

After examination of the financial statement of the franchisor and the duties and obligations of the franchisor to furnish goods and/or services to assist its franchisees in establishing and opening their franchise business, it has been determined that adequate financial resources may not be available to the franchisor for the performance of such obligations. Therefore, we will require that the franchisor assure financial capability by one of the following means:

- A. The escrow of 100% of the franchise fee paid by a franchisee who is a resident of North Dakota until the obligations of the franchisor to assist the franchisee to establish and open his or her business are fulfilled.
- B. If the franchisor is a subsidiary of another company whose financial statements demonstrate an ability to perform the obligations contained in the franchise agreement, we will accept a guarantee of performance from the parent company. The parent company shall submit, in addition to the guarantee of performance and its latest audited financial statements, a resolution of its Board of Directors authorizing the guarantee, a certificate by its Secretary for such resolution, and a consent to service of process and corporate acknowledgement for the parent company.
- C. In lieu of the escrow funds or guarantee of performance, the franchisor may post a surety bond in an amount equal to 100% of the franchise fee, said bond to be issued by a corporate surety authorized to transact business in the State of North Dakota. We will require that the franchisor determine the number of franchises he hopes to sell in North Dakota and multiply the franchise fee times that number to determine the amount of the bond. In no event, however, is the bond to be less than \$25,000.
- D. In lieu of the escrow funds or guarantee of performance or surety bond, the franchisor may defer the initial franchise fees until such time as all initial obligations owed to franchisee under the franchise agreement or other documents have been fulfilled by the franchisor and the franchisee has commenced doing business pursuant to the franchise agreement.

**Whichever means you choose, we require the appropriate disclosure of financial assurance to both the Franchisee and the North Dakota Insurance & Securities Department. To satisfy your disclosure to North Dakota, indicate your choice on the cover letter included with your franchise application filed via NASAA EFD.**

#### ESCROW OF FUNDS:

The Commissioner may impose as a condition to registration an escrow of not more than 100% of the franchise fees and other funds paid by a franchisee who is a resident of that state to the franchisor or an affiliate of the franchisor until the obligations of the franchisor to assist the franchisee to establish and open the business are fulfilled. When an escrow is imposed in connection with the registration or exemption of a franchise offering, the account shall comply with the following requirements:

1. Checks shall be made payable to the escrowee by the franchisee.
2. The account shall be established in a bank or trust company acceptable to the Commissioner, and the funds shall be kept and maintained in an account separate and apart from the franchisor's business and personal accounts.
3. All proceeds so deposited shall remain the property of the franchisee and shall not be subject to any liens or charges by the escrowee or judgments, garnishments, or creditor's claims against the franchisor until released to the franchisor as hereinafter provided. This escrow is for the benefit of each franchisee in the amount paid by each franchisee.
4. At the discretion of the Commissioner, a statement indicating the status of the escrow shall be furnished by the bank or trust company to the Commissioner.
5. An escrow agreement, in substantially the following form, shall be entered into between the bank or trust company and the franchisor, which shall state that its purpose is to protect the franchisee and shall authorize the Commissioner to inspect the records of the bank or trust company, as trustee relating thereto, and shall state that, upon order of the Commissioner or a court of competent jurisdiction, the trustee shall release and pay over the funds, or a portion thereof, to the franchisor or franchisee, as directed by the Commissioner.

## ESCROW AGREEMENT

Agreement, made this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by \_\_\_\_ (name of franchisor)\_\_\_\_, a \_\_\_\_ (type of business entity)\_\_\_\_ organized under the laws of the State of (hereinafter referred to as \_\_\_\_\_), and \_\_\_\_ (name and address of bank)\_\_\_\_ hereinafter referred to as "BANK", a banking association organized under the laws of the State of \_\_\_\_\_, as Escrowee for the franchisees of \_\_\_\_ (name of franchisor)\_\_\_\_;

WHEREAS, \_\_\_\_ (name of franchisor)\_\_\_\_ is desirous of establishing franchises in the State of North Dakota; and

WHEREAS, it is in the discretion of the Securities Commissioner, as administrator of the North Dakota Franchise Investment Law, to require an escrow of franchise fees; and

WHEREAS, in order to conform to the procedures for arranging an escrow account, (name of franchisor)\_\_\_\_ desires to enter into an escrow agreement with BANK, pursuant to which franchise fees are to be held in escrow for the purpose of complying with the North Dakota Franchise Investment Law.

