persons/Entities) can acquire, merge, affiliate with or engage in any other transaction with, other businesses (competitive or not), with companies and/or units located anywhere, including in proximity to Franchisee's Play Center. Such transactions may include (but are not limited to) arrangements involving competing outlets and brand conversions (to or from the Gymboree® format). Such transactions are permitted under this Agreement, and Franchisee agrees to fully participate in any such conversion, including all re-branding, all at Franchisee's sole expense.

In spite of any restrictions in this Agreement or otherwise, Gymboree can develop or become associated with other concepts (including dual branding and/or other franchise systems) whether or not using the Gymboree System and/or the Marks, and may award franchises or other rights for locations anywhere.

Franchisee understands that Gymboree is not granting to Franchisee, and hereby reserves to itself and the Franchisor-Related Parties/Entities, any rights to use the Marks and/or the Gymboree System in connection with the Internet, World Wide Web and/or other electronic media. In addition, Gymboree may, in its sole and absolute discretion, restrict Franchisee's use of the Internet, World Wide Web, other electronic means of marketing and/or mail order (or any other means of distribution), and/or may require that Franchisee deal only with certain customers located in the Territory.

If Franchisee defaults on any obligation to Gymboree or any affiliate, or fails to meet the performance standards set forth in Section 7.3, Gymboree may, in its sole and absolute discretion, reduce, eliminate or otherwise modify Franchisee's territorial rights.

## **2.2 Selection and Construction of Sites, Equipment, Program Aids and Resale Items.**

(a) If the site for your Gymboree Play Center has not been identified and purchased (or leased) by you and accepted by us by the time you and we sign this Agreement, then within six (6) months from the date you attended initial training you must purchase or lease (and obtain possession of) a site suitable for the operation of your Gymboree Play Center and acceptable to us. We won't unreasonably withhold our acceptance of a site that meets our standards but we can make no assurance that appropriate sites will be available, the terms on which possession may be obtained or otherwise, all such matters being your sole responsibility. If you are unable to purchase or lease an acceptable site within such periods, we may (but have no obligation to), at any time thereafter, terminate our obligations and your rights under this Agreement, provided we refund to you the lesser of (a) one-half (1/2) of the initial franchise fee paid to us pursuant to this Agreement or (b) the initial franchise fee less all expenses (including legal fees, commissions, training costs, etc.) incurred in connection with such franchising and termination; and you will concurrently execute documents acceptable to us, providing for (1) continuation of your indemnification, confidentiality and non-competition obligations and the dispute avoidance and resolution provisions of this Agreement, including those of Article 11, together with the provisions of Article 13, and (2) a ~~general release~~ **General Release**, in form prescribed by us, of any and all claims, liabilities and/or obligations, of any nature whatsoever, however arising, known or unknown, against us and/or any or all of the Franchisor-Related Persons/Entities.

You won't make any commitments with respect to any location or operate a Gymboree Program and/or use any of the Marks, from or at any location (nor will you relocate your Gymboree Play Center) until and unless we've accepted such location. If there is any disagreement or dispute relating to any aspect of your site, you and we will resolve it through good faith mediation/arbitration as provided in this Agreement.

While we may, as a courtesy, assist you in evaluating or negotiating any lease (or other documents or arrangements) or otherwise assist you in your efforts to select and obtain a site by providing consultation, evaluation and/or otherwise (including providing references to potential contractors, real estate agents, site selection specialists and other professionals, some of whom may be affiliated and/or associated with us), we strongly recommend that you have all matters related to site selection and securing reviewed by your own independent attorney, real estate broker, architect and other professionals retained by you. While the selection of a site by you is subject to our reasonable consent, and although this franchise may be awarded for a specific existing location, neither we nor any company or person will recommend or approve any particular location or any related services to you. Acceptance by us of any location is in no way a recommendation, approval or endorsement of such location nor a representation or warranty as to its legal or business availability, suitability, appropriateness, success potential or otherwise and we cannot guarantee success for any location.

You're the only person and/or company with any liability or responsibility for those decisions and matters.

In any case, you understand and agree that the selection and securing of a site, the negotiation of a lease or purchase, the selection of developers, real estate agents, site selection specialists, contractors, etc., financing and all other matters related in any way to your site are exclusively and entirely your sole and ultimate responsibility and that neither we, any of Franchisor-Related Persons/Entities nor any other person or company affiliated or associated with us in any way will have any liability or responsibility with respect to any matters related in any way to the site for your Gymboree Play Center, including (but not limited to) site location, identification, evaluation, selection, lease/purchase negotiation, financing, review of documents, construction, build out, compliance with local requirements, suitability for any use or purpose and/or any other aspect of the development process (and any related steps) or otherwise, all such responsibilities being solely yours.

We may (but have no obligation to), make available to you standard and/or site specific plans and specifications to be utilized by you in the construction or otherwise of your Gymboree Play Center. You'll obtain, at your sole expense, all further qualified architectural and engineering services to prepare surveys, site and foundation plans and adapt any plans and specifications to your location and all applicable laws, regulations and ordinances. Any changes from plans provided by us must be submitted to us for our consent, which we may grant, condition or withhold in our sole and absolute discretion. Neither we nor any other person or company recommended by and/or affiliated in any way with us will have any liability with respect to any plans, specifications and/or other items/services provided to you and/or to be utilized by you in the construction or otherwise of your Gymboree Play Center, or any deviations or modifications therefrom, nor with respect to the preparation, construction, operation or otherwise of your Gymboree Play Center, whether in accordance with standard plans or otherwise, all such responsibilities being solely yours.

We make no representations, guarantees or otherwise as to the costs of development and build-out (or otherwise) of your Gymboree Play Center, the date on which your Gymboree Play Center will be open for business or otherwise, such matters not being within our sole control. Our review of and/or consent to any plans (or modifications) submitted by you, your development, construction and/or other activities, and our providing of any plans or other assistance, or otherwise, will be solely for the purpose of determining compliance with Gymboree System standards and you are the sole person/entity responsible for constructing and operating your Gymboree Play Center in compliance with all applicable legal requirements.

You agree that without our ability to limit our (and others') liability as set forth in this Agreement (and, in particular, this Section), we wouldn't be willing to award this Franchise to you (and would consider developing the location as a company-owned unit) or to be involved in any way in assisting you in these matters.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

(b) Any lease or sublease for the Premises of the Site must be satisfactory to us in our sole and absolute discretion and shall, in any event:

(1) provide that Gymboree at our sole option, at any time and without further consideration, will receive a transfer of your leasehold interest, whether on termination, cancellation,

recession or expiration of your rights under any lease/sublease or under this Agreement or otherwise, in each case without the lessor's or sublessor's consent and specifying that the lessor/sublessor will accept us as a substitute tenant on notice from us that we are exercising our rights. (If we exercise this option and you, and each affiliate of yours, are not in default, or under notice of default, and if your rights have not been terminated or expired, under this Agreement or any other agreement with us or any affiliate of ours, we'll sublease the Premises to you on the same terms as we lease it, subject to our usual security deposit and other conditions.) You agree to do all acts necessary or appropriate to accomplish such transfer, on our request and will, at the same time you sign this Agreement, sign the Collateral Assignment of Lease attached as Exhibit "G";

(2) authorize and require the lessor to disclose to Gymboree, upon Gymboree's request, sales and other information furnished to the lessor by Franchisee;

(3) include the lessor's express consent to Franchisee's use of the Marks and initial signage as prescribed by Gymboree for the Site;

(4) provide that the premises for the Site may be used solely for the operation of the Gymboree Program pursuant to a Franchise Agreement in good standing;

(5) prohibit Franchisee from subleasing, assigning, hypothecating, pledging or otherwise, all or any part of its occupancy rights, extending the term or renewing or modifying the lease without Gymboree's prior written approval, which may be withheld in our sole and absolute discretion;

(6) provide that Gymboree has the right to enter the premises of the Site to make modifications necessary to protect the Marks or the System;

(7) provide that the lessor expressly approves and accepts Franchisee's standard interior and exterior premises design. Franchisee shall deliver a copy of the signed lease or sublease to Gymboree within ten (10) days of its execution.

(8) require the lessor/sublessor to concurrently provide us with a copy of any written notice of default under the lease/sublease and granting us the right (but without any obligation on our part) to cure any default under the lease and providing that if you fail to effect such cure during the time period permitted under the lease/sublease, then within thirty (30) days after the expiration of the period in which you can cure the default, we may (at our option) receive an assignment of your leasehold interest but without any liability for past defaults or other obligations other than those solely related to our period of occupancy; and

(9) provide that no sale, assignment or transfer of your leasehold interest will be approved or otherwise consented to, or any change, addition, or other modification to the lease or other instruments be made, without obtaining our prior written consent, which we may grant, condition or withhold in our sole and absolute discretion.

In any event, you won't execute a lease or sublease, or any modification or amendment, without our prior written consent, which we may grant, condition or withhold in our sole and absolute discretion. If you own or acquire the Premises and we request, you'll enter into a lease with us for a term equal to the term of the Franchise (with matching renewal options) on commercially reasonable terms, and will sublease the Premises from us on the same terms as the prime lease, subject to the requirements of this Section and granting us benefits substantially identical to those set out above.

If such provisions are not included in the lease or other instruments, we may, without liability and at our sole option at any time (a) require that you immediately cause such provisions to be inserted or (b) terminate your rights and our obligations under this Agreement.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

(c) Prior to beginning initial training you must secure all financing required to fully develop your Gymboree Play Center. Within ~~three-six~~ (36) months from the completion of initial training you must: (1) submit to us for consent any proposed modifications to the Gymboree Design Standards to comply with applicable ordinances, building codes, permit requirements, lease requirements and restrictions (any modifications will be at your expense); (2) obtain all required zoning changes, building, utility, sign, health, sanitation and business permits and licenses and any other required permits and licenses; (3) construct all required improvements in compliance with construction plans and specifications supplied or consented to by us; (4) decorate your Gymboree Play Center in compliance with plans and specifications consented to by us; (5) purchase and install all required equipment, furniture, fixtures and signs (including the Designated Equipment and computer hardware and software); (6) purchase an opening inventory of the Products designated by us; (7) obtain all customary contractors' sworn statements and partial and final waivers of lien for construction, remodeling, decorating and installation services; and (8) open your Gymboree Play Center for business with the general public.

Within such periods you'll also select and employ a licensed contractor reasonably consented to by us and you'll commence construction and/or development as soon as possible and will expeditiously attend to its completion, purchase and pay for all supplies; purchase, pay for and attend to the installation of all fixtures and equipment, train all employees, obtain all required insurance, permits and licenses and do everything necessary for your Gymboree Play Center to open for business. We do not warrant or guarantee that any contractor (even one referred to you by us) is suitable, competent, reliable or otherwise able to perform adequately the tasks for which they are hired, and you're the only person/company with any responsibility for the work of any contractor selected and/or employed by you. We're unable to provide any assurance as to costs of construction or otherwise, or as to when you may be open for business, since such matters are not within our control.

**You agree to comply with the Design Standards that we furnish you. Any changes from plans provided by us must be submitted to us for our consent, which may be provided in our sole and absolute discretion. Your compliance with the Design Standards does not release you from your obligations to ensure that your Gymboree® Play Center is designed, constructed and operated in compliance with all local, state, and federal laws, including (without limitation) the American with Disabilities Act ("ADA"). You agree to execute and deliver to us an ADA Certification in the form attached to this Agreement as Exhibit \_\_\_\_\_ before you open your Gymboree® Play Center to confirm and certify that your Gymboree® Play Center and any proposed renovations comply with all ADA and other requirements.**

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

(d) If your lease or sublease for your Gymboree Play Center expires or terminates without your fault, if the Premises are damaged, condemned or otherwise rendered unusable, or if, in your and our judgment, there is a change in the character of the location of the Premises sufficiently detrimental to its business potential to warrant its relocation, you will relocate your Gymboree Play Center and we'll grant permission for such relocation, to a location and premises acceptable to us in our sole and absolute discretion and without charging you an additional initial franchise fee, but any such relocation will be at your sole expense and you (and each affiliate of yours) will sign a general release **General Release**, in form prescribed by us, of any and all claims, liabilities and/or obligations, of any nature whatsoever, however arising, ~~known or unknown~~, against us and/or any or all of the Franchisor Related Persons/Entities.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

(e) It's your and our mutual expectation and agreement that your Gymboree Play Center will always be continuously maintained in the same first-class condition, and presented to the public with the same features, programs, equipment, decor and otherwise, as new Gymboree Play Centers, in order to (among other things) meet competitive challenges, take advantage of strategic opportunities, maximize the goodwill associated with the Marks and achieve and maintain a leading position for all Gymboree operators in the retail marketplace with customers and otherwise, and that you will, at your sole expense, promptly undertake all upgrades, repairs, refurbishment, re-equipping, etc. as are required by us from time to time in our sole and absolute discretion and that additional investment by you will be necessary from time-to-time to comply with these, and other, requirements. Such upgrades, etc. may include (but are not limited to) new equipment, furniture, furnishings, tenant improvements, decor package, signage, compliance with all then-current standards for facility design, software, changing any products and/or services offered, methods of operation and other Gymboree System requirements, plus such renovation and modernization of your Gymboree Play Center, as we may require to reflect the then-current Gymboree System requirements, all at your sole expense. Any upgrades, etc. will be subject to prior approval by us of plans, layouts, designs and otherwise, you will promptly and fully comply with all such requirements and, if you fail to do so, we may do so on your behalf and for your account and you will pay us the cost thereof, together with a reasonable administrative fee, within 10 days of our submission to you of any interim and/or final statement.

You agree that: (1) neither your Gymboree Play Center nor the Premises will be used for any purposes other than the operation of a Gymboree Play Center in full compliance with this Agreement and the Manuals; (2) you'll maintain the condition and appearance of your Gymboree Play Center, its equipment, furniture, fixtures, signs, and the Premises in accordance with our then-current specifications and standards, and consistent with the approved image of a Gymboree Play Center and as provided under the Manuals, as each may change from time-to-time; (3) you will perform such ongoing repair, maintenance and upgrading, with respect to the decor, equipment, furniture, fixtures, signs and otherwise, of your Gymboree Play Center and the Premises, as may be required by us from time-to-time in our sole and absolute discretion, including, without limitation: (a) thorough cleaning, repainting and redecorating of the interior and exterior; (b) interior and exterior repair of the Premises; (c) repair or replacement of damaged, worn out or obsolete equipment, furniture, fixtures, signs and otherwise; (4) you will not make any material alterations to the Premises or other items, or to the appearance of your Gymboree Play Center as originally approved by us, or the products and/or services offered by you, without our prior written approval; and (5) you will place or display at the Premises (interior and exterior), on vehicles, products and otherwise, only (and each of) such signs, emblems, lettering, logos and display and advertising materials as are from time-to-time specified by us.



**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

(f) Franchisee agrees to install and purchase or lease telephone and answering equipment, facsimile machine, computer, printer and software, including but not limited to, an e-mail system, and the Gymboree PlaySoft software and support services, as further specified in Gymboree's Operations Manual (as may be amended from time to time in our sole and absolute discretion). Franchisee understands that computer systems are designed to accommodate a certain maximum amount of data and terminals, and that, as such, limits are achieved, and/or as technology and/or software is developed in the future, Gymboree at its sole and absolute discretion may mandate that Franchisee add memory, ports and other accessories and/or peripheral equipment and/or additional, new or substitute software to the original computer system purchased by Franchisee. Franchisee may not use any technology, hardware or software not expressly authorized by Gymboree. Franchisee understands that at a certain point in time it may become necessary for Franchisee to replace or upgrade the entire computer system with a larger system capable of assuming and discharging all of those computer-related tasks and functions as are specified by Gymboree. Franchisee must further agree that computer designs and functions change periodically and that Gymboree may be required to make substantial modifications to its computer specifications, or to require installation of entirely different systems, during the term of the Franchise Agreement, or upon renewal thereof. To ensure full operational efficiency and communication capability between Gymboree's computers and those of all franchised play centers, Franchisee must agree at Franchisee's expense, to keep the computer system in good maintenance and repair, and at Franchisee's expense, and following Gymboree's testing and determination that same will prove economically or systematically beneficial to Franchisee and Gymboree, to install such additions, changes, modifications, substitutions and/or replacements to its computer hardware, software, telephone and power lines and other computer-related facilities as Gymboree directs, and on those dates and within those times specified by Gymboree in its sole and exclusive discretion, in its Operations Manual (as same may be amended from time to time, in our sole and absolute discretion) or otherwise. Franchisee must continuously comply with each of Gymboree's then-current Terms of Use and Privacy Policies (and all other requirements) regarding all computer and other systems, including but not limited to Internet use. Upon termination or expiration of the Franchise Agreement, all computer software, disks, tapes and other magnetic storage media provided to Franchisee by Gymboree shall be returned to Gymboree in good condition (allowing for normal wear and tear).

(g) Franchisee shall be required to purchase all play equipment from Gymboree unless Gymboree, in its sole and absolute discretion, permits otherwise.

(h) Gymboree shall supply the program aids and consumer products to Franchisee at Gymboree's then-current wholesale list price for such goods. Payment for program aids and consumer products provided by Gymboree shall be due and payable in full upon placement of any order with Gymboree or upon such other terms as Gymboree from time to time may specify.

(i) Gymboree may elect to withdraw all or any consumer products from the Gymboree Program at any time and, as provided in Section 2.1(c), above, may elect to market (or have others market) consumer products and other items directly through Gymboree or through other distributors and retailers. So long as Franchisee is required to carry consumer products, it shall at all times maintain an inventory of those items in the minimum quantities specified by Gymboree from time to time.

(j) The reputation and goodwill of each Gymboree Play Center is based on, and can be maintained only by, the satisfaction of all customers who rely on the availability of a wide variety of quality Designated Equipment, Products and Services, compliance with the Gymboree System and courteous and efficient service provided by all employees of Gymboree Play Centers. We've already specified, and plan to specify in the future, various suppliers of Designated Equipment, Products and/or Services to be used or provided by Gymboree Play Centers and that meet our standards and requirements, in each case in our sole and absolute discretion. Your Gymboree Play Center will purchase, use and offer each of, and only, such types, brands and/or quality of Designated Equipment, Products and Services as we designate and, where we so require, use only suppliers as designated by us. Designated suppliers may include, and may be limited to, us and/or companies affiliated with us.

Gymboree has designated and may, in the future and in its sole and absolute discretion, designate suppliers of the equipment, products and supplies that meet its standards and requirements, including, without limitation, standards and requirements relating to reputation, quality, prices, consistency, reliability, financial capability, labor relations and customer relations. Franchisee agrees that the Gymboree Site will purchase such equipment and products only from suppliers that Gymboree has designated (which may be limited to Gymboree and/or its affiliates). We may designate a single supplier or limited number of suppliers, may designate a supplier only as to certain items and may concentrate purchases with one or more suppliers to obtain lower prices, advertising support and/or other benefits in our sole and absolute discretion. Specification of a supplier may be conditioned on requirements relating to frequency of delivery, standards of service, including prompt attention to complaints, as well as payments, contributions or other consideration to us, our affiliates, the Marketing Fund and/or otherwise, or other criteria, and may be temporary, pending a further evaluation of such supplier by us, in each case in our sole and absolute discretion.

You'll notify us in writing (and submit to us such information, specifications, and samples as we request) if you propose to purchase, use or offer any type, brand and/or quality of items that have not been previously specified by us, or if you propose to use any supplier who has not been previously specified by us for the proposed item and will arrange for pre-payment of reasonable charges connected with our review and evaluation of any proposal. We'll notify you within a reasonable time as to whether or not you're authorized to purchase or use the proposed type, brand and/or model of such items or to deal with the proposed supplier. We may, from time-to-time, withhold, condition and/or revoke our approval of particular items or suppliers in our sole and absolute discretion. On receipt of written notice of revocation, you must immediately cease to sell or use any disapproved items and cease to deal with or use items from any such suppliers.

Franchisee must purchase the proprietary consumer products and training products listed in Exhibit B from Gymboree. Franchisee shall not be obligated to purchase any program aids from Gymboree and may purchase the program aids listed in Exhibit B from any source designated by Gymboree in its sole and absolute discretion. If Franchisee desires to purchase program aids from a supplier other than Gymboree, Franchisee shall notify Gymboree thereof along with the name of the supplier, the price of the program aids and any other information Gymboree may require from time to time. Franchisee shall also be required to submit to Gymboree three (3) samples of any proposed item along with drawings, brochures, packaging, tags and related items describing the item proposed for use. Gymboree shall notify Franchisee within ninety (90) days of its receipt of the foregoing of its approval or disapproval of any proposed item. Gymboree's failure to so notify Franchisee within the foregoing time period shall be deemed Gymboree's disapproval thereof. Gymboree will only approve items that conform to the specifications or samples and manufacturers that meet, in its sole and absolute discretion, its standards and requirements, including without limitation, standards and requirements relating to

product quality, packaging, tags, price, consistency, reliability, financial capability, labor relations and customer relations. Gymboree may disapprove proposed items that meet the foregoing requirements in its sole and absolute discretion. Any approval may be revoked at any time without notice or cause in the sole and absolute discretion of Gymboree provided that Franchisee may sell items purchased prior to revocation unless Gymboree deems such items unsafe. In connection with the foregoing, Franchisee shall reimburse Gymboree for all of its actual direct out of pocket costs in connection with testing and reviewing the proposed items. Upon completion of its testing and review of any samples, Gymboree shall have no obligation to return the same to Franchisee or to reimburse Franchisee for its actual costs of purchasing the proposed items.

(k) In order to assure consistency in the programs and apparatus at all Sites, Franchisee agrees that it will not, nor allow others to: (1) use any equipment, program aids or signs not approved by Gymboree, (2) sell any consumer products not approved by Gymboree nor in any manner not approved by Gymboree, or (3) offer any services not approved by Gymboree. Franchisee further agrees not to use or sell any such items other than in connection with the Gymboree Program and as expressly permitted by Gymboree. To request Gymboree's approval, Franchisee agrees to submit to Gymboree drawings, brochures, samples, and related items describing the item proposed for use or sale. Gymboree reserves the right to withdraw approval of equipment, program aids, consumer products and signs including, but not limited to, equipment, program aids and consumer products Franchisee is required to purchase pursuant to this agreement or otherwise, which in Gymboree's sole and absolute discretion are inconsistent with the Gymboree Program or policies of Gymboree.

(l) WITH RESPECT TO ANYTHING (GOODS, SERVICES OR OTHERWISE) PROVIDED, APPROVED OR OTHERWISE BY US, THE FRANCHISOR-RELATED PERSONS/ENTITIES AND/OR ANY PERSON/COMPANY AFFILIATED IN ANY WAY WITH AND/OR REFERRED/"APPROVED" BY US OR THEM, OTHER THAN SPECIFIC WRITTEN WARRANTIES EXPRESSLY PROVIDED BY US IN CONNECTION WITH SUCH ITEMS, SUCH ITEMS ARE PROVIDED WITHOUT ANY WARRANTIES, EXPRESS OR IMPLIED, THE WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE BEING EXPRESSLY DISCLAIMED, NOR DO THERE EXIST ANY EXPRESS OR IMPLIED WARRANTIES ON THE PART OF US, THE FRANCHISOR-RELATED PERSONS/ENTITIES OR ANY AFFILIATE AS TO THE DESIGN, CONDITION, CAPACITY, PERFORMANCE OR ANY OTHER ASPECT OF SUCH (OR OTHER) ITEMS OR THEIR MATERIAL OR WORKMANSHIP. THERE IS NO SPECIFIC DATE IN THIS AGREEMENT BY WHICH GYMBOREE MUST DELIVER ANY PRODUCTS, EQUIPMENT OR SUPPLIES PURCHASED FROM GYMBOREE OR ANY OPERATIONAL GUIDELINES. Gymboree shall assign to Franchisee any warranty or guarantee Gymboree obtains from the manufacturer or supplier. Franchisee acknowledges that Gymboree is not in the business of manufacturing such items and must rely on the professional ability and workmanship supplied by third parties.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**2.3 Training Program.**

(a) Prior to the opening of the first Site within the Territory, or, in the event of a transfer, on the assumption of control, (i) Franchisee or (if Franchisee is not a natural person) Franchisee's principal operating officer and (ii) Franchisee's "Operations Manager," defined in Section 2.3(h) below, are required to attend and successfully complete an entire initial training program in accordance with the

training schedule set out in Exhibit C attached hereto and incorporated by this reference. We'll furnish the initial training program at a time and place, and for such period, as we designate in our sole and absolute discretion (we're currently requiring a minimum of 3-7 days of pre-opening training.) If you've been previously trained, we may elect to not provide training or may require attendance at a revised/shortened training program. We can require successful completion of training by all of your supervisory personnel and we'll furnish such training program at reasonable charges and at such times and places as we designate. In the event that Franchisee's Operations Manager attends an initial training program after the mandatory initial training, Gymboree charges a fee in the amount set forth in Gymboree's then-current or most recent offering circular or Operations Manual. All subsequent training shall be the responsibility of Franchisee; provided, however, that Gymboree may require (i) Franchisee or (if Franchisee is not a natural person) Franchisee's principal operating officer and (ii) Franchisee's Operations Manager and teachers to attend regional training sessions and teacher certification programs from time to time in order to maintain consistency in the Gymboree Program, and to attend remedial training sessions as further provided herein. In connection with regional and remedial training sessions, Franchisee agrees to pay Gymboree a fee representing Franchisee's pro rata share of Gymboree's out-of-pocket costs of conducting such sessions.

