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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:13-cv-01751-LTB

STEAK N SHAKE ENTERPRISES, INC.
and STEAK N SHAKE, LLC,

Plaintiffs,

v.

GLOBEX COMPANY, LLC,
SPRINGFIELD DOWNS, INC.,
CHRISTOPHER BAERNS,
LARRY BAERNS,
KATHRYN BAERNS,
and CONTROL, LLC,

Defendants.

AMENDED COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES

Plaintiffs Steak n Shake Enterprises, Inc. and Steak n Shake, LLC, by their attorneys, and as and for their Amended Complaint against defendants Globex Company, LLC, Springfield Downs, LLC, Christopher Baerns, Larry Baerns, Kathryn Baerns, and Control, LLC, state as follows:

INTRODUCTION

1. This action arises out of the termination of (A) written franchise and license agreements between Steak n Shake Enterprises, Inc., as franchisor, and Steak n Shake, LLC, as licensor, on the one hand, and defendants Globex Company, LLC and Springfield Downs, LLC, as franchisees and licensees, and their individual guarantors, on the other, and (B) a written area

development agreement between SNS Enterprises, Inc. and defendant Control, LLC. After defendants materially breached their obligations under the franchise and license agreements and failed to cure those defaults after having been given notice of their defaults and an opportunity to cure, Steak n Shake Enterprises, Inc. and Steak n Shake, LLC terminated the franchise and license agreements for cause. Likewise, after defendant Control, LLC breached the area development agreement by failing to establish restaurants in accordance with the development schedule set forth in the agreement, SNS Enterprises, Inc. exercised its express right to terminate that agreement for cause.

2. Notwithstanding termination of the franchise and license agreements and area development agreement, defendants continue to use the Steak n Shake name and marks in connection with the operation of competitive restaurants at the same locations as their former franchised Steak n Shake restaurants, and to hold their restaurants out to the public as authentic Steak n Shake restaurants, which they are not.

3. By this action, Steak n Shake Enterprises, Inc. and Steak n Shake, LLC seek (A) preliminary and permanent injunction relief enjoining defendants' trademark infringement and unfair competition, and ordering defendants to perform their post-termination obligations under their franchise and license agreements and area development agreement, including their noncompetition covenants, (B) recovery of the amounts owed to them by defendants, the damages each has sustained by reason of defendants' breaches and the resulting termination of the franchise and license agreements and area development agreement, and (C) an award of the attorneys' fees and costs incurred by Steak n Shake Enterprises, Inc. and Steak n Shake, LLC, as provided for in the parties' agreements.

PARTIES

4. Plaintiff Steak n Shake Enterprises, Inc. (“SNS Enterprises”) is an Indiana corporation with its principal place of business in Indianapolis, Indiana.

5. Plaintiff Steak n Shake, LLC (“SNS”) is an Indiana limited liability company with its principal place of business in Indianapolis, Indiana. None of SNS’s members is a citizen or resident of Colorado.

6. Defendant Globex Company, LLC (“Globex”) is a Colorado limited liability company with its principal place of business in Colorado.

7. Defendant Springfield Downs, LLC (“Springfield”) is a Colorado limited liability company with its principal place of business in Colorado.

8. Defendants Christopher Baerns, Larry Baerns and Kathryn Baerns are citizens and residents of Colorado.

9. Defendant Control, LLC (“Control”) is a Colorado limited liability company with its principal place of business in Colorado. Control is the sole member of Globex and Springfield. All of the members of Control, including defendants Christopher Baerns, Larry Baerns and Kathryn Baerns, are citizens and residents of Colorado.

JURISDICTION AND VENUE

10. The Court has original subject matter jurisdiction of this civil action under 28 U.S.C. §§ 1331, 1338 and 1367, in that this is a civil action involving claims arising under the laws of the United States, including an Act of Congress relating to trademarks, and wherein all other claims are so related to claims within the Court’s original jurisdiction that they form part of the same case or controversy. The Court also has original subject matter jurisdiction of this

action under 28 U.S.C. § 1332, in that this is a civil action between citizens of different States wherein the amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

11. Venue is proper in this judicial district under 28 U.S.C. § 1391, in that each defendant resides in this judicial district and a substantial part of the events or omissions giving rise to the claims asserted herein occurred in this judicial district.

