

ADMINISTRATIVE PROCEEDING
BEFORE THE
SECURITIES COMMISSIONER OF MARYLAND

*

IN THE MATTER OF: *

Tropical Smoothie Franchise *

Development Corporation * Case No. 2008-0329

Respondent *

* * * * *

CONSENT ORDER

WHEREAS, the Maryland Division of Securities (the "Division") initiated an investigation into the franchise-related activities of Tropical Smoothie Franchise Development Corporation ("Tropical Smoothie"), pursuant to the authority granted under the Maryland Franchise Registration and Disclosure Law, MD. CODE ANN. BUS. REG. §14-201 et seq. (2004 Repl. Vol. and Supp. 2007) (the "Maryland Franchise Law"); and

WHEREAS, based on information presented by the Division, the Maryland Securities Commissioner (the "Commissioner") has concluded that grounds exist to allege that Tropical Smoothie violated the registration and disclosure provisions of the Maryland Franchise Law and a previous Agreement of the Commissioner, in relation to the offer and sale of Tropical Smoothie franchises in Maryland; and

WHEREAS, before the holding of a hearing in this matter, without trial or final adjudication of any issue of fact or law, and without Tropical Smoothie admitting or denying any violation of law, the Commissioner and Tropical Smoothie have reached an agreement to enter into this Consent Order:

NOW, THEREFORE, IT IS HEREBY ORDERED AND DECREED:

I. JURISDICTION

1. The Commissioner has jurisdiction in this proceeding pursuant to Section 14-210(a) of the Maryland Franchise Law.

II. STATEMENT OF FACTS

2. Tropical Smoothie is a Florida corporation formed on July 2, 1997 with a principal business address of 4100 Legendary Drive, Suite 250, Destin, FL 32541. Tropical Smoothie offers franchises for the operation of Tropical Smoothie cafes. Tropical Smoothie also offers area developer franchises that grant developers the right to operate Tropical Smoothie cafes and to recruit and service franchises in particular geographic areas.

3. In June, 2002, Tropical Smoothie filed an initial application with the Division to register its unit franchise offering under the Maryland Franchise Law.

4. On February 12, 2003, the Commissioner entered into an Agreement (the “2003 Agreement”) with Tropical Smoothie to resolve a previous violation of the registration and disclosure provisions of the Maryland Franchise Law. Specifically, in that 2003 Agreement, Tropical Smoothie represented that it sold an area development agreement to Venture One, LLC (“Venture One”) on August 15, 2002 when Tropical Smoothie was not registered under the Maryland Franchise Law. The Area Development Agreement granted Venture One the right to serve as an area developer for Tropical Smoothie franchises in an exclusive territory that included the states of Maryland and Virginia.

5. Under the 2003 Agreement, the Commissioner determined that Tropical Smoothie violated Sections 14-214(a) and 14-216(a) of the Maryland Franchise Law. Tropical Smoothie agreed to, among other things: immediately and permanently cease and desist from the offer and sale of franchises in violation of the Maryland Franchise Law; file an application for registration of the franchise offering related to the Area Development Agreement and diligently pursue the registration of that offering; offer rescission to Venture One; and enroll its president and an employee responsible for franchise law compliance matters in a franchise law compliance program.

6. On February 18, 2004, the Division made Tropical Smoothie’s initial applications for registration of its unit and area franchises effective in Maryland.

7. On January 2, 2008, Tropical Smoothie filed a renewal application of its unit franchise registration with the Division. The Division reviewed the renewal application and sent Tropical Smoothie a comment letter outlining several deficiencies that Tropical Smoothie had to correct in order to renew its franchise offering in Maryland.

8. On January 10, 2008, Tropical Smoothie filed a renewal application of its area franchise registration with the Division. The Division reviewed the renewal application and sent Tropical Smoothie a comment letter outlining several deficiencies that Tropical Smoothie had to correct in order to renew its franchise offering in Maryland.

9. In response to the Division's comment letter relating to the unit franchise registration application, Tropical Smoothie submitted revisions to its Disclosure Document including changes to its litigation disclosure. The Division reviewed these changes and noted that Tropical Smoothie had not disclosed an order entered into on February 12, 2003 with the Commonwealth of Virginia, as required, in Item 3 of any of its Uniform Franchise Offering Circulars ("UFOC") registered in Maryland including its initial registration in February 2004.

10. On April 28, 2008, the Division sent Tropical Smoothie a comment letter requesting, among other things, information related to its failure to disclose the Virginia order. On May 16, 2008, in response to the Division's request, counsel for Tropical Smoothie represented that Tropical Smoothie relied on prior counsel for the preparation of the UFOC and the determination as to what was required to be disclosed.

11. On May 19, 2008, the Division sent Tropical Smoothie a comment letter outlining several deficiencies that Tropical Smoothie still needed to correct in order to renew its franchise offering in Maryland. The Division also requested documentation regarding all sales of unit and area franchises to Maryland residents or to be operated in whole or in part in Maryland.