(b) If we, in our sole and absolute discretion, determine that you (or a managing partner or shareholder consented to by us) have not successfully completed (or are not making satisfactory progress in) your initial training, we may cancel all of your rights (and all of our obligations) under this Agreement and/or any other agreements with you and return the Initial Franchise Fee (less \$10,000) to cover our sales, training and other expenses, among other things) to you, and you will return all manuals and you (and each affiliate of yours) execute documentation providing for a general release ~~General Release, in a form prescribed by us, of any and all claims, liabilities and/or obligations, of any nature whatsoever, however arising, known or unknown, against us and/or any or all of the Franchisor-Related Persons/Entities~~ and we will provide you with a similar release, except that your indemnity, non-competition, confidentiality obligations, and the dispute avoidance and resolution provisions of this Agreement, including those of Article 11, together with the provisions of Article 13, will be preserved. Since the possibility of such termination exists, you understand that if you make any investments or sign any documents prior to completion of training, you are at risk. Alternatively, we can (in our sole and absolute discretion) require you to hire a substitute manager and arrange for him/her to complete the training program to our satisfaction.

(c) Gymboree may conduct an annual seminar for its franchisees to discuss and review new programming ideas and concepts. Gymboree shall provide Franchisee with notice of the time and place of such seminar(s), which time and place shall be designated by Gymboree. Gymboree may hold the same year's annual seminar in different locations and on different dates in which case any given franchisee will only be required to go to one. Gymboree requires (i) Franchisee or (if Franchisee is not a natural person) Franchisee's principal operating officer and (ii) Franchisee's Operations Manager to attend an annual franchisee seminar, if held. Franchisee agrees to pay to Gymboree a fee equal to the per-attendee out-of-pocket costs of conducting an annual seminar times the number of Franchisee's attendees, if held.

(d) All teachers of the Gymboree Program must participate in local, regional and/or national teacher certification programs which may include additional training at Gymboree's principal office or such other locations as Gymboree may designate. Franchisee shall provide to Gymboree periodic reports of participation in the teacher certification programs on behalf of each teacher in such form and manner as Gymboree shall prescribe.

(e) In addition to the remedial training that may be required pursuant to Section 8.8 hereof, Gymboree may require (i) Franchisee or (if Franchisee is not a natural person) Franchisee's principal operating officer and (ii) Franchisee's Operations Manager to attend additional remedial training programs as specified by the Franchise Operations Department of Gymboree whenever in Gymboree's opinion Franchisee's performance indicates the necessity of supplementary training.

(f) All expenses of travel to and from any training program or seminar, and for meals and lodging during the training or seminar, shall be paid by Franchisee.

(g) From time to time, Gymboree may develop audio or video tapes to update franchisees on new program ideas, procedures, and techniques. Franchisee agrees to purchase such tapes from Gymboree at list cost, plus postage and handling, and to promptly watch and/or listen to such tapes upon Franchisee's receipt thereof.

(h) For purposes of this Agreement, an "Operations Manager" is a person in charge of the day-to-day operations of the franchise or involved with any of the following duties: hiring, training, supervising or dismissing instructors, or implementing or interpreting the Gymboree Program in a supervisory fashion (i.e., other than solely as an instructor).

### **3. TERM; SUCCESSOR FRANCHISE**

**3.1 Initial Term.** This franchise shall be for an initial term of ten (10) years, commencing on \_\_\_\_\_ and ending on \_\_\_\_\_, unless sooner terminated in accordance with this Agreement.

**3.2 Your Rights.** Your rights and our obligations under this Agreement terminate at the expiration of the initial term, but at that time, subject to the provisions below, you will be eligible to be awarded a successor franchise (which may materially differ, in economic and other areas, from this Franchise Agreement and its requirements) for your Gymboree Play Center for a single ten (10) year period, without any further term, successor franchise or right of renewal. In no event shall we be obligated to negotiate or obtain any renewal, extension or otherwise of any lease or sublease, or solicit or accept any proposal from the landlord (or other person/entity controlling the premises) for a renewal, extension or otherwise of any lease or sublease, even if on the same terms and conditions as have previously been applicable to the premises.

**3.3 Your Obligations.** Any award of the successor franchise must meet all of the following conditions, each of which are agreed to be reasonable, together with such other conditions as are reasonable at the time:

(1) You (and each affiliate of yours) have fully and continuously complied with this Agreement and all other agreements with us (and/or any affiliate of ours), in each case without any defaults, cured or uncured, during the term (including all of the conditions set out below);

(2) You maintain possession of your Premises and by the expiration date of this Agreement (a) your Gymboree Play Center and its operations must have been brought into full compliance with the specifications and standards then-applicable for new Gymboree Play Centers, including a full upgrade to the same first-class condition as new Gymboree Play Centers, which may include (but is not limited to) new equipment, furniture, furnishings, tenant improvements, decor package, signage,

compliance with all then-current standards for facility design, software, provision of goods and services, methods of operation and other Gymboree System Standards, plus such renovation and modernization of the Gymboree Play Center as we may require to reflect the then-current standards and image of the System, all at your sole expense (you agree that no monetary or other limitations as to new equipment, etc., whether contained in this Agreement or elsewhere, shall apply to the requirements of this Section or any transfer) and (b) you present evidence satisfactory to us that you have the right to remain in possession of your Gymboree Play Center for the duration of the successor franchise; or, in the event you are unable to maintain possession of the premises, or in our judgment your Gymboree Play Center should be relocated, you secure substitute premises consented to by us and have furnished, stocked and equipped such premises to bring your Gymboree Play Center and inventory into full compliance with our then-current requirements by the expiration date of this Agreement;

(3) You have given written notice of election to obtain the successor franchise to us not less than six (6) months, but not more than twelve (12) months, prior to the expiration of the term of this Agreement. Within ninety (90) days after our receipt of such timely notice, we will furnish you with written notice of: (a) any reasons which could cause us not to award the successor franchise, including any deficiencies which require correction and a schedule for correction thereof by you, and (b) our then-current requirements relating to the image, appearance, decoration, furnishing, equipping, stocking and programs of a Gymboree Play Center, and a schedule for effecting such upgrading, modifications or otherwise, as a condition of receiving the successor franchise. Prior to the expiration date of this Agreement, you will fully cure all such deficiencies and fully satisfy all such requirements and conditions. You understand and agree that we may refuse to award a successor franchise if, in our reasonable judgment, you (or any affiliate of yours) have failed to render satisfactory performance as a Franchisee in any operational or other areas (including, but not limited to, safety, compliance with all Manuals, adverse impact on the Marks and associated goodwill, etc.), whether or not such failure constitutes or constituted a default. The award of the successor franchise will be conditioned (among other things) on your (and your affiliates') continued compliance with all the terms and conditions of this Agreement (and all other agreements with us and/or any affiliate) up to the date of expiration and correction of any deficiencies within the periods specified by us.

(4) You (and each affiliate of yours) have satisfied all monetary obligations owed to us and any company affiliated with us and have timely and fully met such and all other obligations throughout the term of this Agreement;

(5) You've executed our then-current form of Franchise Agreement and related documents (with appropriate modifications to reflect the fact that the successor Franchise Agreement relates to the award of a single successor franchise without the right to further successor franchises or renewals), including guarantees, as are then customarily used by us in the award of franchises for Gymboree Play Centers, and the economic and other terms of which may materially differ from the terms of this Agreement, including, without limitation, higher royalty fees and/or marketing contributions; provided, however, you will not be required to pay the then-current initial franchise fee. In our sole and absolute discretion, and to further your and our mutual interests in having consistent documents to cover all of your units, and to update documents to reflect changed competitive and other conditions, we can require you to sign our then-current form of Franchise Agreement to cover all Gymboree Play Centers in which you (or any affiliate) then have an interest;

(6) You've complied with our then-current qualification and training requirements. We may require your personnel to attend and successfully complete any retraining program(s), and at such times and location(s), as we then specify. There will be no charge for any retraining program(s),

but you'll be responsible for all travel, meals, lodging and other expenses of your personnel.;

(7) You (and each owner and/or affiliate of yours) have executed a general release **General Release**, in form prescribed by us, of any and all claims, liabilities and/or obligations, of any nature whatsoever, however arising, known or unknown, against us and/or any or all of the Franchisor-Related Persons/Entities. If you fail to execute such a release, the awarding of a successor franchise will be the equivalent of the granting of such release, since you and we agree that it would be inappropriate and improper for you to continue in a franchise (or other) relationship with us, and have the right to use the Names, Marks and System, if you had any claims, liabilities and/or obligations, of any nature whatsoever, however arising, known or unknown, against us (or other persons/entities covered by such a release) or otherwise failed to execute such a release, particularly in view of the fact that you are not being charged a full initial franchise fee in connection with the successor franchise; and

Failure by you and/or your owners to timely complete such requirements will be deemed an election by you not to obtain the successor franchise.

If, at any time, you or any affiliate is to receive one or more successor, additional, other and/or further franchise(s) from us [we having no obligation to award you any such additional, other and/or further franchise(s)], whether or not a successor franchise, you, each of your affiliates, each owner of the Franchisee, the new franchisee and each owner thereof will at each such time sign a general release **General Release**, in form prescribed by us, of any and all claims, liabilities and/or obligations, of any nature whatsoever, however arising, known or unknown, against us and/or any or all of the Franchisor-Related Persons/Entities, except (where so required by applicable law) for any claims exclusively related to the offer and sale of the successor, additional, other and/or further franchise(s). A copy of our current form of releasing language (which is subject to change by us at any time) is attached as Exhibit H for your information.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

#### **4. COMPENSATION**

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

(a) You'll pay us, on signing this Agreement, an initial franchise fee of \_\_\_\_\_ Thousand Dollars (\$\_\_\_\_\_), determined by (among other things) the number of Sites projected for the Territory and the financing plan elected by Franchisee. The projected number of Sites in the Territory is determined by the market development plan for the Territory, which is hereinafter referred to as "Market Plan" and is set out in Exhibit D attached hereto and incorporated by this reference. The Market Plan for the Territory covered by this Agreement provides for the establishment of \_\_\_\_\_ Sites in Franchisee's Territory, which is the number of Sites you are limited to under this Agreement. We make no assurance that such (or any other) number of sites can be profitably or effectively operated in the Territory or otherwise. You understand that the initial franchise fee may not be same for all franchisees and may take into account factors such as size of territory, number of sites, number of franchises to be awarded, previous business relationship with us or otherwise.

The initial franchise fee is fully earned by us on signing of this Agreement and is entirely nonrefundable (as are all amounts paid to us and/or any affiliate) except for possible partial or other refund (in each case at our sole option) as expressly provided in this Agreement.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

(b) Franchisee shall pay the franchise fee according to the fee schedule set out in Gymboree's current or most recent offering circular and incorporated by this reference or a promissory note signed by the Franchisee.

(c) The execution of this Agreement will constitute, and you (and each affiliate of yours, together with each owner of you, if you are a business entity, and/or any affiliate of yours) will, as a condition to the award of this and/or any future or other franchise execute, ~~in a form prescribed by us, a general release~~ **General Release**, of any and all claims, liabilities and/or obligations, of any nature whatsoever, ~~however arising, known or unknown, against us and/or any or all of the Franchisor-Related Persons/Entities,~~ excepting only (where so required by applicable law) those claims solely related to the offer and sale of the new Franchise, you agreeing that it would be inappropriate from a business standpoint to enter into further franchise relationships with us while there might be a possibility of claims based on a prior relationship. We can make no assurance as to whether additional or future franchises may be awarded to you or the prices, terms or conditions relating thereto. If we should, through inadvertence or otherwise, fail to require such separate release at any time, the execution of this Agreement, and each Franchise Agreement after this one, will be regarded as the equivalent of the granting of such releases.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

(d) Franchisee acknowledges that Franchisee and Gymboree have jointly developed and mutually agreed upon the Market Plan based upon: (1) demographic information available to Franchisee and (2) Franchisee's knowledge of the Territory. Franchisee further acknowledges that demographic studies are not an accurate method of predicting business success, that the ability to successfully open and operate the agreed-upon number of Sites in the Territory includes a number of other variables, such as Franchisee's performance level and the competition, if any, within the Territory and that there can be no assurance as to the number of sites that can be actually opened and/or operated in the Territory, or their economic results. Franchisee further acknowledges that it has been cautioned to make its own determination of the minimum number of Sites that should be included in the Market Plan.

(e) In addition, and in the interests of consistency, efficiency of administration, improved ability to meet competitive challenges and ongoing improvement of the Gymboree System (among other things), on award of this or any other and/or subsequent Gymboree or other franchise to you (and/or any affiliate) by us (and/or any affiliate), and/or as a condition to any transfer (as defined below) or relocation by you (and/or any affiliate) and/or the award of any successor franchise to you (and/or any affiliate), we may require that any or all existing franchise agreement(s) with you (and/or any affiliate) be cancelled and the then-current form of Gymboree Franchise Agreement(s) be executed (using the then-current royalties, marketing fund contributions and other provisions) with respect to each Gymboree unit owned and/or operated by you (and/or any affiliate), with appropriate modifications to reflect the facts that, for such pre-existing units only: (a) where the initial franchisee has



been paid in full, no initial franchise fee will be charged, (b) any specific territory awarded to you will be reflected in the new agreement (but all other provisions relating to territory, including, but not limited to, exclusions for alternate channels of distribution, special distribution opportunities, rights to locations outside the Territory, our rights to operate non-Similar Businesses, acquisitions, dual branding or otherwise will be as provided in our then-current form of Franchise Agreement) and (c) the expiration date of the initial term, and the duration of any successor franchise, will not be changed with respect to such pre-existing units as a result of your signing such new agreement(s). In connection with the execution of such new Franchise Agreement, you (and each affiliate of yours, together with each owner of you, if you are a business entity, and/or any affiliate of yours) will execute, ~~in a form prescribed by us, a general release~~ **General Release**, of any and all claims, liabilities and/or obligations, of any nature whatsoever, ~~however arising, known or unknown, against us and/or any or all of the Franchisor-Related Persons/Entities~~, excepting only (where so required by applicable law) those claims solely related to the offer and sale of the new Franchise.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

#### **4.2 Continuing Franchise Fee.**

(a) In addition to the franchise fee, Franchisee shall pay to Gymboree a continuing franchise fee of six percent (6%) of Franchisee's Gross Receipts, as hereinafter defined. The term "Gross Receipts" includes all revenues (except sales tax collected and paid when due to the appropriate taxing authority and actual customer refunds, adjustments and credits) which are, or could be, received or earned by you (and/or any affiliate and/or on/for your behalf or benefit) (1) ~~by or with respect to your Gymboree Play Center, (and/or at or from the Premises) (2) which relate to the type of products, services or any other items which are or could be provided, sold, rented or otherwise distributed at, through or in association with a Gymboree Play Center [including, without limitation, class fees (including Gymboree On The Go Program and such other programs as Gymboree designates from time to time), membership fees, and revenues from special events and parties], (3) with respect to any products and services which are, or could be, provided, sold, or otherwise distributed in association with any use of the Marks, the Gymboree System, or any related techniques, systems, procedures, or know-how or the operation of any Similar Business (but our receipt, acceptance and/or otherwise of any royalties with respect to any Similar Business will not constitute approval of your, or anyone else's, involvement with any Similar Business) and/or (4) with respect to, any tenants and/or subtenants of yours (including rent and other lease payments) and/or with respect to any co-branding activities. All transactions will be recorded at full list retail selling price and without discount. You'll not divert any business or take any other actions (or fail to take any actions) which would have the effect of reducing the Gross Receipts with respect to which royalties are payable and you will use your best efforts to maximize Gross Receipts. All sales and/or billings, whether collected or not, will be included in Gross Receipts, with no deduction for credit card or other charges.~~

(b) The continuing franchise fee shall be payable in quarterly calendar payments (ending March 31, June 30, September 30 and December 31), based on all Gross Receipts received during each quarter, regardless to which quarter the payments received were attributable. Payments are due thirty (30) days following the end of each calendar year quarter (i.e., on April 30, July 30, October 30, and January 30). Franchisee agrees to keep and maintain, at Franchisee's principal place of business, records of Gross Receipts and expenses. Concurrently with each payment of continuing franchise fees, Franchisee shall deliver to Gymboree a statement of Gross Receipts, expenses, class attendance, and related information for each quarterly session on a form provided by Gymboree as well as any other

reports Gymboree may request from time to time. In addition, Franchisee shall provide to Gymboree at certain times during a class session's term, estimates of revenue and other related information as specified in the Operations Manual. At its option, Gymboree may change the payment schedule, with three (3) months notice, from quarterly to monthly or otherwise and may require payment by electronic draft or otherwise.

**4.3 Interest and Late Fees on Late Payments and/or Reports.** All amounts you may owe us and/or our affiliates will bear interest at the highest applicable legal rate for open account business credit, but not to exceed one and one-half percent (1.5%) per month. This doesn't constitute our agreement to accept payments after they're due or any commitment to extend credit to, or otherwise finance your operation of, your Gymboree Play Center. If you fail to pay any amounts (including any electronic draft returns, returns for insufficient funds or otherwise), or fail to deliver any report when due, that failure can constitute grounds for termination of this Agreement, in spite of the provisions of this Section. Also, to cover additional costs sustained by us in handling delinquent reports and payments, you'll pay a late fee of Three Hundred Dollars (\$300.00), plus a late fee of \$50.00 per day, for each report and/or each payment received by us after its due date. The \$300.00 late fee and the \$50.00 per day charges apply to each late report and each late payment. To cover additional expenses incurred by us in handling dishonored checks, you agree to pay a dishonored check fee of Two Hundred Dollars (\$200.00), for each dishonored check tendered by you. If you tender two (2) or more dishonored checks within a one (1) year period or become two (2) or more months delinquent in any of your accounts with us and/or any affiliate, we may require payments on any or all amounts to be made by cashier's check. Notwithstanding any provision in this Agreement to the contrary, in no event will any amounts be charged as late fees or otherwise which exceed or violate any applicable legal restrictions. Each of the foregoing amounts will be subject to adjustment for inflation, as set forth in this Agreement.

**4.4 Inflation Adjustments.** Where so designated in this Agreement with respect to certain amounts, such amounts will be adjusted each year, in proportion to the changes in the Consumer Price Index (U.S. Average, all items) maintained by the U.S. Department of Labor (or such equivalent index as may be adopted in the future.) We will notify you of the percentage adjustment each year.

**4.5 Electronic Funds Transfer.** You must participate in our then-current electronic funds transfer program authorizing us to utilize a pre-authorized bank draft system on an every four-week basis (or otherwise as we specify from time-to-time in our sole and absolute discretion.) All royalties, Marketing Fund Contributions and other amounts due us (or any affiliate) for each period must be received by us (and such affiliate) or credited to our (or our affiliate's) account by pre-authorized bank debit before 5:00 p.m. on the 10th day after each four-week period or other point in time specified by us. We may, from time-to-time, specify periodic amounts for regular transfer to our (or our affiliate's) account, based on past reports of sales by you and reasonable expectations of royalties, Marketing Contributions and other amounts to become due from you. You will participate in our then-current electronic reporting system covering sales and other items.

## **5. IMAGE AND OPERATION**

**5.1 Condition And Appearance Of Your Gymboree Play Center, Regular Upgrading.** You agree that: (1) neither your Gymboree Play Center nor the Premises will be used for any purposes other than the operation of a Gymboree Program in full compliance with this Agreement and the Manuals; (2) you'll maintain the condition and appearance of your Gymboree Play Center, its equipment, furniture, fixtures, signs, and the Premises in accordance with our specifications and

standards, and consistent with the approved image of a Gymboree Program and as provided under the Manuals, as each may change from time-to-time; (3) you will perform such ongoing repair, maintenance and upgrading, with respect to the decor, equipment, furniture, fixtures, signs and otherwise, of your Gymboree Play Center and the Premises, as may be required by us from time-to-time in our sole and absolute discretion, including, without limitation: (a) thorough cleaning, repainting and redecorating of the interior and exterior; (b) interior and exterior repair of the Premises; (c) repair or replacement of damaged, worn out or obsolete equipment, furniture, fixtures, signs and otherwise; (4) you will not make any material alterations to the Premises or other items, or to the appearance of your Gymboree Play Center as originally approved by us, without our prior written approval; and (5) you will place or display at the Premises (interior and exterior) and on all other items only such signs, emblems, lettering, logos and display and advertising materials that are from time-to-time designated by us.

**5.2 Gymboree Systems.** You acknowledge and agree that the Marks are critical to the public image and success of each Gymboree Play Center and that the Marks are an integral part of the Gymboree System. Therefore, you will use and display the Marks only in such manner, offer only the Products and Services we authorize, and use only such equipment and other systems, as we authorize from time-to-time, in each case promptly complying with any changes we may require, all at your sole cost and expense.

**5.3 General Operations.**

(a) Franchisee shall operate its business in accordance with good business practices and in accordance with and subject to all the standards and policies of Gymboree now or hereafter adopted as though fully set forth herein and shall use its best efforts to promote the success of the business. Mandatory specifications, standards and operating procedures prescribed from time to time by Gymboree in its Operations Manual, or otherwise communicated to Franchisee in writing, will constitute provisions of this Agreement as if fully set forth herein. Franchisee or (if Franchisee is not a natural person) its principal operating officer shall at all times maintain a principal residence near the Territory and shall be in charge of the day-to-day operations of the franchise. If Franchisee is not a natural person, its principal operating officer shall be a natural person who is a principal or partner of Franchisee with not less than a one-third beneficial ownership interest in Franchisee. Franchisee agrees that it and (if Franchisee is not a natural person) its principal operating officer shall devote its or their primary efforts to the conduct of the franchise business and shall not engage in any other outside activities which will interfere with the performance of the duties required of Franchisee hereunder. If at any time Franchisee desires to designate a person other than it or (if Franchisee is not a natural person) its principal operating officer as the Operations Manager for the business or desires to designate another person as Operations Manager, such designation or change shall require the prior written approval of Gymboree, which approval will be given provided the proposed individual (i) submits to a personal interview at Gymboree's principal office without expense to Gymboree, if requested by Gymboree, (ii) except for monetary requirements, satisfies Gymboree's then-current standards for new franchisees, and (iii) attends (and pays a reasonable fee for attending) the next initial training program and all subsequent regional training sessions and annual seminars, if requested by Gymboree.

(b) Franchisee shall not promote, offer or sell any product or services in connection with the Gymboree Program, except as expressly permitted by the terms of this Agreement.

(c) Franchisee and all staff of the franchise business shall comply with Gymboree's qualifications, dress, grooming, general appearance and demeanor standards and wear such uniforms as Gymboree specifies from time to time in our sole and absolute discretion.

(d) We (and/or our designees, including any landlord or its agent pursuant to the lease or sublease for the premises for your Gymboree Play Center) will have the right, at any time during business hours, and without prior notice, to (1) inspect the Premises, the Designated Equipment and other equipment, furniture, fixtures, signs, operating materials and supplies; (2) observe, photograph and video tape the operations of the franchise business for such consecutive or intermittent periods as Gymboree deems necessary in our sole and absolute discretion; (3) authorize third party agents, shoppers or investigators to inspect and observe the franchise business; (4) interview personnel and customers of the franchise business; and (5) inspect and copy any books, records, documents and electronically stored information relating to the operation of the franchise business; (6) remove samples of any items for testing and analysis; (7) inspect, and/or conduct, supervise or observe a physical count of, the inventory and assets of your Gymboree Play Center. Franchisee must fully cooperate with Gymboree in connection with any such inspections, observations, photography, video taping and interviews. Franchisee must present to its customers such evaluation forms as are periodically prescribed by Gymboree and must participate and request its customers to participate in any surveys performed by or on behalf of Gymboree. Franchisee must retain all tax returns and all of Franchisee's other business records and related back-up material throughout the term of this Agreement and for at least three (3) years following the transfer, termination or expiration of this Agreement.

(e) Franchisee shall maintain such records and furnish such reports to Gymboree in such form as Gymboree from time to time prescribes. Franchisee shall establish and maintain at its own expense a bookkeeping, accounting and recordkeeping system conforming to the requirements, ~~and data processing systems, and formats~~ **and accounting basis** prescribed by Gymboree from time to time. Franchisee shall maintain a separate bank account for its Gymboree franchise into which all receipts will be deposited from which all expenses will be paid. Franchisee shall conduct physical site self-audits with the use of written forms, videotape and photographs as prescribed by Gymboree in the Operations Manual or otherwise. Franchisee shall furnish to Gymboree, in the form from time to time prescribed by Gymboree upon its request, such data, information, and records for such periods as Gymboree from time to time requires. Any such information submitted by Franchisee to Gymboree shall be verified and signed by Franchisee in the manner prescribed by Gymboree. We (and/or our designees, including any landlord or its agent pursuant to the lease or sublease for the premises for your Gymboree Play Center) will have the right at any time during business hours, and without prior notice to you, to inspect and/or audit the properties, assets, premises, business records, bookkeeping and accounting records, sales and income tax records and returns (you waiving all privileges with respect thereto), cash register tapes, invoices, payroll records, check stubs and bank deposit receipts, computer files and other records of, and/or relating in any way to, your Gymboree Play Center and the books and records of any person(s), corporation or partnership which holds, or does business with, the Franchise. Franchisee shall fully cooperate with representatives of Gymboree and independent accountants hired by Gymboree to conduct any such inspection or audit. Our right to audit includes the right to access all cash registers, computers and other equipment by electronic means. In the event any such inspection or audit shall disclose an understatement of the Gross Receipts of the franchise, Franchisee shall pay to Gymboree, within fifteen (15) days after receipt of the inspection or audit report, any continuing franchise fee and cooperative advertising contributions due on the amount of such understatement, plus interest and late fees (at the rate and on the terms provided in Section 4.3) from the date originally due until the date of payment. Further, in the event such inspection or audit is made necessary by the failure of Franchisee to furnish reports, supporting records, or other information, as herein required, or to furnish such reports, records, or information on a timely basis, or if an understatement of Gross Receipts for any period of any audit is determined by any such audit or inspection to be greater than two percent (2%), Franchisee shall reimburse Gymboree for the cost of such inspection or audit,

including, without limitation, the charges of attorneys and any independent accountants, and the travel expenses, room and board and applicable per diem charges for our and their employees. Should any such audit disclose the intentional understatement of Gross Receipts in any amount, or an understatement (whether intentional or not) of Gross Receipts in excess of five percent (5%) or any other violation of this Agreement, we may terminate all of your rights, and our obligations, hereunder, in addition to exercising any other remedies we may have. These remedies are in addition to all other remedies and rights of ours hereunder or under applicable law, including termination.