NOW, THEREFORE, with the foregoing recitals hereinafter incorporated by reference and made a part thereof, it is agreed as follows:

1. \_\_\_\_ (Name of franchisor)\_\_\_\_ shall deposit with BANK payments received from franchisees that are required to be escrowed under the order to the Commissioner, but BANK shall not be responsible for insuring that all monies received from each or any one franchisee are deposited with BANK.

2. \_\_\_\_ (Name of franchisor)\_\_\_\_ will supply BANK with the name and address of each franchisee, together with the amount of the deposit, which represents moneys paid by each franchisee, and BANK will maintain records containing the same information.

3. All monies received by BANK from \_\_\_\_ (name of franchisor)\_\_\_\_ shall be held by BANK as escrowee for the exclusive purpose herein described and will be placed in a single segregated account substantially as follows:

\_\_\_\_ (Name of bank)\_\_\_\_, AS ESCROWEE FOR FRANCISEES OF \_\_\_\_ (name of franchisor)\_\_\_\_ (hereinafter referred to as "Escrow Account").

4. BANK shall accept such funds as \_\_\_\_ (name of franchisor)\_\_\_\_; shall deliver to BANK, as escrowee, and BANK shall acknowledge the receipt of funds from \_\_\_\_ (name of franchisor)\_\_\_\_; however BANK shall be responsible only for funds actually deposited with it and shall not be responsible for the accuracy of the information provided to it by \_\_\_\_ (name of franchisor)\_\_\_\_.

5. Any funds deposited hereunder in the Escrow Account shall be invested and kept invested by BANK, at the option of \_\_\_\_ (name of franchisor)\_\_\_\_, in obligations of the United States, money market mutual funds with assets in excess of one billion dollars, or savings accounts or certificates of deposits of BANK, until they are to be disbursed as provided in paragraph 6 hereof.

All interested received and any increment thereon shall be added to the funds so deposited in the Escrow Account and shall be distributed as provided in paragraph 6.

6. BANK shall pay out funds, plus interest, if any, from the Escrow Account upon the occurrence of one of the following conditions:

- (a) Upon receipt of a letter from an officer of     (name of franchisor)     directing BANK to pay out such funds to     (name of franchisor)    , accompanied by a written notice from the Commissioner stating that he takes no exception (hereinafter referred to as "No Exception Notice") to the release, BANK shall pay apart of all the moneys held in escrow for the benefit of a specified franchise, plus interest, if any, to     (name of franchisor)    .
- (b) Upon written notice from the Commissioner BANK shall return part of all of the deposited franchise fee and other funds, plus interest, if any, to a specified franchisee.
- (c) BANK shall pay funds into court or disperse or deliver them in accordance with any final order of any court of competent jurisdiction.

BANK shall not be personally liable for any act taken or omitted hereunder if taken or omitted by it in good faith and in the exercise of its own best judgment. BANK shall also be fully protected in relying upon any written notice, demand, certificate or document, which it in good faith believes to be genuine.

7. BANK is authorized, in its sole discretion, to disregard any and all notices or instruction given by any of the undersigned or by any other person, firm or corporation, except only such notices or instructions by the Commissioner as are hereinafter provide or and orders or process of any court entered or issued with or without jurisdiction. If any property subject hereto is at any time attached, garnished, or levied upon under any court order or in case the payment, assignment, transfer, conveyance or delivery of any such property shall be stayed or enjoined by any court order, or in case of any court order affecting such property or any part thereof, then and in any of such events BANK is authorized, in its sole discretion, to rely upon and comply with any such order, writ, judgment or decree which it is advised by legal counsel of its own choosing is binding upon it; if it complies with any such order, writ, judgment or decree, it shall not be liable to any of the parties hereto or to any other person, firm or corporation by reason of such compliance even though such order, writ, judgment or decree may be subsequently reversed, modified, annulled, set aside or vacated.

8. Written consent of BANK to act in the capacity of escrowee shall be manifested upon the duly authorized execution of this Agreement. The Commissioner may, at any time, inspect the records of BANK, insofar as they relate to this Escrow Agreement. At the Commissioner's discretion, statements indicating status of escrow shall be furnished by BANK to the Commissioner. An executed duplicate original of the Agreement shall be filed with the

Securities Commissioner, State Capitol 5<sup>th</sup> Floor, 600 East Boulevard Avenue, Bismarck, North Dakota, 58505.

9. BANK shall be paid by     (name of franchisor)     for any expenses incurred by it and reasonable compensation for its services hereunder. Funds held by BANK pursuant to this Agreement shall not be subject to liens or charges by BANK.