12. On June 9, 2008, in response to the Division's request, Tropical Smoothie submitted documents related to the offers and sales of unit franchises in Maryland.

13. Tropical Smoothie acknowledged to the Division that it gave its UFOC for a unit franchise to the following individuals on the dates indicated: Melvin Tucker (“Tucker”) on February 2, 2007; Smurti Nebhnani (“Nebhnani”) on March 18, 2007; Dipika Chawla (“Chawla”) on March 20, 2007; Kwang-Woo Choi (“Choi”) and Joselito Chua (“Chua”) on September 4, 2007; Carmen Cunningham (“Cunningham”) on October 26, 2007; Charles Dix (“Dix”); and, Kelly Kurtz (“Kurtz”). Each individual is a resident of Maryland or a nonresident interested in a franchise to be operated in whole or in part in Maryland.

14. Tropical Smoothie acknowledges that the UFOC it provided to Tucker, Nebhnani, Chawla, Choi, Chua, Cunningham, Dix and Kurtz did not contain all required disclosures.

15. Tropical Smoothie entered into a unit franchise agreement on the dates indicated with each of the following individuals: Tucker on April 18, 2007; Nebhnani and Chawla on April 12, 2007; Nebhnani and Chawla on August 22, 2007; Choi and Chua on October 8, 2007; and, Cunningham on December 12, 2007. Each franchise business is to be located in Maryland.

16. In connection with the 2003 Agreement, Tropical Smoothie represents that the UFOC effectively registered in Maryland for the sale of area franchises that was provided to Venture One along with the offer of rescission did not contain all required disclosures. Tropical Smoothie represents that the Virginia order was disclosed in the UFOC registered in Virginia on October 22, 2002 and was given to Venture One in connection with the Virginia order. Pursuant to the Uniform Franchise Offering Circular Guidelines, however, the disclosure required in Item 3 is the same for all jurisdictions filing a UFOC.

17. Tropical Smoothie represents that its offer and sale of an unregistered area franchise to Venture One was inadvertent. Tropical Smoothie also represents that its offers and sales of unit franchises, and its offer to rescind the area franchise, using disclosure documents that do not comply with the Maryland Franchise Law was based upon reliance on prior counsel’s determination as to what was required to be disclosed.

18. As of the date of this Consent Order, Tropical Smoothie represents that it has developed new

compliance procedures to ensure that, in the future, it complies with all required provisions of the Maryland Franchise Law.

19. Tropical Smoothie also represents that, other than the offers and sales to Venture One, Tucker, Nebhnani, Chawla, Choi, Chua, Cunningham, Dix and Kurtz, Tropical Smoothie did not offer or sell any Tropical Smoothie unit or area franchises to any Maryland residents, or to any other residents for a franchise territory located in whole or in part in Maryland, in violation of the registration and disclosure requirements of the Maryland Franchise Law and the Commissioner's 2003 Agreement.

III. CONCLUSIONS OF LAW

20. By engaging in the above activities, the Commissioner has concluded that Tropical Smoothie violated §§14-214, 14-216, 14-223, and 14-228 of the Maryland Franchise Law, Maryland Franchise Regulations (COMAR) Section 02.02.08.04, and the Commissioner's 2003 Agreement.

IV. ORDER AND CONSENT

21. THE COMMISSIONER HEREBY ORDERS AND TROPICAL SMOOTHIE REPRESENTS AND CONSENTS THAT:

- A. Tropical Smoothie shall immediately and permanently cease and desist from the offer and sale of franchises in violation of the Maryland Franchise Law;
- B. Tropical Smoothie shall diligently pursue the completion of the pending renewal applications to register the Tropical Smoothie unit and area franchise offerings in Maryland;
- C. Prior to the date of this Consent Order, Tropical Smoothie has submitted to the Division a copy of new compliance procedures approved by the Division that Tropical Smoothie has implemented to make sure that it complies with the Maryland Franchise Law;
- D. Tropical Smoothie shall engage an independent franchise law compliance training program or trainer (hereafter the "Monitor") approved by the Division to monitor Tropical Smoothie's franchise sales activities in Maryland and to Maryland residents for a period of two (2) years from the date that Tropical Smoothie's franchise renewal registration is made effective; such monitoring to include at least the following: (i) an annual on site review of Tropical Smoothie's books, records and recordkeeping policies and procedures regarding

Tropical Smoothie's obligations under the Maryland Franchise Law; (ii) submission of monthly reports regarding any sales of franchises with documentation, where applicable, demonstrating as to each sale compliance with the Maryland Franchise Law; and (iii) an annual report by the Monitor to the Division confirming that the Monitor's review disclosed no evidence that Tropical Smoothie is not in compliance with the requirements of this Paragraph or the Maryland Franchise Law. For purposes of this paragraph, the records of Tropical Smoothie must include correspondence with franchisees and prospective franchisees, records of payments, and any complaints regarding franchise sales. Tropical Smoothie must share with the Monitor all relevant non-public information for the purpose of evaluating compliance with the Maryland Franchise Law. The Monitor shall use such information solely for the purpose of performing monitoring duties as outlined in this paragraph and shall disclose such information solely to the Division;