(f) Franchisee agrees that Gymboree may require Franchisee to provide Gymboree from time to time with the names and addresses of its class and open house attendees and other names and addresses gathered as a result of Franchisee's marketing program, together with such other information as Gymboree may require. Gymboree may use the lists and information (1) to analyze enrollment trends, (2) to provide franchisees with computerized mailing labels, (3) to market Gymboree-developed goods and products or goods and products consistent with the Gymboree image, (4) to provide the lists and information to third parties, and (5) for such other purposes as Gymboree deems appropriate. All net profits received by Gymboree from providing the lists and information from United States and Canada based franchisees to third parties shall become the property of Gymboree.

(g) If Gymboree so requests, Franchisee agrees to: (1) display and distribute Gymboree specified quantities of the then-current Gymboree product catalog to Franchisee's class and its open house attendees (the costs therefor to be borne by Franchisee); and (2) mail the then-current Gymboree product catalog with each mailing of Franchisee's class schedule to each person on Franchisee's class schedule mailing list. Gymboree agrees to provide the catalogs to Franchisee for mailing at no cost to Franchisee and to reimburse Franchisee for all costs and mailing (via postage prepaid bulk rate mail) the class schedules and product catalogs in excess of the costs of mailing only the class schedules. Gymboree may provide the catalogs to Franchisee for class and open house distribution and, if so, shall charge Franchisee no more than Gymboree's costs (plus shipping and handling) therefor. As described in Section 2.3(g) above, Franchisee also may be required to purchase training tapes and materials.

(h) In the event Gymboree, in its sole and absolute discretion and without obligation to do so, elects to pay certain expenses of operating the franchise, including customer refunds, when Franchisee fails to do so, Franchisee shall immediately reimburse Gymboree in the amount of such payments and all expenses incurred in connection therewith plus late fees as provided for herein.

(i) During the term of the Franchise, we will loan you (or allow you electronic or other access to) one copy of the Manuals, containing mandatory and suggested specifications, standards and operating procedures prescribed from time to time by us for a Gymboree Program and information relative to your obligations hereunder. We can modify any aspect of the Manuals, the Gymboree System or specifications, standards, policies and procedures of Gymboree Play Centers, to, among other things, specify brands, types and/or models of equipment which must be used by you in the operation of your Gymboree Play Center, to specify changes in the Products and Services used and/or offered by you, and/or to specify changes in the decor, format, image, products, services, operations or otherwise of a Gymboree Program. You'll promptly and continuously comply, at your sole expense, with all provisions of, and additions/deletions/changes to, the Manuals. You have no expectation that the Manuals (and the Gymboree System) will not be changed over time and you and we, in fact, anticipate that such changes will take place, in response to competitive challenges, commercial opportunities and otherwise. You'll keep your copy of the Manuals current by immediately inserting all modified pages and (at our option) destroying or returning to us all superseded material. Any such additions/deletions/changes will take precedence over all prior communications and in the event of a

dispute, the master Manuals maintained at our office shall control. The provisions of the Manuals as modified from time to time by us and communicated to you constitute provisions of this Agreement and are binding upon you. The Manuals contain proprietary information of ours and you agree to keep the Manuals and information contained therein confidential at all times during and after the term of the Franchise.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

(j) Franchisee may suggest or offer ideas to improve or modify the Gymboree Program. Franchisee acknowledges and agrees that any such ideas offered or suggested by it will belong in their entirety to Gymboree, may be incorporated into the Gymboree Program and Franchisee shall have no right, title or interest in any such ideas offered or suggested to Gymboree.

(k) Neither we nor any of the Franchisor-Related Persons/Entities, any supplier designated by us or otherwise will have any liability and/or obligation with respect to, [and neither you, nor any affiliate of yours, will make (and you and each affiliate of yours will forever hold us and each of the Franchisor-Related Persons/Entities harmless with regard to) any claims against us, any of the Franchisor-Related Persons/Entities, any supplier designated by us or otherwise, with respect to] any failures, errors or otherwise, of or by (and/or any loss, damage, liability, expense or otherwise caused by or related to) any computer systems, software, hardware or otherwise, whether or not provided and/or specified by us, any of the Franchisor-Related Persons/Entities and/or any supplier, including (but not limited to) any Year 2000-related problems and/or any other computer-related problems. We do not have any obligation to assure that any computer hardware, software, systems or otherwise are Year 2000 compliant and all such obligations are solely yours.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**5.4 Management and Personnel of Your Gymboree Play Center, Training.** Your Gymboree Play Center must be personally managed on a full-time basis by a person who has successfully completed all training required by us and meets all of our other then-current standards. Although we don't require it, we strongly recommend that you personally manage your Gymboree Play Center on an "on-premises" basis: Absentee ownership is **not** recommended by us and exposes you to a greater risk of failure than if you are personally involved, on a full time basis, in the on-site daily management of your Gymboree Play Center. Training for one Gymboree Program manager is included in the initial franchise fee but you'll be responsible for all travel, meals, lodging and similar costs for all persons attending training and we may charge a reasonable training fee for subsequent Gymboree Program managers. You'll keep us advised of the identities of the manager and other supervisors of your Gymboree Play Center, and we'll have the right to deal with the manager on matters pertaining to day-to-day operations of, and reporting requirements for, your Gymboree Play Center. We reserve the right to review any agreements between you and your manager and to require the manager to sign confidentiality and other agreements acceptable to us. We strongly recommend, but do not require, that the manager of your Gymboree Play Center have an equity interest and/or profit participation in your Gymboree Play Center. You'll hire all employees of your Gymboree Play Center and will be solely responsible for their supervision and possible termination, the terms of their employment and compensation and for the proper training of such employees in the operation of your Gymboree Play Center. You'll establish and maintain at your Gymboree Play Center an ongoing training program, meeting our standards, for new and continuing employees.

## **5.5 Indemnification and Insurance.**

(a) You're the only one responsible for any damage, loss or other claims arising out of, or related in any way to, any of your acts, errors or omissions, whether related to you, your employees, agents or representatives, your operations or ownership of your Gymboree Play Center or otherwise arising. Franchisee agrees at all times to defend at its own cost, and to indemnify and hold harmless to the fullest extent permitted by law, Gymboree and each of the Franchisor-Related Persons/Entities (each of the foregoing being hereinafter referred to individually and collectively as "Indemnitees") from all losses and expenses (as hereinafter defined) incurred in connection with any action, suit, proceeding, claim, demand, investigation, or formal or informal inquiry (regardless of whether same is reduced to judgment) or any settlement thereof which arises out of or is based upon any act, error and/or omission of yours (including, but not limited to, your ownership and/or operation of your Gymboree Play Center, any act or omission of your employees and/or agents, and/or any transfer of any interest in this Agreement, your Gymboree Play Center, the Franchise, the Franchisee or otherwise, including (but not limited to) any of the following: Franchisee's alleged infringement or any other violation or any other alleged violation of any patent, mark or copyright or other proprietary right owned or controlled by third parties; Franchisee's alleged violation or breach of any contract, federal, state or local law, regulation, ruling, standard or directive or of any industry standard; libel, slander or any other form of defamation by Franchisee; Franchisee's alleged violation or breach of any warranty, representation, agreement or obligation in this Agreement; any acts, errors or omissions of Franchisee or any of its agents, servants, employees, contractors, partners, proprietors, affiliates or representatives; latent or other defects in the franchise business, whether or not discoverable by Gymboree or Franchisee; the inaccuracy, lack of authenticity or nondisclosure of any information by any customer of the franchise business; any service provided by Franchisee at, from or related to the operation of the franchise business; any services or goods provided by any affiliated or non-affiliated participating entity; any action by any customer of the franchise business; and, any damage to the property of Franchisee or Gymboree, their agents or employees, or any third person, firm or corporation, unless such losses, claims, costs, expenses, damages, or liabilities were actually or allegedly caused wholly or in part through the active gross negligence of Gymboree or any of its agents or employees, or resulted from any strict liability imposed on Gymboree or any of its agents or employees.

For the foregoing purpose, the term "losses and expenses" shall be deemed to include all losses, compensatory, exemplary or punitive damages, fines, charges, costs, expenses, lost profits, attorneys' fees, experts' fees, court costs, settlement amounts, judgments, compensation for damages to Gymboree's reputation and goodwill, costs of or resulting from delays, financing, costs of advertising material and media time/space, and costs of changing, substituting or replacing same, and any and all expenses of recall, refunds, compensation, public notices and other such amounts incurred in connection with the matters described.

Franchisee agrees to give Gymboree notice of any such action, suit, proceeding, claim, demand, inquiry or investigation. At the expense and risk of Franchisee, Gymboree may elect to assume and control (but under no circumstance is obligated to undertake) the defense and/or settlement of any such action, suit, proceedings, claim, demand, inquiry or investigation, in such manner as we deem appropriate in our sole and absolute discretion, in each case without affecting our rights under any indemnity. Such an undertaking by Gymboree shall in no manner or form diminish Franchisee's obligation to indemnify Gymboree and to hold it harmless.

In order to protect persons or property, or its reputation or goodwill, or the reputation or goodwill of others, Gymboree may, at any time and without notice as it in its judgment deems appropriate, offer, order, consent or agree to settlements or take such other remedial or corrective actions as it deems expedient with respect to the action, suit, proceeding, claim, demand, inquiry or investigation if, in Gymboree's sole judgment, there are reasonable grounds to believe that any of the acts or circumstances enumerated above have occurred, or any act, error, or omission of Franchisee may result directly or indirectly in damage, injury or harm to any person or any property.

All losses and expenses incurred above shall be chargeable to and paid by Franchisee pursuant to its obligations of indemnity hereunder, regardless of any actions, activity or defense undertaken by Gymboree or the subsequent success or failure of such actions, activity or defense.

Indemnitees do not assume any liability whatsoever for acts, errors, or omissions of those with whom Franchisee may contract, regardless of the purpose. Franchisee shall hold harmless and indemnify Indemnitees for all losses and expenses which may arise out of any acts, errors or omissions of these third parties.

Under no circumstances shall Indemnitees be required or obligated to seek recovery from third parties or otherwise mitigate their losses in order to maintain a claim against Franchisee. Franchisee agrees that the failure to pursue such recovery or mitigate loss will in no way reduce the amounts recoverable by Indemnitees from Franchisee.

Gymboree shall have the right to defend any claim in such manner as it deems appropriate or desirable in its sole and absolute discretion. This indemnity shall continue in full force and effect subsequent to and notwithstanding the expiration, surrender or termination of this Agreement.

In the event Franchisee defaults in the performance of any of its obligations under this Agreement, Gymboree may, but is not obligated to, cure such default for the account and on behalf of Franchisee. The costs incurred by Gymboree in connection with curing such default, including attorneys' fees, will be due and payable by Franchisee to Gymboree on demand.

(b) You'll maintain in force policies of insurance issued by carriers approved by us covering various risks, as specified by us from time-to-time in our sole and absolute discretion.

For your information, our current insurance requirements (which can be changed by us at any time in our sole and absolute discretion and with which you'll promptly comply) for your Gymboree Play Center include the following: The minimum amount of insurance required shall be \$5,500,000, which may include a basic liability policy augmented by umbrella policies. In addition, Franchisee shall secure and maintain at no cost to Gymboree (i) an accident, medical and dental expense policy with a minimum limit of \$10,000 per incident and a deductible not to exceed \$25 per incident, (ii) automobile liability insurance on all Franchisee's vehicles (all Owned, Leased, Non-Owned and Hired Vehicles) with limits of not less than \$250,000/\$500,000 or a combined single limit of not less than \$300,000 for bodily injury and with limits of not less than \$50,000 for property damage, (iii) (as required by law) a workers' compensation policy covering its employees, covering their operations with minimum limits of \$10,000. If Franchisee offers the Gymboree On The Go Program, then its teachers also must maintain the minimum amount of automobile liability insurance as required by state law. Gymboree may periodically increase the amounts of coverage required under such insurance policies and require different or additional kinds of insurance at any time, to reflect inflation, identification of new risks, changes in law or standards of liability, higher damage awards or other relevant changes in circumstances. Franchisee



shall provide Gymboree with a Certificate of Insurance reflecting that the insurance coverage is in effect, that Gymboree is an additional insured on the public and product liability (if required) and automobile liability and umbrella policies, and that all insurance policies may not be changed or canceled except upon thirty days' written notice by the insurance carrier to Gymboree. All insurance policies shall be issued by insurance companies with a financial rating of at least A- status as rated in the most recent edition of Best's Insurance Reports and must be approved by Gymboree. In the event that Franchisee does not provide the foregoing insurance, Gymboree may, in addition to all other remedies it may have, procure such insurance and charge the cost of procuring such insurance to Franchisee, or terminate this Agreement as provided in Section 7.1.

(c) If Gymboree in its discretion so elects, Gymboree may make available to Franchisee at Franchisee's sole cost and expense insurance coverage through master policies or insurance programs arranged by Gymboree.

(d) Franchisee agrees to deliver to Gymboree, within ten (10) days of any incident involving injury, illness or death of any person arising out of or in connection with operation of each Site within the Territory, a statement in such form as Gymboree may specify from time to time of the circumstances of the incident and the action taken or perform any other requirements set forth by Gymboree or its carriers.

(e) Franchisee agrees that it shall not operate at any time without the insurance required by this Agreement. Gymboree reserves the right, in addition to all other rights and remedies Gymboree may have, to seek injunctive relief to enforce the provisions of this paragraph.

#### **5.6 Protection of the Gymboree Marks.**

(a) Franchisee acknowledges that Franchisee's right to use the Gymboree Marks and the Gymboree Program is derived solely from this Agreement and is limited to the operation of the franchise by Franchisee pursuant to and in compliance with this Agreement and all applicable standards, specifications and operating procedures prescribed by Gymboree from time to time during the term of the franchise. You understand and agree that you are not awarded any rights to use the Marks and the Gymboree System in connection with the Internet, World Wide Web and/or other electronic media, all such rights being retained by us. Any unauthorized use of the Gymboree Marks or the Gymboree Program by Franchisee shall constitute a breach of this Agreement and an infringement of the rights of Gymboree in and to the Gymboree Marks and the Gymboree Program. Franchisee acknowledges and agrees that all usage of the Gymboree Marks and the Gymboree Program by Franchisee and any goodwill established thereby shall inure to the exclusive benefit of Gymboree and that this Agreement does not confer any goodwill or other interest in the Gymboree Marks or the Gymboree Program upon Franchisee (other than the license to operate the franchise in compliance with this Agreement). All provisions of this Agreement applicable to the Gymboree Marks shall apply to any other trademarks, service marks and commercial symbols hereinafter authorized for use by and licensed to Franchisee by Gymboree. All copyrighted materials supplied by Gymboree to Franchisee, and used by Franchisee in connection with its franchise, shall contain such copyright notices as are required by Gymboree.

(b) Franchisee acknowledges and represents to Gymboree that Franchisee has investigated the region in which Franchisee desires to open its franchise and has found therein no use by an unauthorized person or entity of the name "Gymboree" or any similar trade name, or other commercial identification. Franchisee shall immediately notify Gymboree of any apparent infringement of or challenge to Franchisee's use of any Gymboree Mark, or claim by any person of any rights in any

Gymboree Mark, and Franchisee shall not communicate with any person other than Gymboree and its counsel in connection with any such infringement, challenge or claim. Gymboree, at its sole cost and expense, shall have sole and absolute discretion to take such action as it deems appropriate in connection with the foregoing, and the exclusive right to control any settlement, litigation or Patent and Trademark Office or other proceeding arising out of any such alleged infringement, challenge or claim or otherwise relating to any Gymboree Mark. Franchisee agrees to execute any and all instruments and documents, render such assistance, and do such acts and things as may, in the opinion of Gymboree's counsel, be necessary or advisable to protect and maintain the interests of Gymboree in any litigation or other proceeding or to otherwise protect and maintain the interests of Gymboree in the Gymboree Marks. Franchisee acknowledges that Gymboree is not obligated hereunder to protect the rights which Franchisee has to use the Gymboree Marks, except that if any action in connection therewith is brought against Franchisee, Gymboree shall defend, indemnify and hold Franchisee harmless with respect to any judgment or award in favor of a third party with respect to such action, unless due to Franchisee's misuse of a Gymboree Mark, whether or not pursuant to and in compliance with this Agreement.

(c) If it becomes advisable at any time, in our sole and absolute discretion, for you to modify or discontinue the use of any of the Marks or use one or more additional or substitute trademarks or service marks, you will promptly comply (at your sole expense) with our directions to modify or otherwise discontinue the use of such Marks, or use one or more additional or substitute trademarks or service marks, including (but not limited to) replacement of all signage, etc. We won't have any liability or obligation (whether of defense, indemnity, expense reimbursement or otherwise) to you, and you agree to make no claim, for, or in connection with, any modification, discontinuance or otherwise, and/or any dispute regarding the Marks and/or your and/or our rights in or to them. We make no guaranty that a modification, discontinuance or otherwise may not be required, whether as a result of expiration, termination or limitation of our rights to the Marks or otherwise.

You understand that there is always a possibility that there might be one or more businesses, similar to the business covered by the Franchise, operating in or near the area(s) where you may do business or otherwise, using a name and/or marks similar to ours and with superior rights to such name and/or marks as a result of prior use or otherwise. We strongly urge you to research this possibility, using telephone directories, local filings and other means, prior to your signing this Agreement, any other documents, expending or paying any sums or making any commitments and you understand that if you fail to do so, you're at risk.

(d) Franchisee agrees to use the Gymboree Mark "Gymboree" as the sole trade identification of each Site, provided that Franchisee shall identify itself as the independent owner of the each Site, in the manner prescribed by Gymboree. Franchisee shall not use any other trademark, service mark or trade name owned by Gymboree as part of any corporate or trade name or with any prefix, suffix, or other modifying words, terms, designs or symbols (other than logos and additional trade and service marks licensed to Franchisee hereunder), or in any modified form, nor may Franchisee use any Gymboree Mark in connection with the performance or sale of any unauthorized services or products or in any other manner not expressly authorized in writing by Gymboree. Franchisee agrees to display prominently the Gymboree Marks in the manner prescribed by Gymboree at each Site and in connection with advertising and marketing materials. Franchisee agrees to give such notices of trade and service mark registrations and copyright as Gymboree specifies and to obtain such fictitious or assumed name registrations as may be required under applicable law. Prior to commencing business under the Gymboree Marks, Franchisee must supply evidence satisfactory to Gymboree that Franchisee has complied with applicable law regarding the same, if required by Gymboree, and the total appearance of Franchisee's trade name and other identifying marks and symbols must be approved by Gymboree.

Such approval may be sought and obtained in accordance with the procedures specified by Gymboree in its Operations Manual.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**5.7 Confidentiality.** We have, and plan to develop and acquire from time-to-time, certain confidential and proprietary information and trade secrets relating to Gymboree Play Programs and other matters and which constitutes the "Confidential Information", including but not limited to, the following categories: (1) the methods of implementing the Gymboree Program; (2) contents of Gymboree "In Gyms" and of video training tapes, trainings, lesson plans, seminars and workshops conducted by Gymboree; (3) methods, techniques, specifications, procedures, information, lesson plans, systems and knowledge of and experience in the development, operation, and franchising of Gymboree sites; (4) marketing programs and promotion aids; (5) knowledge of test, research and development programs for the development and introduction of products and services to be sold at Gymboree sites; (6) business forms; (7) accounting procedures; (8) information bulletins; and (9) Gymboree proprietary software.

We'll disclose, to you, during training, in the Manuals and in guidance and assistance furnished to you during the term of the Franchise, parts of the Confidential Information needed for the operation of a Gymboree Play Center, and you may learn additional Confidential Information of ours during the term of the Franchise. You will not acquire any interest in the Confidential Information, other than the right to utilize it in the operation of a franchised Gymboree Play Center at the Premises and pursuant to this Agreement.

You acknowledge and agree that the Confidential Information is a valuable asset of ours, includes trade secrets of ours and will be disclosed to you solely on the condition that you will forever: (1) not use the Confidential Information in any way other than the operation of your Gymboree Play Center under a Franchise Agreement in good standing with us; (2) maintain the absolute secrecy and confidentiality of the Confidential Information during and after the term of this Agreement; (3) not make unauthorized copies of any portion of the Confidential Information; and (4) adopt and implement all reasonable procedures prescribed by us from time-to-time to prevent unauthorized use or disclosure of, or access to, the Confidential Information. Specifically, you will not sell, rent or allow anyone to use any list of customers (such list being part of the Confidential Information and our property) other than in connection with the mailing of advertising materials approved by us for your Gymboree Play Center. You agree that any unauthorized use or duplication of any part of the Confidential Information, including in any other business, would be an unfair method of competition with us and other Gymboree operators.

So as to assist in the development of the Gymboree System and for the mutual benefit of all Gymboree operators, we'll have the perpetual right to use and to authorize those we designate and/or other Gymboree Play Centers to use, and you'll fully and promptly disclose to us, all ideas, concepts, methods, techniques and otherwise relating to the development, marketing, operation and/or otherwise of a Gymboree Play Center, or which would be usable therein, which are conceived or developed by you and/or your employees during the term of this Agreement, in each case without compensation or other obligation.

You'll cause each of your employees, agents, principals and affiliates to execute and deliver to you an agreement containing substantially the same provisions as set forth in this Section, in a form or

forms consented to by us. Our current form of such agreement (which is subject to change by us in our sole and absolute discretion) is attached as Exhibit E. An original of each executed Confidentiality Agreement will be available for our inspection during business hours. You will, on our request, deliver to us copies of any Confidentiality Agreement.

Your Initials: \_\_\_\_\_ / \_\_\_\_\_

**5.8 Exclusive Relationship, Restrictions on Similar Businesses During Franchise Term and After Transfer, Termination, Expiration, Repurchase, etc.** You and we share a mutual interest in avoiding situations where persons or companies who are, or have been, Gymboree Franchisees operate or otherwise become involved with, a Similar Business, anywhere, either during the term of, or after the termination or expiration of your rights under, this Agreement.

This mutual interest exists since, and you and we both agree that, (1) such activities would, as a practical and realistic business matter, make use of techniques, methods, systems and procedures learned by the operator while he/she/it was a Gymboree Franchisee, (2) the operation of a Similar Business, irrespective of location or vicinity to any existing or future Gymboree Program, would inevitably draw on and benefit from the operator's training and experience as a Gymboree Franchisee, including techniques not known to you or other operators prior to becoming a Gymboree Franchisee, (3) operation of such a business, and use of any such techniques, methods, systems and procedures, would damage both us and other Gymboree Franchisees and unfairly limit reasonable expansion alternatives open to us and our Franchisees, particularly in light of the limited number of goods and services provided by us and our Franchisees and the limited number of favorable locations or areas available, thereby placing us and other Gymboree operators at a competitive disadvantage, (4) there would be an extreme difficulty and expense involved in accurately determining actual financial impact from such activities by a current or former Gymboree Franchisee, (5) such activities would expose us and our Franchisees to a strategy under which a person could acquire a Gymboree franchise, learn all of our methods of doing business including innovations by other Gymboree Franchisees, default under the franchise agreement or otherwise obtain termination or expiration and then open an unlimited number of locations drawing on their experience and training as a Gymboree Franchisee, including access to favorable locations, (6) the possibility of such occurrences would discourage the free flow of information and innovation within the Gymboree System, resulting in reduced growth and a decline in the value of the investments made by us and our Franchisees in Gymboree Play Centers and the System, making subsequent sales or operation of Gymboree franchises in the area of a Similar Business, or other areas, extremely difficult and placing us and our Franchisees at a disadvantage in the competitive marketplace, (7) such activities could reduce your level of time and attention given to your operation of a Gymboree Program and thereby reduce its chances for success, (8) such activities would constitute an unfair and inequitable method of competition with us and other Gymboree Franchisees and is the type of behavior to which you (as a Gymboree Franchisee) would strenuously object if engaged in by another Gymboree Franchisee, and (9) if we were unable to protect Gymboree Franchisees from such (and other) adverse consequences due to violations of the provisions of this (or similar) agreements by current and/or former Gymboree Franchisees, it would be substantially more difficult to obtain, and retain, qualified Gymboree Franchisees for the general benefit of the Gymboree system, and would, therefore, injure the interests of Gymboree Franchisees not violating such provisions.