RELEVANT FACTS

12. Steak n Shake Operations, Inc., SNS Enterprise's parent, has continuously operated Steak n Shake restaurants specializing in premium burgers and hand-dipped milkshakes since 1934. There are currently 415 company-owned Steak n Shake restaurants in 15 states across the country. In addition, SNS Enterprises grants franchises to qualified persons to establish and operate Steak n Shake restaurants pursuant to written franchise agreements with SNS Enterprises, and written license agreements with SNS. There are currently 100 franchised Steak n Shake restaurants operating in 23 states, including Colorado.

The Steak n Shake Name and Marks

13. To identify the source, origin, and sponsorship of Steak n Shake products and services, and to distinguish those products and services from those established, made, offered, and sold by others, SNS Enterprises, SNS and their authorized franchisees and licensees have extensively used certain trademarks, service marks, trade names, logos, emblems, commercial symbols, and indicia of origin, including but not limited to the "Steak n Shake" mark and related marks (the "Steak n Shake Marks"), in connection with the operation of authorized Steak n Shake restaurants.

14. The Steak n Shake Marks are owned by SNS, and are licensed to authorized SNS Enterprises' franchisees for use solely in connection with their operation of franchised Steak n Shake restaurants operated pursuant to written franchise agreements with SNS Enterprises.

15. The Steak n Shake Marks are registered on the Principal Register of the United States Patent and Trademark Office. The registration of the Steak n Shake Marks continues in full force and effect.

16. SNS has given notice to the public of the registration of the Steak n Shake Marks as provided in 15 U.S.C. § 1111 and complies with all legal requirements to ensure that it and its authorized licensees remain the exclusive users of the Steak n Shake Marks.

17. Steak n Shake Operations, Inc., SNS Enterprises, and SNS, and their authorized franchisees and licensees have continuously used the Steak n Shake Marks in interstate commerce in connection with the operation of Steak n Shake restaurants and the promotion, offer and sale of the products and services they offer throughout the United States, since the date of their registration.

18. Steak n Shake Operations, Inc., SNS Enterprises, and SNS, and their authorized franchisees and licensees have extensively advertised and promoted the Steak n Shake Marks and the products and services offered in association with those marks throughout the United States and through various media. As a result of such efforts and the substantial amounts spent in connection therewith, the products and services offered at Steak n Shake restaurants under the Steak n Shake Marks have met with widespread public approval and have established demand and goodwill among consumers throughout the United States.

Defendant Control's Area Development Agreement

19. On December 2, 2011, Control entered into a written area development agreement with SNS Enterprises pursuant to which it initially committed to establish eight franchised Steak n Shake restaurants in a defined area in accordance with a specified development schedule.

20. The area development agreement was amended on September 25, 2012. As amended, the area development agreement required Control to develop a total of thirteen franchised Steak n Shake restaurants within its development area in accordance with a specified development schedule.

Defendants' Franchise and License Agreements

21. On September 26, 2012, Globex and Springfield entered into franchise and license agreements with SNS Enterprises and SNS, respectively, for the operation of franchised Steak n Shake restaurants in Centennial and Sheridan, Colorado.

22. Defendants Christopher Baerns, Larry Baerns and Kathryn Baerns personally guaranteed each of Globex's and Springfield's obligations under their respective franchise and license agreements.

23. Under the franchise agreements, defendants specifically acknowledged and agreed, among other things, that (a) maintaining uniformity – including uniformity of the prices specified by SNS Enterprises for menu items and mandatory promotions – is essential to the success of the Steak n Shake system; (b) they would exclusively use menus printed by SNS Enterprises and would serve, sell and offer for sale all of the (and only the) food and beverage products and merchandise listed in those menus at the prices specified by SNS Enterprises; and

(c) they would not deviate from the standards, specifications and procedures for serving and selling food and merchandise – including pricing – specified by SNS Enterprises.

24. The franchise agreements expressly provide for termination of the franchise agreements in the event Globex or Springfield sells food or merchandise for a price in excess of any maximum price established by SNS Enterprises or fails to offer a mandatory promotion.

25. Each of the license agreements provides that the Steak n Shake Marks may be used solely in accordance with the terms of the franchise agreement, and prohibits the use of the Steak n Shake Marks not permitted under the franchise agreement. The unauthorized use of the Steak n Shake Marks constitutes grounds for immediate termination of the license agreements.