10. If BANK believes it to be reasonably necessary to consult with counsel concerning any of its duties in connection with this escrow, or in the event BANK retains counsel upon becoming involved in litigation on account of any deposit or of this Agreement,     (name of franchisor)     shall reimburse BANK for and indemnify and hold BANK harmless against any and all costs, attorneys' fees, charges, disbursements and expenses in connection with such consultation or litigation.

11.     (Name of franchisor)     unconditionally guarantees that, in the event BANK misapplies, dissipates, converts or is otherwise responsible for a deficiency in the funds deposited in the Escrow Account,     (name of franchisor)     shall reimburse each and every franchisee to the extent of such deficiency if such amounts deposited are required to be returned to such franchisee under paragraph 6 hereof.

12.     (Name of franchisor)     shall give each franchisee a copy of this agreement prior to collecting any monies from such franchisee.

13. BANK'S duties as escrowee shall terminate upon final distribution of all moneys received under this Agreement.

IN WITNESS WHEREOF, this Agreement has been duly executed, the parties intending to be legally bound hereby.

ATTEST:

NAME AND ADDRESS OF BANK:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

BY: \_\_\_\_\_

Title: \_\_\_\_\_

\_\_\_\_\_  
Bank's Secretary

NAME AND ADDRESS OF FRANCHISOR:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

BY: \_\_\_\_\_

Title: \_\_\_\_\_

\_\_\_\_\_  
Franchisor's Secretary

PETITION FOR RELEASE OF ESCROWED FUNDS

IN THE MATTER OF:

FRANCHISOR: \_\_\_\_\_

FRANCHISEE: \_\_\_\_\_

DATE: \_\_\_\_\_

The undersigned franchisor hereby requests the North Dakota Securities Commissioner to authorize release from escrow the sum of \$ \_\_\_\_\_, plus accrued interest, representing (percentage) of the amounts paid by (name of franchisee), (address of franchisee) on \_\_\_\_\_, 20\_\_\_\_.

The undersigned franchisor hereby represents that it has performed its obligations under the franchise or other agreement which are a precondition to the release of part of all of the escrowed funds, and that \_\_\_\_\_ days has elapsed since opening of franchisee's business as verified herein by the same franchisee at the undersigned franchisor's request.

The undersigned franchisor recognizes that said franchisee has not waived any rights by affixing his or her signature to this petition.

The undersigned franchisee acknowledges that he or she received the goods and services pertaining to the establishment and opening of his or her business, which he or she was entitled to receive under the agreement with the undersigned franchisor and that \_\_\_\_\_ days has elapsed since the opening of franchisee's business.

The undersigned franchisee consents to the release to (name of franchisor) of the sum of \$ \_\_\_\_\_, plus accrued interest, representing (percentage) of the amounts paid by the undersigned franchisee on \_\_\_\_\_, 20\_\_\_\_.

The undersigned franchisee understands that this statement does not hold harmless the franchisor nor waive any rights that the undersigned franchisee may have against said franchisor for unsatisfactory performance of its obligations under the franchise or other agreement.

\_\_\_\_\_  
Printed Name of Franchisee

\_\_\_\_\_  
Name of Bank

\_\_\_\_\_  
Address of Franchisee

\_\_\_\_\_  
Address of Bank

\_\_\_\_\_  
Franchisee's Phone Number

\_\_\_\_\_  
Franchisor's Phone Number

\_\_\_\_\_  
Signature of Franchisee

By: \_\_\_\_\_  
Name and Title

Dear Sir/Madam:

The Commissioner has no objection to the release to the above named franchisor of the sum for which this petition has been made, subject to the following exceptions, if any:

\_\_\_\_\_  
North Dakota Securities Commissioner

Date: \_\_\_\_\_

SURETY BOND

We, \_\_\_\_\_ (name of franchisor) \_\_\_\_\_, a corporation with principal offices at (address of franchisor) \_\_\_\_\_, as principal, and \_\_\_\_\_ (name of surety company) \_\_\_\_\_, a surety company incorporated under the law of the State (Province) of \_\_\_\_\_, and authorized to conduct business in the State (Province) of \_\_\_\_\_, as Surety, are indebted to administrator, \_\_\_\_\_ (address of administrator) \_\_\_\_\_, Obligee, in the sum of \_\_\_\_\_ to be paid to the Obligee or its legal representatives, successors, or assigns, for which payment we bind ourselves and our legal representatives and successors, jointly and severally.