In addition, you acknowledge and agree that (1) you will receive valuable training and confidential information throughout the term of the Franchise, including, without limitation, information regarding our promotional, operational, sales, and marketing methods and techniques and the System

which was not known to you before becoming a Gymboree Franchisee, (2) we would be unable to protect such confidential information and other information and techniques against unauthorized use or disclosure, would be unable to encourage a free exchange of ideas and information among Gymboree franchisees and the goodwill and other assets of our business and those of other Gymboree Franchisees would be at risk if franchise owners and members of their immediate families were permitted to hold interests in or perform services for a Similar Business during or after the term of the Franchise Agreement, (3) your ownership and/or operation of, or any other relationship with, a Similar Business would necessarily benefit from, and be inconsistent with, your status and obligations as a Gymboree franchisee and (4) the requirements of this section have been expressly bargained for and are an express condition of our award of the Franchise to you.

You acknowledge that you've considered, as reasonable business alternatives, other franchise opportunities, as well as the possibility of your entering our industry as a non-franchised participant (in each instance not being subject to the restrictions of this Agreement), each of the restrictions on competition contained in this Agreement (including, but not limited to, those in this Section) are fair, reasonable and necessary for the protection of all members of the Gymboree family of companies, including you and your fellow Gymboree Franchisees and represent a reasonable balancing of the legitimate long-term interests of us, you and other Gymboree Franchisees, will not impose any undue hardship on you, since you have other valuable opportunities, skills, experience, education and abilities unrelated to the ownership and/or operation of a Gymboree Program and which will provide you with the opportunity to derive significant income from other endeavors, that any burden on you resulting from the enforcement of such provisions will be entirely self-inflicted and that such enforcement will, in any event, be in the public interest by avoiding diversion of business, your self-enrichment and consequent impairment of the investment made in the Gymboree system by us and other Franchisees.

Therefore, to protect your and our investments and those of all Gymboree Franchisees, you and we agree as follows: during the term of this Agreement (and any other Franchise Agreement with us) and any extension thereof, and for two (2) years after any transfer, repurchase, the termination (whether for cause or otherwise) of your rights, the expiration of this (or any other) Agreement (without award of a successor franchise or renewal term), and/or the date on which you cease to operate your last Gymboree Program, whichever is later, neither you, any affiliate of yours, nor any shareholder, member or partner of yours (in the event you are or become a business entity) entity) or any affiliate of yours, nor any member of your immediate family nor any member of the immediate family of any affiliate, shareholder or partner of yours will [except for Gymboree Play Centers operated in good standing under franchise agreements with us]: (a) have any direct or indirect interest as a disclosed or beneficial owner in any Similar Business located, or operating units located, anywhere; (b) have any direct or indirect interest (whether through a member of the immediate family of yours or any owner of you, or otherwise) as a disclosed or beneficial owner in any entity which is awarding franchises or licenses or establishing joint ventures or other business enterprises for the operation of Similar Businesses located, or operating units located, anywhere; (c) perform services as a director, officer, manager, employee, consultant, representative, agent, or otherwise for any Similar Business or any entity which is awarding franchises or licenses or establishing joint ventures to operate Similar Businesses anywhere; or (d) directly or indirectly employ, or seek to employ, any person who is employed by us or any of the Franchisor-Related Persons/Entities or by any other Gymboree franchisee, nor induce nor attempt to induce any that person to leave said employment without the prior written consent of us and that person's employer; provided that, in the event of a violation by you of the foregoing restriction, our remedies will include, at our election, (i) termination of your rights and our obligations under this and all other agreements, together with recovery of damages and all other remedies allowed at law and/or equity or (ii) payment to us by you of \$5,000 (subject to adjustment for

inflation, as set forth in this Agreement), such amount having been mutually agreed on by you and us in view of the extreme difficulty in accurately determining the damages suffered by us as a result of your violation (including effects on relationships with other employees, customers, retraining costs, lost sales, etc.) and your and our mutual interest in avoiding a lengthy and costly dispute over damages, and, in addition, you (and each affiliate of yours, together with each owner of you, if you are a business entity, and/or any affiliate of yours) will execute, ~~in a form prescribed by us,~~ a general release **General Release**, of any and all claims, liabilities and/or obligations, of any nature whatsoever, however arising, ~~known or unknown,~~ against us and/or any or all of the Franchisor Related Persons/Entities; provided further if the foregoing restriction regarding our and the employer's consent is unenforceable, you will first notify us and that employer before taking any action with respect to any such employment or offer of employment. You confirm that prior to entering into the franchised business you possessed (and still possess) valuable skills unrelated to the franchised business, have the ability to be gainfully employed in other fields entirely acceptable to you and that the strict enforcement of the restrictions of this Agreement will not work any undue or significant hardship on you or your family.

If any of the restrictions of this Section are determined to be unenforceable due to excessive duration, geographic scope, business coverage or otherwise, you and we agree that they will be reduced to the level that provides the greatest restriction but which is still enforceable, notwithstanding any choice-of-law or other provisions in this Agreement to the contrary. The time period of the competitive restrictions described in this Agreement will be extended by the length of time during which you or any other person or entity are in breach of any provision of this Agreement (including the limitations of this Section.) The provisions of this Section will continue in full force and effect through the extended time period.

The restrictions of this Section don't apply to the ownership of shares, of a class of securities listed on a stock exchange or traded on the over-the-counter market, that represent less than three percent (3%) of the number of shares of that class issued and outstanding.

If you violate any obligations under this Agreement (or otherwise) with respect to a Similar Business, our remedies will include (but are not limited to) the right to obtain a temporary restraining order, preliminary and/or permanent injunction (or other equitable relief), notwithstanding any provisions of this Agreement to the contrary.

On our request, you will obtain written non-competition commitments from the persons subject to the non-competition provisions of this Agreement, in such form as we direct and naming you and us as beneficiaries of such agreements.

If the restrictions of this Section are unenforceable or are reduced to a level which we, in our sole and absolute discretion, find unacceptable, we may, in addition to any other remedies available to us, require you to pay a fee (either paid immediately on a present value basis or over time, as we select) of one-half (1/2) of the royalties and marketing contributions which would be payable if the business in question was a franchised Gymboree Program, for three (3) years, such amount having been jointly selected by you and us as fair and appropriate damages and in consideration of (1) the difficulty of accurately predicting actual damages, (2) the fact you will inevitably benefit in the operation of such business from your training and experience as a Gymboree Franchisee, (3) the possible impact on the expansion and operation of our system, including the expense and difficulty of a sale of a franchise in your area and (4) you not having any rights, nor we having any obligations, under this Agreement or otherwise during such period.

Your Initials: \_\_\_\_\_ / \_\_\_\_\_

**5.9 CONSENT TO DISCLOSURE. FRANCHISEE HEREBY CONSENTS TO GYMBOREE'S DISCLOSURE IN ITS FRANCHISE OFFERING CIRCULARS OR OTHERWISE OF INFORMATION RELATING TO FRANCHISEE'S OWNERSHIP AND OPERATION OF THE GYMBOREE PLAY CENTER, EITHER AS REQUIRED BY LAW OR WHICH GYMBOREE MAY CHOOSE TO DISCLOSE IN ITS SOLE AND ABSOLUTE DISCRETION, INCLUDING, BUT NOT LIMITED TO, FRANCHISEE'S NAME, BUSINESS ADDRESS AND TELEPHONE NUMBER, HOME ADDRESS AND TELEPHONE NUMBER, REVENUES, EXPENSES, PROFITS AND/OR ANY OTHER FINANCIAL INFORMATION RELATING TO THE GYMBOREE PLAY CENTER AND OTHER RELATED INFORMATION.**

Your Initials: \_\_\_\_\_ / \_\_\_\_\_

**5.10 Continued Payment of Royalties and Other Obligations During Closure, etc.**  
You and we recognize that closure of your Gymboree Play Center may become necessary from time-to-time for remodeling, due to fire or other casualty, governmental action, shopping center or street closure, etc. Of course, if your Gymboree Play Center, the Premises or any significant assets used in the operation of the franchise are damaged or become inoperable or if your Gymboree Play Center is closed for any reason, you will promptly undertake all steps necessary to remedy such conditions and return your Gymboree Play Center to full operation as soon as possible. If any closure of your unit takes place for any reason, you will immediately notify us, submit a plan for re-opening (with discussion of budget, deadlines, possible relocation and subject to our reasonable approval) and diligently take (at your expense) all steps necessary to fully re-open your Gymboree Play Center for business as soon as possible. In any event, all financial obligations of yours to us or any affiliate, whether under this Agreement or otherwise, will remain in full force and effect during such closure and any amounts due or to become due us or any affiliate calculated based on Gross Receipts or similar amounts (such as percentage royalties, percentage Marketing Fund Contributions, percentage rent, etc.) will continue to be paid during such closure, as specified below. During any closure, weekly Gross Receipts will be assumed to be equal to the average weekly Gross Receipts during the 3 four-week periods (or shorter period if your Gymboree Play Center was not open for such 3 four-week periods) prior to such closure beginning. Since you will continue to have this obligation to pay percentage and other amounts based on average assumed Gross Receipts even though your Gymboree Play Center is closed, you will maintain business interruption insurance as provided in this Agreement or otherwise specified by us.

Your Initials: \_\_\_\_\_ / \_\_\_\_\_

## **6. ADVERTISING AND PUBLIC RELATIONS**

### **6.1 Advertising Materials and Local Advertising.**

(a) Gymboree will furnish to Franchisee initial advertising materials (artwork for class schedules, newspaper ads, and the like) and shall assist Franchisee in implementing its own initial advertising and public relations programs. Franchisee will purchase from Gymboree or other suppliers (such as the Marketing Fund, as hereinafter defined) reasonable quantities of current material for distribution. Franchisee shall only use those advertising brochures, printed materials and public relations

materials and programs currently approved by Gymboree. Franchisee shall maintain an adequate supply of all printed advertising and other materials, including Play Pointer materials, in each Site at all time.

(b) Prior to use, their use by you, samples of all advertising and promotional materials and programs (including web sites and any other use related to the Internet, World Wide Web or other electronic media) not prepared or previously approved by us must be submitted to us, in the form and manner prescribed by us from time-to-time, for our review and consent, which we may grant, withhold or condition as we see fit in our sole and absolute discretion, including forbidding you from doing any advertising/marketing on, or in connection with, the Internet, World Wide Web or other electronic media. You won't use any advertising or promotional materials or programs that we have disapproved or that does not include the copyright, trademark and other notices required by us.

(c) Gymboree shall have the right to require Franchisee to report the nature, extent and amount of all local advertising expenditures, in such form and at such times as Gymboree may request. Franchisee also agrees to provide Gymboree with copies of all press and media coverage of Franchisee's operations, and samples of advertising pieces and collateral pieces used.

(d) Gymboree shall have the right to require Franchisee to purchase and maintain a display advertisement advertising its franchise in the yellow page telephone directory which services the area immediately surrounding its franchise. Such display advertisement shall be in such form and have such content as is specified from time to time by Gymboree in our sole and absolute discretion. Gymboree may require Franchisee to obtain a toll-free telephone number for the franchise.

(e) All use of the Internet, World Wide Web or other electronic media by you in connection with your Gymboree Play Center will be as specified by us from time-to-time, whether in the Manuals or otherwise (and we may prohibit and/or condition any use by you of the Internet, World Wide Web or other electronic media), in our sole and absolute discretion. Among other things, we may require that all use of the Internet, World Wide Web or other electronic media be through us, using an Internet/Intranet Service Provider selected by us (or which can be us or an affiliate) and that all pages be accessed only through our "home" or other page and meet our design and other specifications. We own and control all URLs, whether used in connection with your Gymboree Play Center or otherwise.

**6.2 Regional Advertising.** In regional and metropolitan areas where there are two or more licensed operators of Sites, Franchisee shall participate in an advertising and public relations cooperative and, if approved by a majority, pay its proportionate share of the cost of joint regional and local public relations and advertising programs. In determining the level of expenditure and the type of advertising and public relations program, each licensed operator of Sites within the area participating in the cooperative shall have one vote for each Site in operation and scheduled to be in operation during the session for which the programs are designed to promote (hereafter "Total Operational Sites"). Franchisee's share of the expenses for public relations and electronic media advertising shall be the ratio of the number of Franchisee's Operational Sites to the Total Operational Sites in the relevant regional and metropolitan area. Franchisee's share of expenses for print media advertising shall be the ratio of the circulation of the publication in Franchisee's Territory to the circulation of that publication in all the franchisees' territories in that relevant regional and metropolitan area.

**6.3 Cooperative Marketing and Public Relations Program.** We've instituted an advertising, publicity and marketing fund (the "Marketing Fund") for such advertising, advertising-related, marketing and/or public relations programs, services and/or materials as we, in our sole and



absolute discretion, may deem necessary or appropriate to promote current and/or future Gymboree Play Centers. The Marketing Fund may be combined with any marketing fund otherwise established for Gymboree Play Centers and the funds merged for use in accordance with this Agreement. You'll contribute to the Marketing Fund up to five percent (5%) of Gross Receipts. Such percentage marketing contributions will be calculated and payable at the same time and in the same manner as percentage royalties. We'll cause all Gymboree Play Centers owned by us to make contributions to the Marketing Fund as if they were subject to our then-current form of Franchise Agreement. You understand that, due to differing forms of Franchise Agreements or otherwise, some Gymboree Franchisees may have different Marketing Fund and/or other obligations than in this Agreement. Funds in the Marketing Fund must be expended, prior to termination of the Marketing Fund, only for the purposes authorized by the relevant Franchise Agreement(s.) No profit, gain or other benefit will directly accrue to us from the Marketing Fund.

We'll have sole and absolute discretion over all matters relating to the Marketing Fund (consistent with its purposes and the provisions of this Agreement) in any way, including (but not limited to) its management, all financial matters, expenditures, receipts and/or investments by the Marketing Fund, timing of expenditures, creative concepts, content, materials and endorsements for any marketing programs, together with the geographic, market, and media placement and allocation thereof. The Marketing Fund may be used, to (among other things) pay costs of marketing programs (including public relations), "brand/image advertising" and other marketing programs new product development, signage, preparing, producing, distributing and using marketing, advertising and other materials and programs; administering national, regional and other marketing programs, purchasing media, employing advertising, public relations and other agencies and firms; and supporting public relations, market research and other advertising and marketing activities to promote current and/or future Gymboree Play Centers and the Brand, as well as any expenses associated with any Franchisee Advisory Council(s), if those Councils, and such expenses, are approved by us in our sole and absolute discretion. A brief statement regarding the availability of information regarding the purchase of Gymboree franchises may be included in advertising and other items produced and/or distributed using the Marketing Fund.

We can, in our sole and absolute discretion, arrange for services, goods and otherwise, including (but not limited to) creative concepts, production, placement, purchase of media, legal, accounting and other services, related to the purposes and activities of the Marketing Fund, to be provided to the Marketing Fund by ourselves and/or any affiliated persons/companies and our and/or their employees or agents, including persons/entities who may be owned, operated, controlled by, and/or affiliated with, us (such as an "in-house advertising agency") and we may use the Marketing Fund to compensate and reimburse any of such persons/entities (including ourselves) for goods, services, materials, etc. (including administrative services) rendered to the Marketing Fund, provided that any compensation to us and/or any persons/entities owned, controlled and/or operated by us will not must be reasonable in amount. While we are not required to submit any proposed or other expenditures by (or any other matters relating to) the Marketing Fund for approval by any Franchisee Advisory Council, if we do submit any matters for approval and approval is granted by a majority of such Franchisee Advisory Council, such approval will be final and binding on you. In any event, the Marketing Fund will be accounted for separately from our other funds and may be used to pay all administrative and/or other costs of the Marketing Fund related to its activities and purposes and/or as authorized by the relevant Franchise Agreements.

You'll participate in all marketing programs instituted by the Marketing Fund or us but will retain full freedom to set your own prices, except that we may, to the greatest degree permitted by applicable

law, specify maximum prices above which you will not sell or otherwise provide any goods or services and you will comply with all such maximum prices. You will fully honor all coupons, price reduction and other promotions/programs as issued/designated by us. The Marketing Fund will, as available, furnish you with marketing, advertising and promotional formats and sample materials and may charge the direct cost of producing them plus shipping and handling. We may, in our sole and absolute discretion, use the Marketing Fund to pay the costs of advertising, advertising-related, marketing and/or public relations programs, services and/or materials with respect to locations, programs or concepts where products and/or services offered under the Marks are to be offered in conjunction with products and/or services offered under other marks, including (but not limited to) any co-branding, dual franchising or other programs, and any other franchised or non-franchised alternative channel of distribution, whether controlled by us or not.

The Marketing Fund will be accounted for separately from our other funds and will not be used to defray any of our general operating expenses, except for such salaries, administrative costs, overhead and other expenses as we may reasonably incur in activities related to the Marketing Fund and its programs (including, without limitation, conducting market research, preparing advertising and marketing materials, insurance, legal costs and collecting and accounting for the Marketing Fund; provided that the Marketing Fund will not be charged any legal expense which is unrelated to the activities and purposes of the Marketing Fund.) All taxes (including, but not limited to, gross receipts, income, value added and/or sales taxes) incurred in connection with or related to the Marketing Fund, its activities, contributions to the Marketing Fund and/or otherwise, whether imposed on us, the Marketing Fund or otherwise, will be the sole responsibility of the Marketing Fund. In any event, we may charge the Marketing Fund for attorney's fees and other costs related in any way to our defense of any claims against us and/or any of the Franchisor-Related Persons/Entities regarding the Marketing Fund or with respect to collecting amounts due and/or expenditures by or from the Marketing Fund. We may, in our sole and absolute discretion, spend in any fiscal year an amount greater or less than the aggregate contributions to the Marketing Fund in that year and the Marketing Fund may borrow from us or other lenders to cover deficits of the Marketing Fund or cause the Marketing Fund to invest any surplus for future use by the Marketing Fund. In making expenditures, the Marketing Fund will first spend any contributions made by any supplier; second, any earnings on assets held by the Marketing Fund; third, any contributions made by us; and finally any contributions made by Franchisees. We can collect for remission to the Marketing Fund any advertising or promotional monies or credits offered by any supplier based upon purchases by you or otherwise. All interest, etc. earned on monies contributed to, or held in, the Marketing Fund will be remitted to the Marketing Fund and will be subject to the restrictions of the relevant Franchise Agreement(s.) A statement of monies collected and costs incurred by the Marketing Fund will be prepared annually by us and be furnished to you upon written request. We may (but are not required to) have financial statements of the Marketing Fund audited and any costs in connection therewith will be paid by the Marketing Fund. We'll have the right to cause the Marketing Fund to be incorporated or operated through an entity separate from us as we deem appropriate, and such successor entity will have all rights and duties of ours relating to the Marketing Fund.

We may (but are not required to) revise marketing and other programs, and/or make separate expenditures from the Marketing Fund, to take account of cultural or other differences (and/or we may delegate management of a portion of the Marketing Fund in connection therewith), and we can defer, waive and/or compromise claims for contributions to, and/or claims against or with respect to, the Marketing Fund, and/or waive future contributions, in our sole and absolute discretion, using the Marketing Fund to pay any such claims. We'll have sole and absolute discretion as to whether or not we take legal or other action against any Franchisee who is in default of his or her obligations with

respect to the Marketing Fund (including obligations to make contributions) or otherwise and whether a Franchisee may be allowed to make direct advertising expenditures in place of contributions to the Marketing Fund.

We will have no obligation to ensure that expenditures by the Marketing Fund in or affecting any geographic area are or will be proportionate or equivalent to the contributions to the Marketing Fund by Gymboree Play Centers operating in that geographic area or that any Gymboree Program will benefit directly, indirectly and/or in proportion to its contributions to the Marketing Fund or from the development of advertising and marketing materials and/or programs, the placement of advertising or otherwise. We have no obligation to cause other Gymboree Play Centers, licensees or outlets (some of which may be under different arrangements) to contribute to the Marketing Fund, any cooperative or engage in local marketing. You agree that we (and each of the Franchisor-Related Persons/Entities) will not have any direct or indirect liability or obligation to you, the Marketing Fund or otherwise with respect to the management, maintenance, direction, administration or otherwise of the Marketing Fund. You agree that neither we (nor any of the Franchisor-Related Persons/Entities) will be liable for any act or omission, whether with respect to the Marketing Fund or otherwise which is consistent with this Agreement or other information provided to you, or which is done in subjective good faith or which is the result of the exercise of our (or the Franchisor-Related Persons/Entities') business judgment. You and we, each having a mutual interest in, and agreeing on the critical practical business importance of, your and our relationship being governed solely by written instruments signed by the parties to be bound (and not having either of us subject to the uncertainty and ambiguity inherent in the application of legal or other concepts not expressly agreed to in writing by you and us), agree that your and our rights and obligations with respect to the Marketing Fund and all related matters are governed solely by the express terms of this Agreement and that this Agreement (and all rights and obligations with respect to the Marketing Fund) is not in the nature of a "trust," "fiduciary relationship" or similar special arrangement (neither you nor we intending to create such relationships and expressly disavowing any such or similar relationships) and is only an ordinary commercial relationship between independent businesspersons for their independent economic benefit. We may maintain Marketing Fund assets in one or more accounts designated as "trust accounts" (or similarly designated), for purposes of protecting such assets from claims of third-party creditors or otherwise, but such designation and/or treatment will not operate to create any "trust," "fiduciary relationship" or similar special arrangement as to the Marketing Fund, its assets or otherwise.

Subject to the express requirements of this Agreement that your contributions will only be spent as authorized herein, if you are in default of any of your obligations to us, the Franchisor-Related Persons/Entities and/or the Marketing Fund, or your Franchise Agreement is otherwise subject to termination, you will have no rights, and we will have no obligations to you, under the Marketing Fund (and/or related) provisions of this Agreement. We may deny access to any and all programs and/or materials created by, and benefits of, the Marketing Fund to Franchisees who are in default in any obligations to the Marketing Fund.

**Your Initials:** \_\_\_\_\_/\_\_\_\_\_

**6.4 Local Marketing.** Franchisee must implement a local marketing program as directed by Gymboree's marketing department and in accordance with Gymboree's current Operations Manual. As part of this obligation, Franchisee must maintain an advertisement of a minimum number column inches in the local Yellow Page directory as set forth in Gymboree's Operations Manual or its most current offering circular. The minimum number of column inches currently is set at one column inch. In addition to the contributions to the Marketing Fund required under Section 6.3, Franchisee agrees to

spend for local advertising and promotion of the Gymboree Program using direct mail and other materials approved by Gymboree (excluding discount programs discussed in Section 6.5) not less than One Thousand Dollars (\$1,000.00) per calendar quarter. Franchisee shall submit to Gymboree on a quarterly basis, in a form prescribed by Gymboree, verification of its expenditures for local advertising and promotion. Franchisee shall also display in the Gymboree Site such materials, signs and brochures as designated by Gymboree from time to time, including, but not limited to, inquiry cards which shall be supplied to Franchisee by Gymboree.

Prior to use by you, samples of all advertising and promotional materials and programs (including any use of the Internet, World Wide Web and/or other electronic media) not prepared or previously approved by us must be submitted to us, in the form and manner prescribed by us from time-to-time, for our review and consent, which we may withhold or condition as we see fit in our sole and absolute discretion. If written disapproval is not received by you within fifteen (15) days from the date of receipt by us of such materials, we will be deemed to have given the required consent but we can later retract any consent (whether express or as a result of such failure to respond) by written notice to you. You won't use any advertising or promotional materials or programs that we have disapproved or that does not include the copyright, trademark and other notices required by us. We can require that a brief statement regarding the availability of information regarding the purchase of Gymboree franchises may be included in all advertising used by you and that a brochure regarding purchase of Gymboree franchises be placed in a prominent location in your Gymboree Play Center.

**6.5 Establishment of Discount Programs.** Gymboree may, from time to time, develop, establish, and market special discount or free coupon programs designed to induce users of Franchisee's goods or services to patronize Franchisee's Site(s), and Franchisee shall have the right, but not the obligation, to participate therein. Gymboree shall notify Franchisee of the creation of all such discount or coupon programs and shall advise Franchisee with respect to all of the elements thereof. Within five (5) days of receipt of such notice, Franchisee shall advise Gymboree as to whether or not Franchisee wishes to participate in such discount or coupon programs. If Franchisee notifies Gymboree that it wishes to participate, Franchisee shall in all respects adhere to all elements of said program. If Franchisee elects to be excluded from such discount or coupon program or programs, Gymboree shall have the right to advise consumers, by advertising, sales solicitation or otherwise, that Franchisee is not a participant in such program, and Franchisee shall not be entitled to the benefits thereof. Gymboree shall establish all such discount or coupon programs in its sole, subjective discretion and shall not be required to consent, consult or confer with Franchisee or any other franchisee of Gymboree with respect to the nature, content or amount of any discount or coupon established pursuant to any such program.