- E. Upon notification by the Division that Tropical Smoothie's unit and area franchise offerings have been effectively registered for use in Maryland, Tropical Smoothie shall send to Venture One, Tucker, Nebhnani, Chawla, Choi, Chua, and Cunningham the following: (i) a copy of the applicable, effectively registered Maryland Franchise Disclosure Document; (ii) a copy of this Consent Order, and (iii) a letter, in substantially the form attached to this letter as Exhibit 1, notifying each franchisee and developer that it has the right to rescind its Tropical Smoothie franchise agreement and area developer agreement.
- F. Tropical Smoothie acknowledges that this Consent Order is a discloseable order as described under §14-216(c)(9)(i)(4) of the Maryland Franchise Law and Item 3 of the FTC Franchise Rule.

V. JURISDICTION RETAINED

22. Jurisdiction shall be retained by the Commissioner for such further orders and directions as may be necessary or appropriate for the construction or enforcement of the Consent Order.

VI. CONSEQUENCES OF VIOLATING THIS CONSENT ORDER

23. If Tropical Smoothie fails to comply with any term of this Consent Order, the Division may bring administrative or judicial proceedings against it to enforce this Consent Order or to sanction it for violating an order of the Commissioner, and may take any other action authorized under the Maryland Franchise Law or any other applicable law. In any such proceeding in which, after an opportunity for a hearing, the Commissioner or a court finds that Tropical Smoothie has violated this Consent Order, the Statement of Facts and the violations of the Maryland Franchise Law alleged in the Consent Order shall be deemed admitted and may be introduced into evidence against it.

VII. MODIFICATION OF CONSENT ORDER

24. The terms of this Consent Order may be modified only by a subsequent order issued by the Commissioner.

BY CONSENT:

Tropical Smoothie Franchise
Development Corporation

_____/s/_____

BY:

Print Name

Title

SO ORDERED:

**Commissioner's Signature is on File
with Original Document**

MELANIE SENTER LUBIN
SECURITIES COMMISSIONER

DATE OF THIS ORDER:

September 23, 2008

FORM
(On Franchisor's Letterhead)

Certified Mail
Return Receipt Requested

Re: [Franchisor] Notice of Offer to Rescind Franchise or Area Developer Agreement

Dear _____:

In accordance with discussions our attorneys have had with the Division of Securities of the Maryland Attorney General's Office (the "Division"), [Insert name of Franchisor] ("we") have agreed to offer rescission to all Maryland residents who purchased franchise or area developer agreements, and to other persons who purchased franchise or area developer agreements to be located in Maryland, that we sold in violation of the registration and disclosure provisions of the Maryland Franchise Law. This offer of rescission is made in settlement of the administrative proceeding that the Division may bring for the sale of a franchise in violation of the Maryland Franchise Law and does not affect any civil liability for which we may be responsible.

If you elect to rescind and terminate the franchise or area developer relationship, we agree to return to you the initial fees you paid, and cancel any indebtedness you may have to us, less the cost for any unreturned items and equipment included in the purchase price you paid us for the franchise.

In the event you elect to rescind, you will give up your franchise or area developer agreement and any rights to use our trademarks and system. Also, you will be obligated to refrain from using and disclosing our trade secrets and any of our confidential and proprietary information. This offer will remain open for thirty (30) days from the date you receive this letter. Please check the appropriate place below and return a signed copy of this letter to me within the time period.

If you have any questions, please contact Dale E. Cantone, Assistant Attorney General, at the Division (410-576-6368).

Sincerely,

THE FRANCHISOR

ACCEPTANCE OR REFUSAL OF OFFER TO RESCIND FRANCHISE AGREEMENT
OR AREA DEVELOPER AGREEMENT

1. I, the undersigned franchisee or area developer, acknowledge that I have read the preceding Notice of Offer to Rescind Franchise Agreement and Area Developer Agreement and understand its contents.
2. I understand that I have not waived my rights under the Maryland Franchise And Disclosure Law by signing this document.
3. I hereby make the following choice to accept or refuse your offer to rescind my agreement:

For Franchise Agreement check here _____:

For Developer Agreement check here _____:

CHECK ONE

_____ I hereby **accept** your offer of rescission and, unless I am continuing to operate under either a franchise or developer agreement, agree to not use your trademarks and system and to not use or disclose to anyone the trade secrets, and confidential and proprietary information that we obtained from you.

_____ I do **not accept** your offer of rescission. I wish to remain a franchisee or area developer in your franchise system.

Date: _____
_____ Franchisee

Date: _____
_____ Area Developer