WHEREAS, the above-named principal has made application to the administrator for registration of the offer of its franchises under the \_\_\_\_\_ (franchise law) \_\_\_\_\_; and

WHEREAS, the Principal proposes to offer in \_\_\_\_\_ (state or province) \_\_\_\_\_ franchise(s) within one year from the effective date of the proposed registration under \_\_\_\_\_ (franchise law) \_\_\_\_\_; and

WHEREAS, the administrator has authority to require a franchisor to assure its financial capability to furnish goods and/or services to assist its franchisees in establishing and opening their franchise businesses by the escrow of franchise fees and other payments or other means acceptable to the administrator; and

WHEREAS, one of the means by which a franchisor can give such assurance of financial capability is the furnishing of a security bond in form and with surety acceptable to the administrator; and

WHEREAS, the administrator finds this bond and surety acceptable on the conditions herein stated; and

WHEREAS, the Obligee intends to assign this bond to the respective purchaser(s) of the aforementioned franchise(s) upon sale of the aforementioned franchise(s) to said purchaser(s).

THEREFORE, the condition of this bond is that if the Principal, its agent or employees shall:

1. Comply with the \_\_\_\_\_ (franchise law) \_\_\_\_\_ and all rules and orders promulgated thereunder; and
2. Pay all damages suffered by any person by reason of the violation of the said \_\_\_\_\_ (franchise law) \_\_\_\_\_ or any rules, or orders promulgated thereunder of any acts, rules or orders amendatory thereof and/or supplementary thereto, or hereafter enacted, or by reason of any misrepresentation, deceit, fraud or omission to state a material fact necessary in order to make any statement made in light of the circumstances under which such statement was made, not misleading, including, but not limited to, the failure

to disclose, as required by \_\_\_\_\_ (franchise law) \_\_\_\_\_ and the rules and regulations promulgated thereunder, the true financial condition of franchisor; and

3. Fully completes its obligations under the franchise agreement and all related agreements to provide real estate, improvements, equipment, inventory, training, and other items included in the franchise offering;

then this obligation shall be void; otherwise this obligation will remain in full force and effect. This bond and obligation hereunder shall be deemed to run continuously and shall remain in full force and effect for three (3) full years after the effective date of Principal's registration of the off of franchises under \_\_\_\_\_ (franchise law) \_\_\_\_\_.

In the event that any action or proceeding is initiated with respect to this bond, the parties agree that the venue thereof shall be the state of province in which the offer or sale of the franchise occurred.

IN WITNESS WHEREOF, Principal and Surety have executed this instrument at

\_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

(SEAL)

\_\_\_\_\_  
Principal

By: \_\_\_\_\_  
Name and Title

(SEAL)

\_\_\_\_\_  
Surety

\_\_\_\_\_  
Attorney-in-Fact

\_\_\_\_\_  
Address of Attorney-in-Fact

\_\_\_\_\_



FORM OF CORPORATE RESOLUTION

CORPORATE RESOLUTION OF  
(AFFILIATE)  
FOR THE GUARANTEE OF PERFORMANCE OF  
(FRANCHISOR)

RESOLVED, that it is desirable and in the best interest of this Corporation that its affiliate, (name of franchisor) \_\_\_\_\_, be authorized to offer and sell franchises in the State of \_\_\_\_\_; that the President, any Vice-President, the Secretary, or any Assistant Secretary are hereby authorized to execute on behalf of this Corporation any Guarantee of Performance of all of the duties and obligations of \_\_\_\_\_ (name of franchisor) \_\_\_\_\_, to furnish goods and/or services necessary to establish and open the business of franchisees to whom franchises are granted by \_\_\_\_\_ (name of franchisor) \_\_\_\_\_, pursuant to the registration of such franchises in the State of \_\_\_\_\_, and the terms and conditions of its franchise and other agreements entered into with franchisees in the State of \_\_\_\_\_, as the same have been or may hereafter be amended, modified, renewed, or extended from time to time; and that the execution of previous such Guarantees of Performance of \_\_\_\_\_ (name of franchisor) \_\_\_\_\_, by any of the aforesaid officers is hereby ratified and approved.

FORM OF SECRETARY'S CERTIFICATE

CERTIFICATE

The undersigned hereby certifies that the undersigned is the \_\_\_\_\_ Secretary of \_\_\_ (name of affiliate) \_\_\_, a corporation organized and existing under the laws of the State of \_\_\_\_\_, that the foregoing is a true and correct copy of the resolution duly adopted at a meeting of the Board of Directors of said corporation held on the \_\_\_ day of \_\_\_\_\_, 20\_\_\_, at which meeting a quorum was at all times present and acting; that the passage of said resolution was in all respects legal; and that said resolution is in full force and effect.

Dated this \_\_\_ day of \_\_\_\_\_, 20\_\_\_.

\_\_\_\_\_  
Secretary