## **7. TERMINATION OF THE FRANCHISE**

**7.1 Defaults with No Right to Cure.** Your rights and our obligations under this Agreement will automatically terminate on delivery [or, in any event, on three (3) calendar days after mailing] of notice of termination to you (without further action by us and without opportunity to cure) if: (1) you or any of your owners fail, in the time provided in, or otherwise in accordance with, this Agreement to: (a) locate a site accepted by us; (b) obtain lawful possession of the Premises; or (c) develop and open your Gymboree Play Center; (2) you or any of your owners abandons or fails to operate your Gymboree Play Center for more than seven (7) calendar days, or surrenders or transfers control without our prior written approval; (3) you or any of your owners has made any material misrepresentation or omission in your application for the Franchise, including (but not limited to) failure to disclose any prior litigation or criminal convictions (other than minor traffic offenses); (4) you or any

of your owners is judged bankrupt, becomes insolvent, makes an assignment for the benefit of creditors, is unable to pay his or her debts as they become due, or a petition under any bankruptcy law is filed against you or any of your owners or a receiver or other custodian is appointed for a substantial part of the assets of your Gymboree Play Center; (5) you or any of your owners is convicted by a trial court of or pleads no contest to a felony, or to any crime or offense that may adversely affect the reputation of the Franchisee or any owner or your Gymboree Play Center or the goodwill associated with the Marks or engages in any misconduct which unfavorably affects the reputation of the Franchisee or any owner or your Gymboree Play Center, us or the goodwill associated with the Marks (including, but not limited to, child abuse or other mistreatment, health or safety hazards, drug or alcohol problems, or allowing unlawful activities or unauthorized or illegal items to be used or distributed at the Premises or in connection with the Franchise); (6) you or any of the Franchisee's owners makes an unauthorized transfer as defined in this Agreement; (7) you or any of the Franchisee's owners makes any unauthorized use or disclosure of or duplicates any copy of any Confidential Information, makes any unauthorized use of the Marks, or uses, duplicates, or discloses any portion of the Manuals or you and/or any other person/entity violates any restriction on ownership, operation, etc. of a Similar Business; (8) you or any of the Franchisee's owners loses the right to possession of the Premises and does not relocate your Gymboree Play Center to other premises in accordance with this Agreement; or (9) you [and/or any of your owners (and/or any affiliate of you and/or any affiliate's owners)] make any misrepresentation to us or any affiliate,, including (but not limited to) any misrepresentation of Gross Receipts and/or any amounts due us and/or any affiliate and/or commit any other act or omission constituting fraud, misrepresentation or similar act or omission, whether with respect to us, any of the Franchisor-Related Entities and/or any third party (you agree that any fraud, misrepresentation or similar act or omission by you, etc. is by its nature incurable, since it would adversely affect the goodwill associated with the Marks and/or irrevocably damage the relationship between you and us); or (10) you (and/or any owner and/or affiliate of yours) engage in any legal action (including arbitration, but not including mediation) against us and/or any of the Franchisor-Related Persons/Entities and do not receive a final judgment or award substantially in your favor on the merits; (11) there are five or more customer complaints with respect to your Gymboree Play Center in any 12-month period, whether or not resolved; (12) you fail to comply with our Terms of Use and/or Privacy Policies (and/or any other requirements) regarding all computer and other systems, including (but not limited to) Internet use; and/or (13) and/or you have failed to retain (or otherwise fail to produce on request) any records required to be maintained by our record retention policy or otherwise are required for us to confirm your compliance with the provisions of this (or any other) agreement. In the case of default (10), you will be allowed 60 days after notice of termination to transfer the Franchise and the Franchised Business.

**7.2 Defaults with Right to Cure.** Your rights and our obligations under this Agreement will automatically terminate on our mailing of notice of termination to you (without further action by us and without further opportunity to cure beyond that set forth in this section), if you, any of the Franchisee's owners or any affiliate of the foregoing:

10 Day Cure

(1) fail to report accurately the Gross Receipts of any Gymboree Play Center or fail to make payments of any amounts due us, any affiliate and/or any supplier/creditor of yours and do not correct such failure within ten (10) calendar days after written notice is mailed to you;

(2) **failure to maintain required insurance.**

30 Day Cure

(2) cause or permit to exist any default under the lease or sublease for the Premises and fail to cure such default within the applicable cure period set forth in the lease or sublease; fail to remain current in your obligations to taxing authorities, landlords, equipment lessors, suppliers or others; or fail to comply with any other provision of this Agreement (or any other agreement with us and/or any affiliate of ours) or any specification, standard or operating procedure or rule prescribed by us (including reporting requirements); and, in any such case, do not: (a) correct such failure within thirty (30) calendar days after written notice of such failure to comply is mailed to you; or (b) if such failure cannot reasonably be corrected within such thirty (30) day period, undertake within thirty (30) calendar days after such written notice is mailed to you, and diligently continue until completion, efforts to bring your Gymboree Play Center into full compliance and furnish, at our request, proof acceptable to us of such efforts and the date full compliance will be achieved; provided that, in any event, such defaults must be fully cured within ninety (90) calendar days after such written notice is mailed to you.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**7.3 Performance Standard.** You and we have entered into this Agreement based on our expectation, and your promise, that you will continuously and diligently use your best efforts to fully develop all available business and you understand that the success of the Gymboree concept, as well as your and our success, and the success of your fellow Gymboree Franchisees, depends in part on your vigorous, pro-active marketing efforts and your maximization of all available business and that you and we have, therefore, a shared interest in you not falling to an excessively low level of Gross Receipts, as well as all Gymboree Franchisees maintaining a leading position in the industry. In particular, you acknowledge that we would never have awarded you this franchise if we had anticipated that your level of Gross Receipts would be significantly below average. Consistent with this mutual understanding, you and we agree as follows:

Every six (6) months after the date of this Agreement, we will compare your Gross Receipts (as reported on a regular, on-going basis by you) with the then-current average Gross Receipts of other Franchisees who graduated from initial training during the same calendar year in which you graduated and who are still in operation and good standing. Such then-current average Gross Receipts of such Franchisees will be the "Applicable Standard," subject to updating every six (6) months. [For example, if the date of this Agreement was January 1, the first Applicable Standard would be determined as of June 30, the next Applicable Standard would be determined as of December 31, etc.]

If your Gross Receipts do not equal at least seventy five percent (75%) of the Applicable Standard at the end of any six month period, the following will take place:

First, we will notify you of your failure to meet the Applicable Standard and you will have six (6) months after the date of mailing of such notice ["the Six (6) Month Correction Period"] to achieve the Applicable Standard.

Second, during the Six (6) Month Correction Period, we will actively work with you to (a) identify the reasons for failure to meet the Applicable Standard and (b) suggest means and methods for you to meet the Applicable Standard.

Third, at one or more times during the Six (6) Month Correction Period, we may require you to meet with us at our headquarters to analyze the reasons for such substandard Gross Receipts, to discuss possible means of correction and/or re-attend training at the

our headquarters, in each case at your expense for costs of travel, meals, lodging and otherwise, but we will not charge any fee for such re-training.

Fourth, at the end of the Six (6) Month Correction Period, we may require you to again meet with us at our headquarters to analyze the situation. In any case, within five (5) days after the end of the Six (6) Month Correction Period, you will provide a written report of Gross Receipts (and such other reports as we may require) and, if, the Applicable Standard has not been met by the end of the Six (6) Month Correction Period, you will indicate at such time in writing whether or not you wish to sell your franchise to a third party. If you indicate that you wish to sell your Franchise, you will have one hundred eighty (180) days after the end of the Six (6) Month Correction Period to complete such sale, subject to all requirements of this Agreement and we may (but aren't required to) assist you in such sale. You (and each affiliate) will, at the time of advising us of your wish to sell the franchise (as well as again at the time of actual sale), sign a ~~general release~~ **General Release**, ~~in a form prescribed by us, of any and all claims, liabilities and/or obligations, of any nature whatsoever, however arising, known or unknown, against us and/or any or all of the Franchisor-Related Persons/Entities.~~

Fifth, if you do not, within such five (5) days, so advise us of your wish to sell the franchise to a third party, or if no sale meeting the requirements of this Agreement takes place within such one hundred eighty (180) days, your rights, and our obligations, under this Agreement will terminate immediately on mailing of written notice of termination from us to you. Alternatively, we can reduce or otherwise adjust your Territory and/or related rights under this Agreement and/or modify (on a retrospective, prospective, temporary, permanent or other basis) the Applicable Standard. In connection with any termination you will return in good condition all manuals, equipment and other items received by you from us, and in connection with any termination, or territory, etc. adjustment, you (and each affiliate) will sign a ~~general release~~ **General Release**, ~~in a form prescribed by us, of any and all claims, liabilities and/or obligations, of any nature whatsoever, however arising, known or unknown, against us and/or any or all of the Franchisor-Related Persons/Entities.~~

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**7.4 Repeated Defaults.** Your rights and our obligations under this Agreement will terminate immediately upon notice to you and without opportunity to cure, if you or any affiliate defaults, on two (2) or more separate occasions within any period of twelve (12) consecutive months, or on three (3) or more separate occasions within any period of twenty-four (24) consecutive months, in any (whether the same or different) whether under this Agreement, any other agreement with us and/or any of our affiliates, the Manuals or otherwise, whether or not such defaults are timely corrected.

If you (and/or any affiliate) have (a) defaulted, on two (2) or more separate occasions within any period of twelve (12) consecutive months, or on three (3) or more separate occasions within any period of twenty-four (24) consecutive months, in any obligation(s) (whether the same or different), whether or not such defaults are timely corrected, or (b) have committed any default, or have violated any obligation to us and/or any of the Franchisor-Related Persons/Entities, which is incurable or (c) have committed any default, or have violated any obligation to us and/or any of the Franchisor-Related Persons/Entities, which remains uncured after any applicable cure period, whether under this

Agreement, any other agreement with us and/or any of our affiliates, the Manuals or otherwise, then we may cancel all of your rights-of-first-refusal, and/or any other territorial or similar rights, whether arising under this Agreement, any other agreement and/or otherwise.

Your Initials \_\_\_\_\_ / \_\_\_\_\_

**7.5 Cross-Defaults, Non-Exclusive Remedies, etc.** Any default by you (or any person/company affiliated with you) under this Agreement may be regarded as a default under any other agreement (including, but not limited to, any lease and/or sublease) between us (or any affiliate of ours) and you (or any affiliate of yours) and any default by you (or any person/company affiliated with you) under any other agreement (including, but not limited to, any lease and/or sublease) between us (or any affiliate of ours) and you (or any person/company affiliated with you) may be regarded as a default under this Agreement, and any default by you (or any person/company affiliated with you) under any lease, sublease, loan agreement, security interest or otherwise, whether with us, any affiliate of ours and/or any third party, may be regarded as a default under this Agreement and/or any other agreement between us (or any affiliate of ours) and you (or any affiliate of yours), in each case with us (and any affiliate of ours) to have all remedies allowed at law, including termination of your rights (and/or those of any person/company affiliated with you) and our (and/or our affiliates') obligations. No right or remedy which we may have (including termination) is exclusive of any other right or remedy provided under law or equity and we may pursue any rights and/or remedies available.

Your Initials: \_\_\_\_\_ / \_\_\_\_\_

**7.6 No Equity on Termination, etc.** Your ownership of the Franchise is controlled by the provisions of this Agreement and you will have no equity or other continuing interest in the Franchise, any goodwill associated with it or otherwise, or any right to compensation, return of amounts paid or otherwise, at the expiration and/or termination of the term of the Franchise.

**7.7 Extended Cure Period.** Notwithstanding anything contained herein to the contrary, where we have the right to terminate this Agreement, we shall have the right, to be exercised in our sole and absolute discretion, to grant to you an extended period of time to cure the breach which gave rise to our right to terminate, but in no event shall such extended cure period be less than thirty (30) days, nor more than six (6) months from the last day of the cure period otherwise applicable to such breach. You acknowledge that our election to grant such an extended cure period to you shall not operate as a waiver of any of our rights hereunder and that, in consideration for such an extension, you will execute a ~~general release~~ **General Release** of all claims, ~~known or unknown, by or on behalf of you, and/or any owner and/or any affiliate of yours against us and/or any or all of the Franchisor-Related Persons/Entities and,~~ if you fail to execute such a release, the grant of such an extension will, in itself, constitute such a release.

Your Initials: \_\_\_\_\_ / \_\_\_\_\_

**7.8 System Compliance Review.** You and we understand that there might develop situations in which you and we have a legitimate difference of opinion as to whether or not you are in compliance with various non-financial, operational obligations of yours relating to your compliance with



the Gymboree System. You and we also agree that the input of other Gymboree Franchisees in such matters might be helpful to, but should not be binding on, each of us. Therefore, if we believe that you are not in compliance with your obligations to follow the Gymboree System in any non-financial, operational areas, we may submit such issue to a committee of the Gymboree Franchisee Advisory Council for their review and evaluation and you and we will cooperate with such committee in their deliberations. Any decision of such committee will be purely advisory and not legally binding on you or us.

**7.9 Management of the Play Center After Issuance of Notice of Default.** If we issue a notice of default, we will have the right, in addition to our other rights and remedies, (but no obligation) to appoint a manager to operate your Gymboree Play Center until you have cured all defaults. All funds from the operation of the Gymboree Play Center during the period of management by us will be kept in a separate fund and all expenses of the Gymboree Play Center, including compensation, other costs and travel and living expenses of our appointed manager, shall be charged to you and may be paid out of such fund. In addition to all other amounts due us and/or any affiliate and/or supplier, we shall be paid Five Hundred Dollars (\$500.00), subject to inflation adjustment as provided in this Agreement, per day during such management period as a management fee. Operation of the Gymboree Play Center during any such period shall be for and on behalf of you; provided that we shall only have a duty to utilize reasonable efforts in the operation of the Gymboree Play Center and shall not be liable to you for any debts, losses or obligations incurred by the Gymboree Play Center, or to any creditor of yours for any items purchased by the Gymboree Play Center during any period in which it is managed by us. In the event that the fund maintained by us is insufficient to pay the expenses of the Gymboree Play Center in a reasonable business-like manner, we shall so notify you and you shall, within five (5) business days, deposit in the fund such amounts as shall be required by us to attain a reasonable balance in the fund. The provisions of this Paragraph shall not restrict our right to terminate this Agreement as herein provided or affect any of our indemnity or other rights.

Your Initials: \_\_\_\_\_ / \_\_\_\_\_

**7.10 Our Right To Discontinue Providing Products, Etc. To you After Issuance of Notice of Default.** If we issue a notice of default, we and each of our affiliates will have the right, in addition to our other rights and remedies, to discontinue selling and/or providing any goods and/or services to you until you have cured all defaults and we and/or our affiliates may cease providing such items to you or require you to pay C.O.D. (i.e., cash on delivery) by certified check until such time as you correct this problem.

Your Initials: \_\_\_\_\_ / \_\_\_\_\_

**8. RIGHTS AND OBLIGATIONS ON TRANSFER, REPURCHASE, TERMINATION AND/OR EXPIRATION OF THE FRANCHISE OR OTHERWISE.**

**8.1 Termination of Rights and Obligations, Payments of Amounts Owed, etc.** Transfer, repurchase, termination or expiration of this Agreement will constitute a termination or expiration of all of your rights and all of our obligations. You'll pay us and each of our affiliates, within ten (10) days after the effective date of any transfer, repurchase, termination or expiration of the Franchise, or such later date that the amounts due to us are determined, such royalties, marketing contributions, amounts owed for purchases by you (or any affiliate) from us and/or any affiliate, interest

due on any of the foregoing, and all other amounts owed to us (or any affiliate) which are then unpaid.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**8.2 Marks, Trade Dress, Phone Listings, etc.** After any transfer, repurchase, termination or expiration of the Franchise, you will immediately: (1) not directly or indirectly at any time or in any manner identify yourself or any business as a current or former Gymboree Play Center, or as a current or former franchisee of or as otherwise associated with us, or use any Mark or any colorable imitation thereof in any manner or for any purpose, or utilize for any purpose any trade name, trademark or service mark or other commercial symbol that suggests or indicates a connection or association with us; (2) remove all signs containing any Mark and return to us or (at our option) destroy all forms and materials containing any Mark or otherwise identifying or relating to a Gymboree Play Center; (3) take such actions as may be required to cancel all fictitious or assumed name or equivalent registrations relating to your use of any Mark; (4) if you retain possession of the Premises, you will, at your expense, make such modifications and alterations, including removal of all distinctive signage, appearance, physical and structural features associated with the Trade Dress of Gymboree Play Centers, as may be necessary or appropriate to distinguish the Premises clearly from its former appearance and from other Gymboree Play Centers as to prevent any possibility that the public will associate the Premises with Gymboree Play Centers and any confusion created by such association, and (5) take all actions necessary or appropriate to transfer any telephone number(s), and any telephone directory listings, associated with the Marks and/or your Gymboree Play Center to us.

You acknowledge and agree that (1) we have the sole rights to, and complete ownership of, all telephone or other service (including home page, cellular and fax), numbers, directory listings, Internet or similar connections (including all rights to any "home page" developed and/or used by you) and/or advertising with respect to, and/or used in connection with, your Gymboree Play Center business and/or associated with the Marks, (2) any direction by Gymboree is conclusive evidence of our rights in and to any such service, numbers, directory listings and/or advertising and (3) we shall have the sole and exclusive right and authority to direct their amendments, transfers, call-forwarding, terminations or any matters with respect thereto. You'll execute such documents, and do all other acts, as may be required by us and/or any service provider to effect a transfer, call-forwarding or otherwise to Gymboree [or such person(s) as we designate] of all such service (including home page, cellular and fax), numbers, directory listings and/or advertising; provided that Gymboree shall hold such documents until the earlier of the time (a) we notify you that you (or any affiliate of yours) are in default under this Agreement or any other agreement with us (or any affiliate of ours), (b) this Agreement expires or is terminated, or (c) any repurchase. You'll pay all amounts, whether due and payable or not, that any service provider may require in connection with such transfer or otherwise and will sign all releases and other documents (including those providing that you indemnify and hold harmless any service provider and us) required by any service provider and/or Gymboree in connection therewith. Our then-current Assignment of Phone Number form must be executed prior to corporate training.

At our option, we may at any time require that any accounts covering any telephone or other service, numbers, directory listings and/or advertising (including URLs, websites, etc.) be in our name rather than yours, with all billings to be sent to us [or such person(s) as we designate-] but to be paid by you within 10 days of submission to you. We may require that you maintain a deposit with us [or such person(s) as we designate] sufficient to cover 3 months of reasonably anticipated service, numbers, directory listings and/or advertising, but in any event no less than \$1500, subject to annual adjustment for inflation as set forth in this Agreement.

We own the list of your customers and may use such list in any way we wish, both before and after any termination, expiration, repurchase, transfer or otherwise.

You authorize us, and hereby appoint us and any officer of ours, as your attorney in fact, to direct the telephone company, other service providers and all listing agencies to transfer the same to us or as we direct, should you fail or refuse to do so, and such companies may accept this Agreement as conclusive evidence of our exclusive rights in such telephone numbers, directory listings, home pages and otherwise and its authority to direct their transfer.

You'll furnish to us, within thirty (30) days after the effective date of termination or expiration, satisfactory evidence of your compliance with the foregoing obligations immediately as of the effective date of such termination.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**8.3 Confidential Information.** You agree that on any transfer, repurchase, termination or expiration of the Franchise (without award of a successor franchise): (1) you will immediately cease to use any Confidential Information of ours disclosed to or otherwise learned or acquired by you in any business or otherwise; and (2) you will return to us all copies of the Manuals and any other confidential materials which have been loaned or made available to you by us.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**8.4 Covenant Not to Compete, Continued Confidentiality, etc.** Notwithstanding any termination, transfer, expiration or repurchase, you'll continue to observe the confidentiality, non-competition and other restrictions of this Agreement, including (but not limited to) those of Sections 5.7 and 5.8.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**8.5 Continuing Obligations.** All obligations of yours and rights of ours, including your obligation to pay royalties, advertising contributions and other amounts, and the provisions of this Agreement with respect to dispute avoidance and resolution (including, but not limited to, those of Article 11), together with the provisions of Article 13, and all other obligations of yours and rights of ours which expressly or by their nature survive the transfer, repurchase, expiration or termination of this Agreement or the Franchise (including, but not limited to, your indemnity, confidentiality and non-competition obligations), will continue in full force and effect subsequent to and notwithstanding its expiration or termination and until they are satisfied in full or by their nature expire. All these obligations will apply notwithstanding any rejection of this Agreement in a bankruptcy proceeding or otherwise. In any event, our exercise of any rights of termination will not be our sole remedy and where we have terminated our obligations and/or your rights under this Agreement by reason of a default of yours, you will not be released or discharged from, and will be required to pay, your obligations hereunder, including your obligations to pay royalties, advertising contributions and other amounts which would have become due if you had continued in operation as a Gymboree Franchisee and our remedies will include (but are not limited to) the right to collect the present value of such amounts as of the date of such termination and to otherwise receive the benefit of our bargain with you, as well as acceleration of

the balances of all promissory notes and other unpaid amounts owed to us or any affiliates of ours, you and we agreeing that it would be unjust and damaging to the interests of all Gymboree operators and the integrity of the Gymboree system if a Gymboree Franchisee could utilize a strategy under which he/she would default, have his/her rights to use the Marks and System properly terminated as a result of that default and then entirely escape any financial consequences related to obligations accruing after the date of termination. If you continue to operate your business, after transfer, repurchase, termination or expiration, using any of the Marks or any aspect of the System, our remedies will include (but will not be limited to) recovery of the greater of (a) all profits or earned by you in the operation of your business after such transfer, repurchase, termination or expiration or (b) all royalties, advertising contributions and other amounts which would have been due if such transfer, repurchase, termination or expiration had not occurred. At any time from the date of this Agreement through and including 120 days after any transfer, repurchase, termination or expiration, for any reason, of your and/or our rights under this Agreement, we may, at our option and without further consideration, receive an assignment of your leasehold interest under any lease/sublease of the Premises (and/or any other facilities from which you operate your Gymboree Play Center, in each case without the lessor's or sublessor's consent, terminating your rights to the Premises and assuming the balance of any lease or sublease.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**8.6 Our Right to Purchase Any or All of the Assets of Your Gymboree Play Center at Any Time (Including on Expiration or Termination) at Fair Market Value.** At any time [including, but not limited to, (a) on, and/or within 120 days after, termination by us of our obligations and/or your rights under this Agreement, (b) on, and/or within 120 days after, expiration of this Agreement and/or (c) on, and/or within 30 days after, the date of delivery to us of a true and complete copy of any offer which is subject to the right-of-first-refusal provisions of this Agreement (together with the deposit and satisfaction of all other requirements for our consent to such transfer)], we will have the option (but no obligation), exercisable by giving written notice thereof, to purchase from you any or all of the assets used in, or in connection with, your Gymboree Play Center.

Assets available for purchase by us will include, without limitation, real property, leasehold interests and/or improvements, equipment, furniture, fixtures, signs, inventory, accounts and/or contracts with existing customers and/or the lease or sublease for the Premises. If the premises were not leased to you by us or our affiliates, the right to an assignment of your lease or sublease for the premises of your Gymboree Play Center (or, if assignment is prohibited, a sublease for the full remaining term and on the same terms and conditions as your lease) will be included as part of the purchase. We'll have the unrestricted right to assign any option to purchase and/or any related rights. We'll be entitled to all customary representations, warranties and agreements given by the seller of the assets of a business, including, without limitation, representations and warranties as to ownership, condition and title to assets, liens and encumbrances relating to assets, validity of contracts, and liabilities (contingent or otherwise) and including typical non-competition covenants by the seller and each owner/executive of the Franchisee. The purchase price will be fair market value, determined in a manner consistent with reasonable depreciation of leasehold improvements owned by you and the items purchased, provided that, in any event, the purchase price will not contain any factor or increment for the Marks or any trademark, service mark or other commercial symbol used in connection with the operation of your Gymboree Play Center, any goodwill, going concern value (in the case of termination and/or expiration) or any franchise rights (but may include a factor or increment for the reasonable value of any accounts and/or contracts with existing customers acquired), and further provided that we may exclude from the assets purchased any equipment, furniture, fixtures, signs, inventory or otherwise that do not meet quality standards for Gymboree Play Centers. There shall be no provision for payment for

leasehold improvements, the title of which shall be governed by the terms of your lease or sublease for the Premises. The length of the remaining term of the lease or sublease for the Premises of your Gymboree Play Center will not be considered in determining fair market value of any lease or sublease to be acquired. If you and we are unable to agree on the fair market value of any assets, fair market value will be determined by an independent appraiser selected by you and us, and if you and we are unable to agree on an appraiser, you and we will each select one appraiser, who together will select a third appraiser, and the fair market value will be deemed to be the average of the three (3) independent appraisals. All sales, transfer and/or similar taxes are to be paid by you. In connection with such purchase, you (and each affiliate of yours) will execute a ~~general release~~ **General Release**, in form prescribed by us, of any and all claims, liabilities and/or obligations, of any nature whatsoever, however arising, ~~known or unknown~~, against us and/or any or all of the Franchisor-Related Persons/Entities.

The purchase price may be paid by us or our assignee in cash or securities on closing or as follows, pursuant to an unsecured promissory note: Twenty Percent (20%) of the purchase price will be paid on closing, the second Twenty Percent (20%) will be paid no later than ninety (90) days after closing, the third Twenty Percent (20%) no later than one hundred eighty (180) days after closing, the fourth Twenty Percent (20%) no later than two hundred ten (210) days after closing, and the final Twenty Percent (20%) no later than two hundred fifty (250) days after closing (in all cases without interest), provided that if we require non-competition covenants to be given, the final Forty Percent (40%) of the purchase price may be paid out in 60 equal monthly installments, beginning at 30 days after close with no interest. Closing will take place no later than thirty (30) days after receipt by you of notice of exercise of this option to purchase, at which time you will deliver instruments transferring to us or our assignee: (1) good and merchantable title to the assets purchased, free and clear of all liens and encumbrances (other than liens and security interests acceptable to us in our sole and absolute discretion), and demonstrating that all sales, transfer and/or similar taxes are to be paid by you through escrow if we so require; (2) all licenses and permits of your Gymboree Play Center which may be assigned or transferred; and (3) the lease or sublease for the Premises, if acquired by us. If you cannot deliver clear title to all of the purchased assets as aforesaid, or in the event there are other unresolved issues, or we otherwise require in our sole and absolute discretion, the closing of the sale will be accomplished through an escrow. You and we will, prior to closing, comply with any applicable bulk sales and/or similar laws. We'll have the right to set off against and reduce the purchase price by any and all amounts owed by you (or any affiliate) to us or any affiliate of ours, and the amount of any encumbrances or liens against the assets or any obligations assumed by us. If we exercise this option to purchase, pending the closing of such purchase as hereinabove provided, we will have the right to appoint a manager to maintain the operation of your Gymboree Play Center. Alternatively, we may require you to close your Gymboree Play Center during such period without removing any assets from the Premises. You'll maintain in force all insurance policies required pursuant to this Agreement, until the date of closing. Our rights under this or any other Section may be assigned by us, in our sole and absolute discretion, to any person or entity we choose.

If such option is exercised, you will forever indemnify and hold us harmless against, all obligations incurred in connection with the business. You'll furnish us with a complete list of accounts unpaid by you within ten (10) days of our notice of intent to exercise this option. We may (but are not required to) pay these unpaid bills directly to the parties owed and deduct them from the purchase price in lieu of paying such portion of the purchase price directly to you.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**8.7 Execution of Release on Default, etc.** In our sole and absolute discretion, in any

case where you have committed a default under this Agreement, any lease/sublease and/or otherwise which would allow us to terminate your rights, we may (but are not required to) waive our rights to collect any royalties, advertising contributions and other amounts which would have become due if you had continued in operation as a Gymboree Franchisee and you will, in consideration for such waiver, execute a general release **General Release**, in form prescribed by us, of any and all claims, liabilities and/or obligations, of any nature whatsoever, however arising, ~~known or unknown~~, against us and/or any or all of the Franchisor-Related Persons/Entities. This option may be exercised by us at any time, including before, at the same time as or after termination, expiration or otherwise and whether or not you or we have made any claims, or begun any proceedings, against the other or anyone else.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**8.8 Minimum Performance Requirements.** If, at any time after opening of Franchisee's first Site, Franchisee's average per-site attendance for two (2) consecutive quarterly sessions is in the bottom ten percent (10%) of average per-site attendance for all of Gymboree's franchisees for those sessions, or at any other time deemed necessary by Gymboree (i) Franchisee or (if Franchisee is not a natural person) Franchisee's principal operating officer and (ii) Franchisee's Operations Manager may be required to attend a remedial training session at Gymboree's principal office at a time specified by Gymboree and shall confer with Gymboree at Gymboree's principal office or any other location Gymboree designates. Gymboree does not currently charge a fee for this remedial training, but reserves the right to charge such a fee in the future as set forth in Gymboree's then-current offering circular or Operating Manual. Franchisee agrees promptly to take remedial action as recommended by Gymboree to improve Franchisee's operations. All costs incurred in connection with the foregoing shall be borne by Franchisee. As a continuing condition of the franchise, the Gross Receipts of Franchisee in the Territory must increase by five percent (5%) each calendar year commencing in January following the first full calendar year of operation of the franchise (the "Minimum Performance Standard"). If Franchisee fails to satisfy the Minimum Performance Standard in any year during the term of this Agreement, Gymboree's personnel may provide to Franchisee remedial training as it deems appropriate in its sole and absolute discretion at one of Franchisee's Sites and at Franchisee's expense. If Franchisee fails to meet the Minimum Performance Standard for two (2) consecutive calendar years and Gymboree has provided remedial training to Franchisee, Gymboree shall have the right to terminate this Agreement and enforce all post-termination covenants.

**8.9 Our Right to Terminate the Franchise and Return a Portion of the Initial Franchise Fee, etc.** At any time, and in our sole and absolute discretion, we may elect to terminate all of your rights, and all of our obligations, under this Agreement, any lease/sublease and/or otherwise and return to you the following amount as applicable: (1) if the termination occurs during the initial term, an amount calculated by multiplying the initial franchise fee actually paid by you times a fraction, the numerator of which is the number of full 12-month periods left until the end of the initial term and the denominator of which is the number of full 12-month periods covered by the initial term or (2) if the termination occurs during a renewal term or successor franchise, an amount calculated by multiplying the amount actually paid by you for the renewal term or successor franchise times a fraction, the numerator of which is the number of full 12-month periods left until the end of the renewal term or successor franchise then in force and the denominator of which is the number of full 12-month periods covered by the renewal term or successor franchise under which you are then operating; in each case without interest and without consideration of any other renewal term or successor franchise which might otherwise be available. In such a case, you will perform thereafter each of your obligations under this Agreement, any lease/sublease and/or otherwise with respect to termination (including all post-term

obligations of yours) wherever contained in this Agreement, any lease/sublease and/or otherwise, including but not limited to de-identification of your Gymboree Play Center, and promptly deliver to us all manuals and other material as provided in this Agreement or in the Manuals and you (and each owner and/or affiliate of yours) will execute a ~~general release~~ **General Release**, in form prescribed by us, of any and all claims, liabilities and/or obligations, of any nature whatsoever, however arising, ~~known or unknown~~, against us and/or any or all of the Franchisor-Related Persons/Entities. Your obligations regarding indemnity and confidentiality and the provisions of this Agreement relating to dispute avoidance and resolution (including but not limited to all provisions of Article 11), and our rights with respect to receiving an assignment of any lease and/or sublease, together with the provisions of Article 13, will survive any expiration, termination or cancellation of this Agreement and we may take possession of the Premises; provided that in the event of exercise of our rights under this sub-section, your post-term non-competition obligations will be canceled and of no further force or effect.

## 9. **TRANSFER**

**9.1 Transfers by Us.** This Agreement, and any and/or all of our rights and/or obligations under it, are fully transferable by us in our sole and absolute discretion and will inure to the benefit of any person or entity to whom we transfer it, or to any other legal successor to our interest in this Agreement. If we transfer this Agreement, or any and/or all of our rights and/or obligations under it, all past, current and future obligations of ours (and of any of the Franchisor-Related Persons/Entities) to you will cease and be forever extinguished. We may be sold and/or we may sell any or all of our intellectual property and/or other assets (including the Marks) to a competitive or other entity, we may go public, may engage in a private or other placement of some or all of our securities, may merge, acquire other entities and/or assets (competitive or not), be acquired by a competitive or other entity, and/or may undertake any refinancing, leveraged buy-out and/or other transaction. You waive any and all claims, demands and/or damages with respect to any transaction or otherwise allowed under this section or otherwise. In view of the efficiencies, economies and other advantages which may be obtained through local servicing of Franchisees' needs, we may, on a permanent, temporary or other basis, delegate any or all of our duties to another company (the "Area Representative") and, in such event, you will look only to such Area Representative for the performance of such duties and not make any claims against us or any of the Franchisor-Related Persons/Entities in connection with any alleged acts or omissions of ours and/or such Area Representative. The benefits and protections of this Agreement which apply to us and/or any of the Franchisor-Related Persons/Entities shall also apply to any current and/or future Area Representative.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**9.2 Transfers by You.** The rights and duties created by this Agreement are personal to you (or your owners if the Franchisee is a partnership or corporation) and we have awarded the Franchise to you relying on the individual or collective character, skill, aptitude, attitude, business ability and financial capacity of you or such owners. Accordingly, neither this Agreement nor the Franchise (nor any interest therein), nor any part or all of the ownership of the Franchisee or your Gymboree Play Center (or any interest in it or assets associated with any of the foregoing), may be transferred without our prior written approval. Any such transfer (or attempted transfer) without such approval will constitute a breach hereof and convey no rights to, or interests in, this Agreement, the Franchise, the Franchisee, your Gymboree Play Center, such assets or otherwise.

The term "transfer" includes (but is not limited to); any voluntary, involuntary, direct or indirect assignment, sale, gift, pledge, mortgage of, or any granting of any security or other interest (whether or not controlling) in; (1) this Agreement; (2) the Franchise; (3) the ownership of the Franchisee; (4) your Gymboree Play Center; or (5) any assets associated with any of the foregoing and which is not in the ordinary course of business. A transfer also includes (but is not limited to) the following events: (1) any transfer of ownership of capital stock or any partnership or similar interest; (2) any merger or consolidation or issuance of additional securities representing an ownership interest in the Franchisee; (3) any sale of voting stock of the Franchisee or any security convertible to voting stock of the Franchisee; (4) any transfer in a divorce, insolvency, corporate or partnership dissolution proceeding or otherwise by operation of law; or (5) any transfer of any interest in any revenues, profits, rights or assets of your Gymboree Play Center; (6) any transfer to a business entity and/or a trust or similar entity; or (7) the creation or otherwise of any security or similar interest affecting any of the foregoing. Any transfer by the Franchisee (or any of your owners) to a corporation and/or of any interest in the event of your death or the death of an owner of the Franchisee, by will, declaration of or transfer in trust, under the laws of intestate succession, or otherwise will be governed by all of the provisions on transfer of this Agreement. We may, in our sole and absolute discretion, deny approval to any transfer involving a portion of your Franchise (for example, but not limited to, a portion of any territory) or a portion of any of the foregoing items.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**9.3 Conditions for Approval of ANY Transfer by Franchisee, etc.** Any transfer by or on behalf of you and/or any entity affiliated with and/or controlled by you will be subject to all of the conditions specified below and anywhere else in this Agreement (each of which you and we agree are reasonable), together with such other terms and conditions as are reasonable in the specific circumstances of the proposed transfer but, in any event, we may refuse consent to any transfer if, in our sole and absolute discretion, the proposed transferee has been or will be associated with a Similar Business or if they do not meet our then-current financial, experience and other standards for issuance of an Gymboree Franchise directly by us. You must be in full compliance with this Agreement and all other agreements between you (including any affiliate) and us (including any affiliate.) A transfer of ownership, possession or control of your Gymboree Play Center or any of its assets may only be made in conjunction with a transfer of the Franchise.

All of the following conditions must be met prior to, or concurrently with, the effective date of any transfer unless we require you to meet them earlier. We may waive any condition in our sole and absolute discretion:

(1) You must be in full compliance with this Agreement, all leases/subleases and all other agreements between you (including any affiliate) and us (including any affiliate), as well as all leases/subleases with any third parties.

(2) The transferee and its owners must have sufficient business experience, aptitude and financial resources to operate your Gymboree Play Center, must be individuals of good moral character and must meet all financial and other standards then-applied by us in evaluating prospects to whom we might award a Gymboree Play Center franchise in the then-current business and competitive environment;

(3) All of your obligations (including all obligations of any entity affiliated with



and/or related to you) to us (including any entity affiliated with and/or related to us) must be expressly assumed by the transferee;

(4) You must pay all royalties, marketing contributions, and other amounts owed by you (including any entity affiliated with and/or related to you) to us (including any entity affiliated with and/or related to us) which are then unpaid (the balances of all promissory notes and other unpaid amounts owed to us and/or any affiliates of ours shall be accelerated and paid in full), all obligations to third parties arising out of the operation of your Gymboree Play Center must be satisfied or assumed by the transferee and your Gymboree Play Center and its operations must have been brought into full compliance with the specifications and standards then applicable for new and/or renewing Gymboree Play Centers, including a full upgrade to the same first-class condition as new Gymboree Play Center, which may include (but is not limited to) new equipment, furniture, furnishings, tenant improvements, decor package, signage, compliance with all then-current standards for facility design, computer hardware and software, provision of goods and services, methods of operation and other Gymboree System Standards, plus such renovation and modernization of the Gymboree Play Center as we may require to reflect the then-current standards and image of the System, all at your (or the transferee's) sole expense;

(5) You must submit all required reports, financial statements and other documents due us up to the effective date of the transfer;

(6) You must have complied with all of the provisions of this Agreement, any amendment or successor hereto, and all other agreements between you and us, our subsidiaries, affiliates or divisions, and, at the time of transfer, shall not be in default thereof;

(7) The transferee and its personnel must (at our option) complete or agree to complete our training program to our satisfaction;

(8) The transferee must obtain, within the time limits set by us, and maintain thereafter, all permits and licenses required for the operation of the franchised business;

(9) You and the transferor(s) must remain liable for all obligations to us, our subsidiaries, affiliates, and divisions, in connection with the franchised business prior to, through and after the effective date of the transfer and shall execute any and all instruments reasonably required by us to evidence such liability;

(10) To the extent required by the terms of any leases or other agreements, the lessors or other parties must have consented to the proposed transfer;

(11) The transferee must assume all of your duties and obligations to us (and any affiliate of ours) and, at our option, (a) agree to be bound by all terms and conditions of this Agreement (and any lease/sublease) for the remainder of its term or (b) execute our then-current form of franchise agreement and ancillary documents (including lease/subleases and guarantees) as are then customarily used by us in the award of franchises for Gymboree Play Centers (which may, among other things, provide for higher royalties, marketing contributions and materially different rights and obligations than are provided in this Agreement) provided, however, that the term thereof will not be greater than the remaining term of this Agreement and no initial franchise fee will be required;

(12) You or the transferee pays to Gymboree a non-refundable transfer fee which

shall be fully earned by Gymboree when paid and shall be in an amount equal to the following percentages of the cash price-per-site franchise fee then being charged new franchisees for transferor's Territory: 30% (10% if transfer is to an existing franchisee) of the cash price-per-site franchise fee for the first site plus 10% (5% if transfer is to an existing franchisee) of the cash price-per-site franchise fee for each additional site in the Market Plan or in operation, whichever is greater, based on the initial franchise fees set out in Gymboree's then-current offering circular; the transfer fee is payable whether or not Gymboree is the purchaser; if Gymboree purchases the franchise pursuant to its exercise of right of first refusal, then transferor must pay whatever transfer fee would have been paid pursuant to such sale if consummated; we may reduce, defer or waive such fee in individual cases in our sole and absolute discretion. Such fee must be deposited with us on a non-refundable basis on your notification to us of the proposed transfer and prior to our undertaking any review, drafting of documents or other activities;

(13) You and each of your owners and/or affiliates [and the transferee (and each owner and/or affiliate of the transferee) if the transferee or such owner and/or affiliate is or has been a franchisee of, or had any other relationship with, us or any of the Franchisor-Related Persons/Entities] must execute a ~~general release~~ **General Release**, in a form prescribed by us, of any and all claims, liabilities and/or obligations, of any nature whatsoever, however arising, ~~known or unknown~~, against us and/or any or all of the Franchisor-Related Persons/Entities;

(14) If you or your owners finance any part of the sale price of the transferred interest or obtains any security interest in the Franchise, the franchised business (or any of its assets) or otherwise, you and your owners (and the transferee) must agree that all obligations of the transferee under or pursuant to any promissory notes, agreements, security interests reserved and/or held by you or your owners, or otherwise will be subordinate to the obligations of the transferee to pay royalties, marketing contributions, and other amounts due and/or to become due to us and/or any affiliate of ours and otherwise to comply with this Agreement, the franchise agreement and all other agreements executed or to be executed by the transferee; provided that, in our sole and absolute discretion, we may refuse to allow you or anyone else to grant or receive a pledge, mortgage, lien or any security or similar interest in and/or to the Franchise, the franchised business (or any of its assets) or otherwise;

(15) Notwithstanding any transfer, your non-competition, indemnity and confidentiality obligations, and the provisions relating to dispute resolution (which include, but are not limited to, all of those of Article 11), as well as those of Article 13, of this Agreement will survive any transfer;

(16) The transferee must obtain from you an agreement that, to the maximum extent permitted by law, you will not, for a period of at least two (2) years following the transfer, either directly or indirectly, or as owner, partner, director, officer, employee, consultant, agent, manager or stockholder, disclosed or undisclosed principal, officer, agent, employee or in any other capacity whatsoever, participate or engage, actively or inactively, in any Similar Business or any other business substantially similar to any business then engaged in by us or any of our Franchisees, and we shall be named as a third-party beneficiary of such agreement;

(17) The transfer must be made in compliance with any laws that apply to the transfer, including state and federal laws governing the offer and sale of franchises; and

(18) In any event, we may withhold or condition our consent to any transfer as we deem appropriate based on the circumstances of the transfer or otherwise.

If we believe, in our sole and absolute discretion, that the terms and/or conditions of any transfer (including, but not limited to, the price and/or terms of payment) or any surrounding circumstances would make the transfer not in the best interests of us, the proposed transferee or the Gymboree family of Franchisees (for example, if the price to be charged and/or the terms of payment would be so burdensome as to, in our sole and absolute discretion, possibly adversely affect the future operations of a Gymboree Play Center by the proposed transferee) we may (but are not required to) refuse to consent to such transfer. If we refuse to grant consent for any reason, your (and the proposed transferee's) sole remedy will be to have such matter resolved through arbitration and for the arbitrator, if appropriate, to order consent to be granted, no damages or other relief to be awarded. We may (but are not required to) candidly discuss all matters related to any transfer and/or proposed transfer (including our views of the price to be charged and/or the terms of payment) with you, any proposed transferee and/or otherwise and will have no liability to you or anyone else regarding such views, discussions or otherwise. In no case will you or any transferee rely on us to review or evaluate any proposed transaction (our examination and possible consent not being an approval or recommendation) and neither we nor anyone else will have any liability to you, any proposed or actual transferee or otherwise in connection with our examination and/or possible consent or withholding of consent, with respect to any transfer and/or proposed transfer or our exercise of any right of ours (including the right to discuss our views with the proposed transferee and/or withhold consent), you agreeing to indemnify and hold us harmless from any liability to you, the proposed transferee or otherwise.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**9.4 Additional Conditions for Transfer to a Wholly-Owned Corporation.** Subject to compliance with all other requirements of this Agreement (including execution of a general release ~~General Release, in form prescribed by us, of any and all claims, liabilities and/or obligations, of any nature whatsoever, however arising, known or unknown, against us and/or any or all of the Franchisor-Related Persons/Entities~~ and satisfying all payment and transfer fee requirements;), if you're in full compliance with this Agreement, we won't withhold our consent to a transfer of this Agreement, the Franchise and your Gymboree Play Center to a corporation which conducts no business other than your Gymboree Play Center. Such an transfer will not relieve you of your obligations hereunder, and you'll remain jointly and severally liable to us for all of your, and such corporation's, past, current and/or future obligations, under any other agreement(s) (whether past, current and/or future) with us or any affiliate of ours and/or any franchise, lease/sublease and/or other agreement(s) to be executed by such corporation.

In addition, any such transfer will be subject to reasonable restrictions, including but not limited to the following (each of which are agreed to be reasonable):

(a) The transferee corporation must be newly organized, the articles of incorporation, bylaws and other organizational documents of such corporation must recite that the issuance and transfer of any ownership interest in the corporation are restricted by the terms of this Agreement and must provide that its activities are confined solely to acting as a Gymboree Franchisee as franchised and in good standing under this Agreement;

(b) You must maintain (and continue to maintain) management control of the corporation and ownership of at least fifty-one percent (51%) of the equity and voting power of all issued and outstanding capital stock in the transferee corporation and to personally manage the affairs

of such corporation;

(c) The individual Franchisee (or, if the Franchisee is a partnership, at least one of the partners) must be and remain the chief executive officer of the corporation;

(d) The transferee corporation must enter into a written assignment (in form satisfactory to us) in which such corporation assumes all of the Franchisee's past, current and/or future obligations under this Agreement and any other past, current and/or future agreement(s) with us and/or any affiliate of ours. At our option we may, in addition to requiring such assumptions, require such corporation to execute our then-current form of franchise agreement, lease/sublease and ancillary documents (including guarantees by the owners of such corporation) as are then customarily used by us in the award of franchises for Gymboree Play Centers;

(e) All current and future shareholders of the transferee corporation must enter into a written agreement (in a form provided or approved by us) agreeing to comply with this Agreement and any other past, current and/or future agreement(s) with us and/or any affiliate of ours and jointly and severally guaranteeing all of the transferee corporation's past, current and/or future obligations under this Agreement and any other past, current and/or future agreement(s) with us and/or any affiliate of ours;

(f) Each stock certificate of the transferee corporation must bear a legend reciting or referring to the restrictions of this Agreement, including those on the issuance and transfer of stock in the transferee corporation;

(g) No shares of securities of any type in the transferee corporation may be issued without obtaining our prior written consent, which may be subject to the restrictions on transfer herein and other reasonable conditions as we deem appropriate;

(h) All obligations of the Franchisee under this Agreement and/or any other agreement(s) with us and/or any affiliate of ours (including all financial and operational compliance matters) must be satisfied prior to the transfer;

(i) No more than twenty percent (20%), in the aggregate, of the voting rights of the transferee corporation may ever be owned beneficially or of record by institutions or publicly held companies;

(j) There shall never be more than 12 owners ("Owners") with ownership interests in the transferee corporation, or any Area, Operating or other Franchisee of ours (married couples and family trusts to be considered together as one for these purposes);

(k) There will be no public offerings of debt or equity ownership in or by the transferee corporation;

(l) None of the Owners will, directly or indirectly, engage in, or have any interest in, any Similar Business, except that any Owner may own up to three percent (3%) of the stock of a publicly-traded Similar Business; and

(m) In any event, we may withhold or condition our consent to any transfer as we deem appropriate based on the circumstances of the transfer or otherwise.

Throughout the term of this Agreement, the transferee corporation will not do any act (including any transfer of assets or otherwise) which would reduce its net worth to a level not reasonably acceptable to us and no transfer will take place unless the Franchisee is current in all payments to us, the Marketing Fund and each of the Franchisor-Related Persons/Entities.

The provisions of this Agreement (including this Section) shall apply to any transfer to an LLC, partnership or other business entity. If the Franchisee is or becomes a corporation, LLC, partnership or other business entity, the chief executive officer of such entity must always meet all of our then-current training and other standards.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**9.5 Death or Disability of Franchisee.** On your death or permanent disability or, if the Franchisee is a corporation or partnership, on the death or permanent disability of the owner of a controlling interest in the Franchisee, the executor, administrator, conservator, guardian or other personal representative of such person will transfer his or her interest in this Agreement and the Franchise, or such interest in the Franchisee, to a third party subject to our consent and all of the provisions of this Agreement with respect to a transfer and possible exercise of our right-of-first-refusal. Such disposition of this Agreement and the Franchise, or such interest in the Franchisee (including, without limitation, transfer by bequest or inheritance), will be completed within a reasonable time, not to exceed six (6) months from the date of death or permanent disability and will be subject to all the terms and conditions applicable to transfers contained in this Agreement. Failure to so transfer the interest in this Agreement and the Franchise, or such interest in the Franchisee, within said period of time will constitute a breach of this Agreement. You shall be deemed to have a "permanent disability" if your personal, active participation in management of your Gymboree Play Center is for any reason curtailed for a continuous period of six (6) months.

In the event of your death, disability, absence or otherwise, we can (but are not required to) operate the franchised business on your behalf and at your expense for such period of time (and under such terms and conditions) as we determine, including paying out of the assets and/or revenues of the franchised business any or all past, current and/or future obligations of the franchised business (including any amounts owed to us and/or any affiliate) in such priorities as we determine from time-to-time in our sole and absolute discretion. We can pay ourselves a reasonable amount to reimburse us for our management services and other costs. We can obtain approval of a court or arbitrator for any such arrangements, the attorney's fees and other costs incurred in connection with obtaining such approval to be charged against the assets and/or revenues of the franchised business. We'll be indemnified by you (and/or your estate) against any costs and/or liabilities incurred by us in connection with, or related in any way to, the operation (or otherwise) of the franchised business.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**9.6 Effect of Consent to Transfer.** Our consent to a transfer, or failure to exercise any right-of-first-refusal, will not constitute a waiver of any claims we may have against you (or your owners), nor will it be deemed a waiver of our right to demand exact compliance with any of the terms or conditions of this Agreement or any other agreement by any transferor or transferee. Unless we expressly release you from your obligations under this Agreement (which we have no obligation to do),

you will remain and be liable for each of the payment and other obligations under this Agreement (and any other agreement with us and/or any affiliate) and any Franchise Agreement and/or other agreement executed by any transferee, including any defaults by any transferee. Any transfer (including any transfer consented to by us and even if the transferee executes a new franchise agreement) will not act as a termination of your confidentiality, indemnity, non-competition or other obligations under this Agreement, including any obligations which by their nature survive the term of this Agreement [your non-competition obligations to expressly continue for the full original term of this Agreement plus any additional period(s) specified in Section 5.8 or otherwise], or affect your and our obligations and rights under the dispute avoidance and resolution provisions of this Agreement, including all of Articles 11 and 13. Any dispute regarding any proposed or completed transfer (including our failure to consent to a proposed transfer) will be resolved under the mediation/arbitration provisions of this Agreement and your sole remedy will be an order that we grant consent.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**9.7 Our Right-of-First-Refusal.** If you or any of the Franchisee's owners wish to engage in any transfer subject to this Agreement, (a) you or your owners will obtain a bona fide, executed written offer and earnest money deposit in the amount of ten percent (10%) or more of the offering price and in the form of a cashier's check and (b) a true and complete copy of the offer (and any proposed ancillary agreements) will immediately be submitted to us by you, the Franchisee's owners or both, together with a non-refundable deposit of the transfer fee. The offer must apply only to an interest in this Agreement, the Franchise, your Gymboree Play Center or the Franchisee and must not include the purchase of any other property or rights of yours (or the Franchisee's owners); but if the offeror proposes to buy any other property or rights from you (or the Franchisee's owners) under a related offer, the price and terms of purchase offered to you (or the Franchisee's owners) for the interest in this Agreement, the Franchise, your Gymboree Play Center, or the Franchisee will reflect the bona fide price offered therefor and will not reflect any value for any other property or rights. We may exclude from the assets purchased hereunder any items that are not approved as meeting quality standards for Gymboree Play Centers, as well as any portion of the price attributable to goodwill. If any of the assets to be purchased do not meet the standards we then apply to new Gymboree Play Centers or you are in default, we can require that such assets be replaced and/or brought into compliance with our requirements before the sale is completed, and/or such defaults be cured, and the time for us to give notice of intent to exercise our right-of-first-refusal will not begin to run until all such assets have been brought up to such standard and such defaults cured.

We'll have the right, exercisable by written notice delivered to you or the Franchisee's owners within thirty (30) days from the date of delivery of an exact copy of such offer to us, together with your deposit of any transfer fee and satisfaction of all other requirements for our consent to such transfer, to notify you that we have elected to purchase such interest for the price and on the terms and conditions contained in such offer (less any portion of the price attributable to goodwill), provided that we may substitute cash, a cash equivalent, or securities of equal value for any form of payment proposed in such offer, our credit will be deemed equal to the credit of any proposed purchaser, and we will have not less than sixty (60) days from the date you receive our notice of intention to exercise such right-of-first-refusal to prepare for closing. We'll be entitled to purchase any interest subject to all customary representations, warranties and agreements given by the seller of the assets of a business or voting stock of an incorporated business, as applicable including, without limitation, representations and warranties as to ownership, condition and title to stock and/or assets, liens and encumbrances relating to the stock and/or assets, validity of contracts, and liabilities, contingent or otherwise, of the corporation whose

stock is purchased and including typical non-competition covenants by the seller and each owner of the Franchisee. In connection with such purchase, you will sign a ~~general release~~ **General Release**, in form prescribed by us, of any and all claims, liabilities and/or obligations, of any nature whatsoever, however arising, ~~known or unknown~~, against us and/or any or all of the Franchisor-Related Persons/Entities. If, for any reason, such transaction is not consummated within one hundred and twenty (120) days after the date of delivery of an exact copy of such offer to us, together with your deposit of any transfer fee and satisfaction of all other requirements for our consent to such transfer, or if you seek to effect a transaction on terms and conditions, or to any person or entity, other than as set forth in the offer disclosed to us by you, then the proposed transaction shall be deemed withdrawn, and all of the provisions of this Section shall again become fully applicable, as if such transaction had not been proposed.

If we do not exercise our right-of-first-refusal, you or your owner may complete the sale to such purchaser pursuant to and on the exact terms of such offer, subject to the conditions provided in this Agreement, provided that if there is a material change in the terms of the sale, we will have an additional right-of-first-refusal for thirty (30) days on the same terms and conditions as are applicable to the initial right-of-first-refusal. Our rights under this or any other Section may be assigned by us, in our sole and absolute discretion, to any person or entity we choose.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

## **10. INTERPRETATION AND ENFORCEMENT**

**10.1 Independent Contractor.** You and we understand and agree that neither this Agreement nor anything else creates, or is intended to create, a fiduciary or agency relationship between you and us, (any such and/or similar relationships being expressly disavowed) that you and we are and will be independent businesses, and that nothing in this Agreement is intended to make either you or us a general or special agent, joint venturer, partner, employee or fiduciary of or for the other for any purpose. No employee of Franchisee shall be deemed to be an employee of Gymboree. Franchisee shall not, without the prior written approval of Gymboree, have any power to obligate Gymboree for any expenses, liabilities or other obligations, other than as is specifically provided for in this Agreement. Gymboree shall not have the power to hire or fire Franchisee's employees and, except as herein expressly provided, Gymboree may not control or have access to Franchisee's funds or the expenditure thereof, or in any other way exercise dominion or control over Franchisee's business.

It is expressly understood and agreed that neither Franchisee nor any employee of Franchisee whose compensation for services is paid by Franchisee may, in any way, directly or indirectly, expressly or by implication, be construed to be an employee of Gymboree for any purpose, most particularly with respect to any mandated or other insurance coverage, tax or contributions, or requirements pertaining to withholdings, levied or fixed by any city, state or federal governmental agency.

FRANCHISEE SHALL CONSPICUOUSLY IDENTIFY ITSELF, ITS FRANCHISE BUSINESS AND ITS VEHICLES, AND IN ALL DEALINGS WITH ITS CUSTOMERS, CONTRACTORS, SUPPLIERS, PUBLIC OFFICIALS AND OTHERS, AS AN INDEPENDENT FRANCHISEE OF GYMBOREE, AND SHALL PLACE SUCH NOTICE OF INDEPENDENT OWNERSHIP ON ALL FORMS, BUSINESS CARDS, STATIONERY, ADVERTISING, SIGNS AND OTHER MATERIALS AND IN SUCH FASHION AS GYMBOREE MAY, IN ITS SOLE AND EXCLUSIVE DISCRETION, SPECIFY AND REQUIRE FROM TIME

TO TIME, IN ITS OPERATIONS MANUAL (AS SAME MAY BE AMENDED FROM TIME TO TIME) OR OTHERWISE.

FRANCHISEE SHALL NOT EMPLOY ANY OF THE GYMBOREE MARKS IN SIGNING ANY CONTRACT, LEASES, APPLICATION FOR ANY LICENSE OR PERMIT, OR IN A MANNER THAT MAY RESULT IN LIABILITY OF GYMBOREE FOR ANY INDEBTEDNESS OR OBLIGATION OF FRANCHISEE, NOR MAY FRANCHISEE USE THE GYMBOREE MARKS IN ANY WAY NOT EXPRESSLY AUTHORIZED HEREIN AND FRANCHISEE MUST USE ITS OWN NAME IN CONNECTION WITH ANY OF THE FOREGOING. FRANCHISEE MUST IDENTIFY ITSELF AS THE INDEPENDENT OWNER OF THE FRANCHISE AND SITES AS INDEPENDENT FRANCHISEE-OWNED IN THE MANNER PRESCRIBED BY GYMBOREE. EXCEPT AS EXPRESSLY AUTHORIZED IN WRITING, NEITHER GYMBOREE NOR FRANCHISEE SHALL MAKE ANY EXPRESS OR IMPLIED AGREEMENTS, WARRANTIES, GUARANTEES OR REPRESENTATIONS, OR INCUR ANY DEBT IN THE NAME OF OR ON BEHALF OF THE OTHER, OR REPRESENT THAT THEIR RELATIONSHIP IS OTHER THAN FRANCHISOR AND FRANCHISEE, AND NEITHER GYMBOREE NOR FRANCHISEE SHALL BE OBLIGATED BY OR HAVE ANY LIABILITY UNDER ANY AGREEMENTS OR REPRESENTATIONS MADE BY THE OTHER THAT ARE NOT EXPRESSLY AUTHORIZED IN WRITING, NOR SHALL GYMBOREE BE OBLIGATED FOR ANY DAMAGES TO ANY PERSON OR PROPERTY DIRECTLY OR INDIRECTLY ARISING OUT OF THE OPERATION OF FRANCHISEE'S BUSINESS AUTHORIZED BY OR CONDUCTED PURSUANT TO THE FRANCHISE.

Gymboree shall have no liability for any sales, use, service, occupation, excise, Gross Receipts, income, property or other taxes, whether levied upon Franchisee, or Franchisee's property, or upon Gymboree, in connection with the sales made or business conducted by Franchisee (except any taxes Gymboree is required by law to collect from Franchisee with respect to purchases from Gymboree). Payment of all such taxes shall be the responsibility of Franchisee.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**10.2 Notices.** All written notices and reports permitted or required to be delivered by the provisions of this Agreement or of the Manuals will be deemed so delivered at the time delivered by hand, immediately on transmission by facsimile transmission or other electronic system, including e-mail or any similar means, one (1) business day after being placed in the hands of a commercial courier service for overnight delivery, or three (3) business days after placement in the United States Mail by Registered or Certified Mail, Return Receipt Requested, postage prepaid and addressed to us at Gymboree Play Programs, Inc., 700 Airport Boulevard, Suite 200, Burlingame, California 94010, (or our then-current headquarters), to the attention of the President, and to you at your Gymboree Play Center and/or any address appearing in your application for a franchise or in our records. All payments and reports required by this Agreement will be directed to us at our address as specified above. Any required payment or report not actually received by us during regular business hours on the date due will be deemed delinquent. Notice to any one Franchisee, or owner of the Franchisee, shall be deemed effective as to all Franchisees and owners of the Franchisee.

**10.3 Non-Waiver.** The failure of Gymboree to act or exercise its rights under this Agreement on the breach of any of the terms thereof by Franchisee shall not be construed as a waiver of such breach, or prevent Gymboree from enforcing strict compliance with any and all of the terms thereof.



## 11. DISPUTE AVOIDANCE AND RESOLUTION

**11.1 Mediation and MANDATORY BINDING ARBITRATION, WAIVER OF RIGHT TO TRIAL BY JURY, etc.** Realizing that in business relationships there's always a possibility of differences of opinion or other disagreements and that what is most important is to resolve any disputes amicably, quickly, inexpensively and professionally and to return to business as soon as possible, it's with that same spirit of cooperation that you and we pledge to resolve differences and to use the procedures specified in this Agreement (and particularly this Article 11), believing that these procedures will reduce instances of possible disputes and make the resolution of any disputes which do arise less expensive, quicker, less subject to public notoriety and achievable in a less formal and antagonistic means than litigation, as well as to increase the opportunities for you and us to maintain a mutually beneficial business relationship. Therefore, you and we agree as follows:

(a) Any litigation, claim, dispute, suit, action, controversy, proceeding or otherwise ("claim") between or involving you (and/or any owner and/or affiliate of yours or which could be brought by, or on behalf of, you, any owner and/or affiliate of yours) and us (and/or any claim against or involving any or all of the Franchisor-Related Persons/Entities or otherwise), except as expressly provided below at Section 11.1 (e), whether arising out of or relating in any way to this and/or any other agreement and/or any other document, any alleged breach of any duty or otherwise (including but not limited to the underlying legality of the offer and/or sale of any franchise, any action for rescission or other setting aside of such sale or any transaction, agreement or document and any claim that this Agreement or any portion thereof is invalid, illegal, void, unenforceable or otherwise and any claim of fraud, including fraud in the inducement) and on whatever theory and/or facts based, will be:

(1) First, discussed in a face-to-face meeting between you (or, if the Franchisee is a corporation or partnership, an individual authorized to make binding commitments on behalf of the Franchisee) and a corporate executive of ours authorized to make binding commitments on our behalf. This meeting will be held at our then-current headquarters, or other location at our sole and absolute discretion and within 30 days after either you or we give written notice to the other proposing such a meeting.

(2) Second, if, in the opinion of either you or us, the meeting has not successfully resolved such matters and if desired by any person or entity involved in the claim, submitted to non-binding mediation for a minimum of eight hours before (a) Franchise Arbitration and Mediation, Inc. ("FAM") or its successor (or an organization designated by FAM or its successor) or (b) any other mediation organization approved by all such persons and/or entities or (c) by Judicial Arbitration and Mediation Service (JAMS) or its successor (or an organization designated by JAMS or its successor) if FAM cannot conduct such mediation and the parties cannot agree on a mediation organization. On election by any party, arbitration and/or any other remedy allowed by this Agreement may proceed forward at the same time as mediation. In the mediation, you and we shall each be represented by an individual authorized to make binding commitments on each party's respective behalfs and may be represented by counsel. In addition, you and/or we may, with permission of the mediator, bring such additional persons as are needed to respond to questions, contribute information and participate in the negotiations. The mediator shall be disqualified as a witness, consultant, expert or counsel for any party with respect to the dispute and any related matters.

(3) Third, if neither you nor we desire mediation (or if such mediation is not successful in resolving such claim), submitted to and finally resolved by binding arbitration before and in accordance with the arbitration rules of FAM or its successor (or an organization

designated by FAM or its successor); provided that if such arbitration is unable to be heard by FAM or its successor for any reason, the arbitration will be conducted before and in accordance with the arbitration rules of Judicial Arbitration and Mediation Service (JAMS) or its successor (or an organization designated by JAMS or its successor). In each case, the parties to any mediation/arbitration will execute appropriate confidentiality agreements, excepting only such public disclosures and filings as are required by law.

(b) Any mediation/arbitration (and any appeal of arbitration) will be exclusively conducted at our then-current headquarters (which may be at a different place than our present headquarters), to facilitate participation of important individuals and availability of documents, etc. to the resolution of the matter, and by a mediator/arbitrator experienced in franchising. You and we acknowledge the critical importance of a single source for decisions in arbitration (and in any court actions) to guide you and us, to eliminate the possibility of inconsistent decisions and awards which could adversely affect the uniform development and administration of the Gymboree System and group of companies and to maximize the opportunity for the arbitrator to give due consideration to your and our ongoing practical business needs in this regard. Except as expressly provided below, the parties to any mediation or arbitration will bear their own costs, including attorney's fees. Any claim, and any mediation/arbitration, will be conducted and resolved on an individual basis only and not on a class-wide, multiple plaintiff or similar basis. On request of any party to a claim, the arbitrator may be required to issue a written award, specifying the facts found and the law applied, but the party so requesting will bear the fees and charges incurred in connection therewith. The arbitrator (and any arbitration appeal panel) shall follow and apply all applicable law and a failure to do so shall be deemed an act in excess of authority. The arbitrator may award or otherwise provide for temporary restraining orders, preliminary injunctions, injunctions, attachments, claim and delivery proceedings, temporary protective orders, receiverships and other pre-judgment, equitable and/or interim relief as appropriate pending final resolution by binding arbitration of a claim, as well as in connection with any such final resolution, and may issue summary orders disposing of all or part of a claim at any point. Each party consents to the enforcement of such orders, injunctions, etc. by any court having jurisdiction. In any arbitration, any and all pre-trial discovery devices (including, but not limited to, depositions, written interrogatories, requests for admission, and requests for production, inspection and copying of documents) will be available to the disputants as if the subject matter of the arbitration were pending in a civil action before a court of general jurisdiction in the state whose law is to be applied under Section 11.14; provided however that, in no event may offers and/or other communications made in connection with, or related in any way to, possible settlement or other resolution of a dispute be admitted into evidence or otherwise used in connection with any arbitration or other proceeding, and any arbitration award in violation of this provision shall be vacated by the arbitration appeal panel (described below) and/or any court having jurisdiction. The subpoena powers of the arbitrator with respect to witnesses to appear at the arbitration proceeding shall not be subject to any geographical limitation. The arbitrator shall have the power to order compliance with such discovery procedures, as well as assess sanctions for non-compliance with any order. The arbitrator (rather than a court) shall decide any questions relating in any way to the parties' agreement (or claimed agreement) to arbitrate, including but not limited to applicability, subject matter, timeliness, scope, remedies, claimed unconscionability and any alleged fraud in the inducement, or otherwise. Each participant must submit or file any claim which would constitute a compulsory counterclaim (as defined by the applicable rule under the Federal Rules of Civil Procedure) within the same proceeding as the claim to which it relates. Any such claim which is not submitted or filed in such proceeding will be forever barred.

The fees and expenses of the mediator(s), arbitrator(s), mediation organization and/or arbitration organization shall be shared equally by the parties to the dispute; provided that in any mediation, arbitration and/or any court proceeding, where a party seeks monetary relief and/or

compensation, or rescission, the first party who seeks such relief shall, on initiating such a mediation, arbitration or court proceeding [or (if later) on requesting such relief] deposit \$10,000 (subject to adjustment for inflation) with such organization (and/or with the court) to cover the costs and fees charged (or to be charged) by such mediation and/or arbitration organization and/or any costs recoverable in a court proceeding, but, in any case, not including any attorney's fees. If such party does not receive substantially all of its initial demand in mediation, or does not prevail in such arbitration or court proceeding, such party shall bear all fees and costs charged by the mediating and/or arbitrating organization, and/or any costs recoverable in a court proceeding, but, in any case, not including any attorney's fees. In the event that any provision of this Section (or any other portion of this Agreement) is invalid or unenforceable, such provision will be construed as independent of, and severable from, every other provision and such provision will be modified or interpreted to the minimum extent necessary to have it comply with the law (including making such provision mutual in effect) and the remaining provisions will remain in full force and effect.

(c) If any party to an arbitration wishes to appeal any final award by an arbitrator (there will be no appeal of interim awards or other interim relief), that party can appeal, within thirty (30) days of such final award, to a three (3) arbitrator panel to be appointed by the same organization as conducted the arbitration, such panel to conduct all proceedings at the same location as specified in subsection (b) above. The issues on appeal will be limited to the proper application of the law to the facts found at the arbitration and will not include any trial *de novo* or other fact-finding function. The party requesting such appeal must pay all costs and fees charged by such arbitration appeal panel and/or arbitration organization in connection with such appeal, as well as posting any bond deemed appropriate by such arbitration organization or arbitration appeal panel. In addition, a party requesting appeal, and who does not prevail on appeal, will pay the other party's (or parties') attorneys' fees and other costs of responding to such appeal.

(d) Judgment on any preliminary or final arbitration award [subject to the opportunity for appeal as contemplated above] may be entered in any court having jurisdiction and will be binding, final and non-appealable.

(e) Disputes with respect to claims or issues relating primarily to (i) the validity of the Marks or other intellectual property licensed to you, or (ii) any disputant's rights to possession of any real and/or personal property (including any action in unlawful detainer, ejection or otherwise) shall be subject to court proceedings only.

(f) Notwithstanding any provisions of this Agreement or otherwise relating to which state or provincial laws this Agreement will be governed by and construed under, all issues relating to arbitrability and/or the enforcement of the agreement to arbitrate contained herein will be decided by the arbitrator (including all claims that this Agreement in general, and/or the within agreement to arbitrate, was procured by fraud in the inducement or otherwise) and will be governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and the federal common law of arbitration. Notwithstanding any provisions of state law to the contrary, we intend to fully enforce the provisions of this franchise agreement and other documents, including all venue, choice-of-laws and mediation/arbitration provisions, and to rely on federal preemption under the Federal Arbitration Act (9 U.S.C. § 1 et seq.)

(g) You and we each knowingly waive all rights to trial by a court or jury, understanding that arbitration may be less formal than a court or jury trial, may use different rules of procedure and evidence and that appeal is generally less available, still strongly preferring (for the

reasons set forth in this section and the following one) mediation and/or arbitration to resolve any disputes, except as provided in Section 11.1 (e).

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**11.2 Venue, WAIVER OF RIGHTS TO TRIAL BY JURY, LIMITATION ON DAMAGES, etc.** Without in any way limiting or otherwise affecting your and our obligations regarding mediation/binding arbitration, you and we agree that any litigation between you and us (and/or involving any principal and/or affiliate of yours or which could be brought by you or on your behalf and including any matters involving any of the Franchisor-Related Persons/Entities or otherwise), whether to enforce an arbitration award or involving any litigation, dispute, controversy, claim, proceeding or otherwise which is not subject to the foregoing agreement regarding mediation/arbitration (or in the event that a court having jurisdiction should hold that the foregoing agreement regarding mediation and/or arbitration is not enforceable) or otherwise, and bearing in mind your and our joint interest in having a single court determine issues in a consistent manner for application throughout the Gymboree System and not have us or our Franchisees exposed to inconsistent decisions, will be held exclusively before a court in the most immediate judicial district encompassing our headquarters and having subject matter jurisdiction or (if a basis for Federal jurisdiction is present), the United States District Court encompassing our headquarters, you (and each principal and affiliate of yours) and we consenting to the exclusive jurisdiction of such court(s) and WAIVING ALL RIGHTS TO TRIAL BY JURY; provided that any action to obtain possession of any real and/or personal property (including any action in unlawful detainer, ejectment or otherwise) may be brought in a state or Federal court having jurisdiction over the real and/or personal property at issue. Any claim, and any litigation, will be conducted and resolved on an individual basis only and not on a class-wide, multiple plaintiff or similar basis.

So as to achieve many of the advantages which would normally be associated with arbitration (such as lower expense, more rapid resolution of controversies, fewer protracted and complex proceedings, reduced instances of costly and time-consuming appeal, use of a more sophisticated and experienced trier of fact and law, etc.) and for your and our mutual benefit, you and we agree that in any arbitration, litigation or otherwise, you (and each owner and affiliate of yours) and we each knowingly waive all rights to trial by jury.

In any arbitration, litigation or otherwise, you and we each waive any right to recover, and any rights to make claims for (whether by claim, counter-claim, offset, way of defense or otherwise), punitive, exemplary, multiple, pain-and-suffering, mental distress, incidental, consequential, special, lost income and/or profits (except as expressly provided below) and/or similar damages under any theory whatsoever, you and we agreeing that such claims are inherently speculative and subject to abuse, often serving as obstacles to the reasonable resolution or settlement of a dispute and frequently operating to primarily benefit the attorneys involved in the claim.

In any event, we may recover the then-current value of any initial franchise fees, royalties, marketing contributions and/or other payments you are, or would be, obligated to make, or would normally make, in the absence of a breach or termination, to us or any affiliated company, whether under this Agreement or otherwise, it being your and our intention that we receive the full benefit of our bargain with you, as well as any past due payments owed to us and/or any affiliate. In any event, our maximum liability (combined with the maximum liability of any of the Franchisor-Related Persons/Entities or any of them) shall be (collectively) limited to the return to you of the initial franchise

fee actually paid by you and your maximum liability will be limited to the present value of the royalties, advertising contributions and other amounts which normally would have been paid by you if the franchise had continued in existence for its full term and any renewals, together with any past due payments owed to us and/or any affiliate, but, in any case, there shall be no limitation on your indemnity and/or similar obligations, whether with respect to trade accounts, other third-party claims or otherwise. You and we have agreed on this limitation in recognition of the facts that the calculation of any actual damages would be exceedingly difficult and subject to speculation and possible abuse and that the foregoing compromises benefit both of us equally. Each party agrees that its only remedy if an injunction or other equitable relief is entered against you will be to obtain dissolution of such injunction, etc.

The dispute avoidance and resolution provisions of this Agreement (shall apply to any claims, etc. any owner and/or affiliate of yours, or which could be brought by you or on your behalf, whether against us and/or any or all of the Franchisor-Related Persons/Entities, as well as any claims by us against any of your affiliates.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**11.3 Prior Notice of Claims by You.** Prior to you taking any legal or other action against us and/or any of the Franchisor-Related Persons/Entities, whether for arbitration, damages, injunctive, equitable or other relief (including but not limited to rescision) and whether by way of claim, counterclaim, cross-complaint, raised as an affirmative defense, offset or otherwise, you will first give us sixty (60) days prior written notice and opportunity to cure such alleged act or omission [or, if such alleged act or omission cannot reasonably be cured within such sixty (60) day period, and we are diligently continuing efforts to attempt to cure such alleged act or omission, such additional time as we are continuing such efforts]; provided that any dispute regarding our withholding consent with respect to a proposed transfer by you may be immediately submitted to face-to-face meeting, mediation and arbitration as provided in Section 11.1.

Since you and we share a mutual interest in your possible success and each believe that it's important that any possible business problems be promptly addressed as soon as possible, you and we agree that if you have any complaint regarding our failing to perform any obligation to you (including, but not limited to, training, marketing, operational support, representations by us or otherwise you will promptly advise us in writing of such problem within 90 days of the problem arising, so that we can have an opportunity to correct the problem. If you fail to so advise us, you'll be forever precluded from taking any legal or other action against us and/or any of the Franchisor-Related Persons/Entities, whether for arbitration, damages, injunctive, equitable or other relief (including but not limited to rescision) and whether by way of claim, counterclaim, cross-complaint, raised as an affirmative defense or otherwise with regard to the problem.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**11.4 Periods In Which to Make Claims.**

(a) No arbitration, action or suit (whether by way of claim, counterclaim, cross-complaint, raised as an affirmative defense, offset or otherwise) by either you or us will lie or be

permitted against the other (nor by you against any of the Franchisor-Related Persons/Entities), whether for damages, rescission, injunctive or any other legal and/or equitable relief, in respect of any alleged breach of this Agreement, or any other claim of any type, unless such party will have commenced such arbitration proceeding, action or suit before the expiration of the earlier of:

(1) One (1) year after the date on which the state of facts giving rise to the cause of action comes to the attention of, or should reasonably have come to the attention of, such party; or

(2) One (1) year after the initial occurrence of any act or omission giving rise to the cause of action, whenever discovered.

(b) Notwithstanding the foregoing limitations, where any federal, state or provincial law provides for a shorter limitation period than above described, whether on notice or otherwise, such shorter period will govern.

(c) The foregoing limitations may, where brought into effect by our failure to commence an action within the time periods specified, operate to exclude our right to sue for damages but will in no case, even on expiration or lapse of the periods specified or referenced above, operate to prevent us from (i) terminating your rights and our obligations under this Agreement as provided herein and under applicable law nor prevent us from obtaining any appropriate court judgment, order or otherwise which enforces and/or is otherwise consistent with such termination or (ii) obtaining and/or enforcing a temporary restraining order, preliminary injunction, permanent injunction or other equitable relief (whether by an arbitrator or a court) with respect to any operational non-compliance by you, irrespective of when such operational non-compliance occurred or came to our attention, in each case you agreeing that such relief is appropriate so that we can, among other things, protect the goodwill inherent in the Marks and the related investments by us and all other Gymboree Franchisees.

(d) The limitations set forth in subsections (a) and (b) will not apply to our claims arising from or related to: (1) indemnification by you; (2) your confidentiality, non-competition or other exclusive relationship obligations; and/or (3) your unauthorized use of the Marks.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**11.5 Withholding Consent.** In no event will you make any claim, whether directly, by way of set-off, counter-claim, defense or otherwise, for money damages or otherwise, by reason of any withholding or delaying of any consent or approval by us. Your sole remedy for any such claim is to submit it to an executive meeting, mediation and arbitration as described in this Agreement and, if the executive meeting and mediation fail to resolve the matter, for the arbitrator to order us to grant such consent. Unless otherwise expressly provided in this Agreement, approvals and consents may be withheld by us in our sole and absolute discretion.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**11.6 Survival and Construction.** Each provision of this Article 11, together with the provisions of Article 13 will be deemed to be self-executing and continue in full force and effect

subsequent to and notwithstanding the expiration, termination, setting aside, cancellation, rescission, unenforceability or otherwise of this Agreement (or any part of it) for any reason, and will survive and will govern any claim for rescission or otherwise and will apply to and govern any claim against, or with respect to, the Marketing Fund.

Each provision of this Agreement (including all dispute resolution provisions) will be construed as independent of, and severable from, every other provision and if any provisions are deemed to be unenforceable in any way, such provisions will be modified or interpreted to the minimum extent necessary to have them comply with the law (including making such provision mutual in effect) and the remaining provisions of this Agreement will remain in full force and effect, the parties agreeing that the unenforceability of any provisions of this Agreement will not affect the remainder of this Agreement, notwithstanding any statutory or decisional law to the contrary.

Each party reserves the right to challenge any law, rule or judicial or other construction which would have the effect of varying or rendering ineffective any provision of this Agreement. The benefits and protections of this Agreement which apply to us (including, but not limited to, all provisions relating to indemnification and/or releases) shall also apply to any past, current and/or future Franchisor-Related Persons/Entities as if they were expressly named beneficiaries of such provisions. In each case where we may exercise any option or other right, we may do so in our sole and absolute discretion, without liability or other obligation. So as to preserve the flexibility to deal with practical business situations (which you and we agree should benefit our businesses in the long term), we may, in our sole and absolute discretion, elect to not enforce (or to selectively enforce) any provision of this Agreement, or any other agreement, any policy or otherwise, whether with respect to you and/or any other franchisee or otherwise, and we may apply different policies to any franchisee, all without liability or other obligation and any such acts or omissions will not limit or otherwise affect our rights, whether to enforce this Agreement or otherwise.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**11.7 Costs and Attorneys' Fees.** Except as expressly provided otherwise in this Agreement with respect to appeal of an arbitration award, or with respect to our rights to recover attorneys' fees in connection with our indemnification rights hereunder, or as otherwise expressly provided in this Agreement, the parties will each bear their own costs of enforcement and/or defense (including but not limited to attorney's fees) in any claim or dispute between you and us (including any claim by you, or on your behalf, against the Franchisor-Related Persons/Entities or otherwise) and will make no claim with regard thereto.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**11.8 Validity and Execution.** This Agreement will become valid when executed and accepted by us at our headquarters.

**11.9 Binding Effect, Modification and Representations.** This Agreement is binding on the parties hereto and their respective executors, administrators, heirs, assigns, and successors in interest, and will not be modified or supplemented except by means of a written agreement signed by both you and our President or one of our Vice Presidents, provided that changes to the Manuals may be made by us at any time and will be fully binding on you notwithstanding any provisions of this

Section or otherwise. No other officer, field representative, salesperson or other person has the right or authority to sign on behalf of us, to make oral or written modifications to this Agreement, or to make any representations or agreements on behalf of us, and any such modifications, representations and/or agreements shall not be binding on us. You expressly acknowledge that no oral promises, representations or declarations were made to or relied on by you and that our obligations are confined exclusively to the terms herein. You understand and assume the business risks inherent in the franchised enterprise.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**11.10 Construction, etc.** Except as expressly provided otherwise, nothing in this Agreement is intended, nor will be deemed, to confer any rights or remedies on any person or legal entity not a party hereto. Except where this Agreement expressly provides otherwise, we have the absolutely unrestricted right to condition, withhold and/or refuse, in our sole and absolute discretion, any request by you and our approval of, or consent to, any action or omission by you. The headings of the several Articles and Sections hereof are for convenience only and do not define, limit, or construe the contents of such Articles or Sections. The term "attorneys' fees" will include, without limitation, legal fees, whether incurred prior to, in preparation for or in contemplation of the filing of any written demand or claim, action, hearing or proceeding to enforce the obligations of this Agreement. References to a "controlling interest" in the Franchisee include, but are not necessarily limited to, fifty percent (50%) or more of the voting control of the Franchisee if the Franchisee is a corporation, and any general partnership interest if the Franchisee is a partnership. The term "you" as used herein is applicable to one or more persons, a corporation or a partnership, as the case may be. The singular usage includes the plural and the masculine and neuter usages include the other and the feminine. If two or more persons are at any time the Franchisee hereunder, whether or not as partners or joint venturers, their obligations and liabilities to us will be joint and several. This Agreement will be executed in multiple copies, each of which will be deemed an original. Each of the provisions of this Agreement (including Articles 11 and 13) apply to any claim brought (or which could be brought) by any owner and/or affiliate of yours or by or on your behalf. If any limitation on your rights (including, but not limited to, any limitation on damages, waiver of jury trial, shortened period in which to make any claim or otherwise) is held unenforceable with respect to you, then such limitation will not apply to us. We shall have the sole right to enforce the obligations of this (or any other) Franchise (or other) Agreement and neither you nor any other franchisee of ours shall be deemed a third party beneficiary with respect to this or any other agreement.

You and we, each believing that (1) having written documents as the only basis for our legal relationship benefits each of us equally and reduces the risk of uncertainty in what should be a long-term business relationship and (2) this Agreement should be strictly interpreted according to its express terms, and each of us having a concern with (among other things) an approach whereby a court or arbitrator might impose (or limit or expand) duties on either of us that were not expressly agreed to in writing by you and us, agree that you and we mutually and expressly waive any "implied covenant of good faith and fair dealing", similar doctrine, rule of interpretation or otherwise and that no such (or similar) doctrine, rule of interpretation or otherwise will have any application to your and our relationship, this Agreement or any other agreement between you and us (or any affiliate or the Franchisor-Related Persons/Entities) nor will affect our ability to make binding changes to the Gymboree System, the Manual(s) or otherwise. Neither you nor we have any expectation or agreement that your or our rights and obligations will be otherwise than as expressly set forth in this Agreement or that where any contractual provision allows you or us any discretion in action or otherwise, the exercise of that discretion will be limited in any way, whether by any "implied covenant of good faith and fair dealing," any similar doctrine or rule of interpretation or otherwise. No course of dealing between you



and us, nor any course of dealing or agreement between us and anyone else, past, present or future, will affect your or our rights under this Agreement or otherwise. When we use the phrase "sole and absolute discretion" (or any similar phrase or concept), whether in this Agreement or otherwise, you agree that there will be absolutely no limitation (including, but not limited to, any "implied covenant of good faith and fair dealing" or otherwise) on our completely unrestrained ability and right to exercise that discretion in any way we choose.

The parties acknowledge and agree that:

1. This Agreement (and the relationship between the parties) grants, in a number of instances, the Franchisor the sole and absolute discretion to make decisions, take actions and/or refrain from taking actions, and which may favorably or adversely affect the individual interests of any particular Franchisee. The Franchisor and the Franchisee agree that the Franchisor's ability to exercise its judgment and make decisions in its sole and absolute discretion in various areas, and without any limitation of any type, is necessary since a nation-wide and international franchise system must (a) retain the flexibility to respond to opportunities, meet competitive challenges and operate in a dynamic (and to some degree **sometimes** unpredictable) business environment that will inevitably generate situations in which individual interests must be subordinated to the interests of the franchise system as a whole and (b) maintain flexibility to respond to evolving business conditions, in each case without limitation. **When in this Agreement we refer to instances in which we may exercise sole and absolute discretion, we must, and do, have the absolutely unrestricted right to make decisions and/or take (or refrain from taking) actions. We have this right even if a particular decision/action may have negative consequences for you, a particular franchisee or group of franchisees. You understand and agree that the unrestricted exercise of our sole and absolute discretion, as provided in various instances in this Agreement, is critical to our role as Franchisor;**
2. The Franchisor shall use its business judgment in exercising such discretion based on its assessment of its own interests and will not be required to consider the individual interests of the Franchisee or any other particular franchisee of the Franchisor, the Franchisee acknowledging that the Franchisor may make decisions based on considerations relating to the franchise system as a whole and which may favorably or adversely affect the individual interests of the Franchisee;
3. The Franchisor shall have no liability or other obligation to Franchisee for the exercise of its discretion in accordance with the provisions of this Agreement;
4. In no event shall any trier of fact, or judge or arbitrator, substitute its judgment for the business judgment so exercised by the Franchisor nor impose on the parties any duties or obligations not expressly undertaken by them; and
5. The provisions of this paragraph may be pleaded as a bar and as a complete defense to any action for an alleged breach of any duty.

If a duty of fair dealing in the performance and enforcement of this Agreement (or similar obligation) is imposed on the parties hereto by any applicable statute, court decision or otherwise (which you and we believe should not be so imposed, in consideration of your and our foregoing and other agreements), then the parties hereby acknowledge and agree that (a) any such duty will not (i) impose any rights or obligations on you or us that are inconsistent with this Agreement, (ii) modify any provisions of this Agreement, (iii) create any cause of action in the absence of a violation of the express provisions of this Agreement and/or (iv) imply any rights or obligations that are inconsistent with a fair construction of the express provisions of this Agreement, and (b) performance and enforcement of this

Agreement in accordance with its terms and in accordance with the exercise of the Franchisor's business judgment as described above will meet the requirements of such duty. You and we agree that, in any event and notwithstanding the imposition of any such duty or otherwise, this Agreement (and your and our relationship) gives us, and we retain, the entirely unrestricted right to make decisions and/or take (or refrain from taking) actions, even though such decisions may adversely affect you.

If any applicable and binding law or rule of any jurisdiction requires a greater prior notice of the termination of or refusal to renew this Agreement than is required hereunder, or the taking of some other action not required hereunder, or if under any applicable and binding law or rule of any jurisdiction, any provision of this Agreement or any specification, standard or operating procedure prescribed by us is invalid or unenforceable, the prior notice and/or other action required by such law or rule shall be substituted for the comparable provisions hereof, and we will have the right, in our sole and absolute discretion, to modify such invalid or unenforceable provision, specification, standard, or operating procedure to the extent required to be valid and enforceable. You agree to be bound by any promise or covenant imposing the maximum duty permitted by law which is subsumed within the terms of any provision hereof, as though it were separately articulated in and made a part of this Agreement, that may result from striking from any of the provisions hereof, or any specification, standard or operating procedure prescribed by us, any portion or portions which a court may hold to be unenforceable in a final decision to which we are a party, or from reducing the scope of any promise or covenant to the extent required to comply with such a court order. Such modifications to this Agreement shall be effective only in such jurisdiction, unless we elect to give them greater applicability, and shall be enforced as originally made and entered into in all other jurisdictions.

You will have no right to enforce any obligation of ours or any other person/entity (including, but not limited to, any other Gymboree Franchisee) under, and you will not be deemed a third party beneficiary of, any other Franchise Agreement, other agreement or otherwise. You agree that neither we (nor any of the Franchisor-Related Persons/Entities) will be liable for any act or omission which is consistent with this Agreement or other information provided to you, or which is done in subjective good faith.

**If we've been required, whether as a condition of registration or otherwise, to agree to an addendum or other modification of this Agreement, we reserve the right to challenge the validity of such requirement(s). You and we agree that if we've been required, whether as a condition of registration or otherwise and whether as a result of an anti-waiver or similar provision in any statute, regulation or otherwise, to agree to a provision purporting to invalidate a requirement that you execute a General Release, you and we agree, and we retain the right to take the position, that such anti-waiver or similar provision may operate to prevent us from requiring a release which would have the effect of releasing us, at the time of and in connection with awarding a franchise, from liability incurred in connection with such award but is not intended to apply to a release of any liability previously incurred and not directly related to the award of the subject franchise.s**

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**11.11 Non-Retention of Funds.** You do not have the right to offset or withhold payments owed to us (and/or any affiliate) for amounts purportedly due you (or any affiliate of yours) from us, the Franchisor-Related Persons/Entities and/or any affiliate as a result of any dispute of any nature or otherwise, but will pay such amounts to us (or our affiliate) and only thereafter seek reimbursement in accordance with the provisions of Article 11. If you believe that we or any other person/entity has

violated any legal duty to you, you will, notwithstanding such dispute, pay as designated all sums specified under this Agreement or any other agreement, whether to be paid to us or the Franchisor-Related Persons/Entities (including royalties, any unpaid portion of the initial franchise fee, any marketing contributions and/or amounts payable to franchisee councils and/or cooperatives, rent or otherwise) and will not withhold any payments except as authorized by an arbitration award in your favor.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**11.12 Severability; Substitution of Valid Provisions.** Except as otherwise stated in this Agreement, each provision of this Agreement, and any portion of any provision, is severable (including, but not limited to, any provision related to dispute resolution), and the remainder of this Agreement will continue in full force and effect. To the extent that any provision is deemed unenforceable, you and we agree that such provisions will be enforced to the fullest extent permissible under governing law. This Agreement will be deemed automatically modified to comply with governing law if such law requires: (a) a greater time period for notice of the termination of, or refusal to renew, this Agreement; or (b) the taking of some other action not described in this Agreement. We may modify any invalid or unenforceable provision to the extent required to be valid and enforceable and you will be bound by the modified provisions.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**11.13 Waivers.** Our waiver of any breach(es) under this or any other agreement [whether by failure to exercise a power or right available to us, failure to insist on strict compliance with the terms, obligations or conditions of any agreement, development of a custom or practice between you and us (or others) which is at variance with the terms of any agreement, acceptance of partial or other payments or otherwise], whether with respect to you or others, will not affect our rights with regard to any breach by you or anyone else or constitute a waiver of our right to demand exact compliance by you with the terms of this Agreement or otherwise. Subsequent or other acceptance by us of any payments or performance by you will not be deemed a waiver of any preceding or other breach by you of this Agreement or otherwise. The rights and remedies provided in this Agreement are cumulative and we will not be prohibited from exercising any rights or remedies provided under this Agreement or permitted under law or equity.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**11.14 Choice of Laws.** You and we, both agreeing on the practical business importance of certainty as to the law applicable to your and our relationship and its possible effect on the development and competitive position of the Gymboree System, jointly agree that, except with respect to the applicability of the Federal Arbitration Act, 9 U.S.C. § 1 et seq. and the effect of federal pre-emption of state law by such Act and except to the extent governed by the United States Trademark Act and other federal laws, or as provided elsewhere in this Agreement, this Agreement (including any claims, counter-claims or otherwise by you and/or any affiliate or yours) and all other matters concerning you (and/or any affiliate of yours) and us (and/or any affiliate of ours), and/or you (and/or any affiliate of yours) and any of the Franchisor-Related Persons/Entities, including your/our/their respective rights and obligations, will be governed by, and construed and enforced in accordance with, the laws of the state

where your Gymboree Play Center is, or will be, located, without regard to the laws of such state relating to conflicts of laws or choice of law; except that the provisions of any law of that state regarding franchises (including, without limitation, registration, disclosure, or relationship, and the regulations thereunder) shall not apply unless such state's jurisdictional, definitional and other requirements are met independently of, and without reference to, this Section.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

**11.15 Advice of Lawyers, Alternative Investment Opportunities, etc.** You acknowledge that you've had the opportunity (and we've strongly advised you) to have this Agreement and all other documents reviewed by your own attorney and that you've read, understood, had an opportunity to discuss with us and agreed to each provision of this Agreement. You agree that you've been under no compulsion to sign this Agreement, that you've carefully reviewed and carefully thought about each provision of this Agreement, that you've considered other franchise opportunities as well as the possibility of your entering our industry as a non-franchised participant and that, therefore, this Agreement will be deemed to have been drafted by you and us in equal parts and that no presumptions or inferences concerning this Agreement's terms, interpretation or otherwise will result by reason of the fact that we prepared this Agreement or may be unwilling (in the interest of consistency of system administration) to change its terms.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

## **12. EXHIBITS**

Attached hereto are the following Exhibits A through **HI**, inclusive, each of which is incorporated herein by this reference:

- Exhibit A -- Territory
- Exhibit B -- Minimum Standard Equipment and Program Aids
- Exhibit C -- Training Program
- Exhibit D -- Market Plan
- Exhibit E -- Non-Disclosure/Non-Competition Agreement
- Exhibit F -- State Addenda
- Exhibit G -- Collateral Assignment of Lease
- Exhibit H -- Releasing Language
- Exhibit I -- ADA and Related Certifications**

## **13. ACKNOWLEDGMENTS AND REPRESENTATIONS, ENTIRE AGREEMENT, NO FIDUCIARY RELATIONSHIP, ETC.**

(a) You and we agree that there does not exist, and there will not be, any fiduciary, trust or similar special relationship between you and us, that no such or similar relationships are intended by you or us and you and we expressly disavowing any such or similar relationships, that the relationship between you and us is an ordinary commercial relationship between independent businesspeople intended for mutual but independent economic benefit and is not in any sense, nor is intended to be, a fiduciary, trust or similar special relationship, that each party has dealt with each other at arm's length and as businesspersons with equivalent bargaining power, notwithstanding the relationship of

Franchisor and Franchisee, and that you have alternative business opportunities (some of which are franchised) which you have investigated and in which you can invest.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

(b) You acknowledge that you [and each of your owners (if you are a corporation or partnership) and investors] has read this Agreement and our Uniform Franchise Offering Circular and all exhibits and that you and they understand and accept the terms, conditions, and covenants contained in this Agreement as being necessary to maintain our high standards of quality and service and the uniformity of those standards at all Gymboree Play Centers and thereby to protect and preserve the goodwill of the Marks and the System.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

(c) You and we, each agreeing on the critical practical business importance of our relationship being governed solely by written documents signed by you and us (including any concurrently executed written personal guarantees, Statement of Prospective Franchisee and/or exhibits - schedules - addenda - promissory note(s) - security agreement(s) or other written documents signed by the party to be bound thereby, all of which will be deemed to be part of this Agreement for the purposes of this Section 13) and not wishing to create misunderstandings, confusion and possible conflict through reference to any alleged prior and/or contemporaneous oral and/or written representations, understandings, agreements or otherwise or any legal doctrines such as: "good faith and fair dealing" or otherwise which might introduce an element of uncertainty into our relationship, jointly intend, represent, warrant and agree that (1) this Agreement contains the final, complete and exclusive expression of the terms of your and our agreement, and the final, complete and exclusive expression of your and our intent, and entirely supersedes and replaces any and all prior and/or concurrent understandings, agreements, inducements, prior course(s) of dealing, representations (financial or otherwise), promises, options, rights-of-first refusal, guarantees, warranties (express or implied) or otherwise (whether oral or written) between you and us, (2) there are no prior and/or concurrent understandings, agreements, inducements, course(s) of dealing, representations (financial or otherwise), promises, options, rights-of-first refusal, guarantees, warranties (express or implied) or otherwise (whether oral or written) which are not fully expressed in this Agreement and (3) no prior and/or concurrent understandings, agreements, inducements, course(s) of dealing, representations (financial or otherwise), promises, options, rights-of-first refusal, guarantees, warranties (express or implied) or otherwise (whether oral or written) of any kind or nature whatsoever have been made by us or anyone else, nor have been relied on by you nor will have any force or effect; excepting only the written representations made by you in connection with its application for this franchise. You and we each expressly disclaim any understandings, agreements, inducements, course(s) of dealing, representations (financial or otherwise), promises, options, rights-of-first refusal, guarantees, warranties (express or implied) or otherwise (whether oral or written) which are not fully expressed in writing in this Agreement. This is equally important to you, as well as us, since, just as we do not wish to deal with allegations that we may have made or entered into understandings, representations, etc. not fully expressed in writing in this Agreement (such as alleged earnings claims), you do not wish to deal with allegations that you made or entered into understandings, representations, etc. (such as promises to achieve particular sales or royalty payment levels, would open a particular number of units, etc.) which are not fully expressed in writing in this Agreement.

Your Initials: \_\_\_\_\_ / \_\_\_\_\_

(d) In particular, we have not authorized, and you have not been promised, nor have we or anyone else made, nor have you received or relied on, any promises, representations or warranties, that: (1) any payments by you are refundable at your option, (2) we will repurchase any rights granted hereunder (or any associated business) or be will able to assist you in any resale, (3) you will succeed in the franchised business, (4) you will achieve any particular sales, income or other levels of performance, (5) you will have any exclusive rights of any type other than as expressly set forth herein, (6) you will receive any level of advertising (television or otherwise), marketing assistance, site location, development or other services, operational assistance or otherwise other than as expressly set forth in this Agreement, (7) you will not be required to obtain any licenses in order to operate your Gymboree Play Center business, (8) any location will be successful, (9) it will be anyone's responsibility other than yours to obtain all licenses necessary in order to establish and operate your Gymboree Play Center business or (10) that you will be awarded additional or further franchises or other rights, except as expressly set forth in a written document signed by a corporate officer of Gymboree Play Program, Inc. No contingency, condition, prerequisite, prior requirement, or otherwise (including but not limited to obtaining financing, obtaining a site or otherwise) exists with respect to you fully performing any or all of your obligations under this Agreement.

Your Initials: \_\_\_\_\_ / \_\_\_\_\_

(e) You have not received or relied on (nor have we or anyone else provided) any oral or written: sales, income or other historical results, projections or otherwise, of any kind or nature or any statements, representations, data, charts, tables, spreadsheets or mathematical calculations or otherwise which stated or suggested any level or range of actual or potential sales, costs, income, expenses, profits, cash flow, tax effects or otherwise and neither we nor anyone else has made, nor have you relied on, any promises, representations or warranties as to any profits you may realize in the operation of a Gymboree Play Center, nor have you received or relied on any representations regarding any working capital or other funds necessary to reach any "break-even" or any other financial level. We can't reliably predict, forecast or project future performance, revenues, profits or otherwise of any Gymboree Play Center, even including one owned and/or operated by us, due to the large number of factors outside our control, and we **certainly** can't reliably predict what your results might be. You understand that results will vary from unit to unit. If any such information, promises, representations and/or warranties has been provided to you, they haven't been authorized, they should not be relied on, we will not be bound by them, and, if you do rely on such information, promises, representations and/or warranties, you do so at your own risk.

Your Initials: \_\_\_\_\_ / \_\_\_\_\_

(f) You acknowledge and agree that the success of the business venture contemplated to be undertaken by you is speculative, is and will be dependent on your personal efforts, that while we can provide you with systems, methods, procedures, techniques and other "tools," including the Gymboree System and otherwise, your success ultimately depends on your efforts, including your proactive, diligent and thorough knowledge and application of the Gymboree System, that entry into any business enterprise is always associated with risk and that no assurance of success has been or can be given to you. You acknowledge and represent that you have entered into this Agreement and made an

investment only after (1) making an independent investigation of the opportunity, including having received a list, in connection with the presentation of our Uniform Franchise Offering Circular, of (and having spoken with) other franchisees currently operating or who have operated Gymboree Play Centers, (2) having had an opportunity to have this transaction and all related documents reviewed by an attorney and a financial advisor of your choosing, such review having been strongly recommended by us and (3) having independently researched all applicable licensing and other requirements related to the operation of your Gymboree Play Center. You acknowledge that you and each person signing as Franchisee (and/or having any investment and/or interest in your Gymboree Play Center) has received, reviewed, understood and fully read, and all questions have been answered regarding, (1) a copy of our Uniform Franchise Offering Circular with all exhibits at least ten (10) business days prior to the earlier of your and/or any such person (a) signing any binding documents or (b) paying any sums and (2) a copy of this Agreement and all other agreements complete and in form ready to sign at least five (5) business days prior to the earlier of you and/or any such person (a) signing any binding documents or (b) paying any sums.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

(g) You understand, acknowledge and agree that (1) we may have offered franchises in the past, may currently be offering franchises and/or may offer franchises in the future, on economic and/or other terms, conditions and provisions which may significantly differ from those offered by this Agreement and any related documents and (2) there may be instances where we have varied, or will vary, the terms on which we offer franchises, the charges we (and/or our affiliates) make or otherwise deal with our Franchisees to suit the circumstances of a particular transaction, the particular circumstances of that Franchisee or otherwise, in each case in our sole and absolute discretion.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

(h) You understand that we are relying on you to bring forward in writing at this time any matters inconsistent with any of the matters set forth in this Section 13 or otherwise so that we can correct any misunderstandings or inappropriate expectations and you agree that if any of the statements or matters set forth in this Section 13 or otherwise are not true, correct and complete you will make a written statement regarding such next to your signature below so that we may address and resolve any such issue(s) at this time and before either you or we go forward.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

(i) You acknowledge and agree that in all of your dealings with the Franchisor, the officers, directors, employees, and agents of the Franchisor act only in a representative capacity and not in an individual capacity. You further acknowledge that this Agreement, and all business dealings between you and such Individuals as a result of this Agreement, are solely between you and Gymboree Play Programs, Inc. and that no other persons and/or entities, including any of the Franchisor-Related Persons/Entities, have or will have any duties or obligations to you. You further represent to us, as an Inducement to our entry into this Agreement, that you have made no misrepresentations in obtaining the Franchise.

**Your Initials:** \_\_\_\_\_ / \_\_\_\_\_

IN WITNESS WHEREOF, you and we have executed and delivered this Agreement in \_\_\_\_\_ counterparts on the day and year first above written.

Executed on \_\_\_\_\_, 20\_\_\_\_, at Burlingame, California.

GYMBOREE PLAY PROGRAMS, INC.

FRANCHISEE

By: \_\_\_\_\_

\_\_\_\_\_

Its: \_\_\_\_\_

\_\_\_\_\_

Individually and/or as an officer or partner of

\_\_\_\_\_, a

(\_\_\_\_\_) corporation

(\_\_\_\_\_) partnership