26. Globex and Springfield further agreed that, upon termination of the franchise agreements, they would cease any and all use of the Steak n Shake Marks, and any methods associated with those marks, pay SNS Enterprises and SNS all damages, together with interest, costs and attorneys' fees caused by any default or termination, and, at SNS Enterprises' option, sell to SNS Enterprises any unique Steak n Shake restaurant equipment, fixtures, signage and décor.

Defendants' Breaches and Failure to Cure

27. Beginning in May 2013, SNS Enterprises started receiving customer complaints about Globex's and Springfield's overcharging customers and refusal to comply with mandatory national marketing promotions, including its highly successful \$4 menu. After investigating, SNS Enterprises determined that Globex and Springfield were not using the \$4 menu specified by SNS Enterprises, were not displaying the required \$4 menu marketing materials, were using different menus than those provided by SNS Enterprises, and were charging customers price that

were far higher than the prices specified by SNS Enterprises and advertised in mandatory promotions.

28. On June 18, 2013, SNS Enterprises served Globex and Springfield with written notice of default notifying them that, unless they promptly cured their defaults by offering the \$4 menu to all customers and displaying all required marketing materials for the \$4 menu, SNS Enterprises and SNS would terminate their franchise and license agreements for cause.

29. Notwithstanding their express obligations under the franchise and license agreements and the written notice of default served on them, Globex's and Springfield's breaches of the franchise and license agreements continued. Accordingly, by written notice dated July 3, 2013 and served on defendants that day, SNS Enterprises and SNS terminated for cause the franchise and license agreements based on Globex's and Springfield's material breaches and failure to cure those breaches even after having received written notice of default.

Control's Breach of the Area Development Agreement

30. Under the area development agreement, Control was required to open its third franchised Steak n Shake restaurant on or before June 2, 2013.

31. Section 7.04 of the area development agreement provides that Control's failure to meet its development schedule shall constitute a default under the agreement.

32. Control breached the area development agreement by failing to comply with its development obligations to open a third restaurant on or before June 2, 2013.

33. Section 4.04 of the area development agreement provides that if Control breaches the agreement or fails to fully and completely perform all of the covenants set forth therein, the

balance of the area development fee held by SNS Enterprises at the time of the breach shall be forfeited to SNS Enterprises as liquidated damages.

34. Additionally, Section 7.06 of the area development agreement provides that upon the occurrence of any of default by Control, SNS Enterprises may terminate the area development agreement effective immediately upon notice to Control.

35. SNS Enterprises terminated the area development agreement by written notice date July 3, 2013 based on Control's failure to comply with its development schedule.

36. As a result of Control's breach, SNS Enterprises is entitled to retain the \$190,000 balance of the area development fee.

Defendants' Post-Termination Obligations

37. Globex and Springfield each assumed certain post-termination obligations under their respective franchise agreement, including, without limitation, (1) to cease any and all use of the Steak n Shake Marks and proprietary and confidential information; (2) to de-identify their former franchised restaurant locations as being or having been associated with Steak n Shake, and to repaint and change the exterior and interior of the restaurants to distinguish them from a Steak n Shake restaurant; (3) to assign the telephone number and web address associated with their former franchised Steak n Shake restaurants to SNS Enterprises; and (4) to pay all amounts owed to SNS Enterprises and damages sustained by SNS Enterprises by reason of termination of the franchise agreements.

38. In addition, Globex and Springfield agreed that, for a two year period following termination of the franchise agreements, they would not have any interest in a competing

business located within five miles of their former franchised Steak n Shake restaurants or any other Steak n Shake or Steak n Shake Signature restaurant.

39. Each of the Baerns defendants guaranteed Globex's and Springfield's post-termination obligations and agreed to be personal bound by their noncompetition covenants.

40. Control agreed in the area development agreement that for a two year period following termination of that agreement it would not have any interest in a competing business located within its former development area.

**Defendants' Failure to Comply
With Their Post-Termination Obligations**

41. Notwithstanding termination of the franchise and license agreements and the area development agreement, defendants have failed and refused to comply and continue to fail to comply with their post-termination obligations under their respective agreements.

42. Defendants continue to operate unauthorized Steak n Shake restaurants at the same locations as their former franchised Steak n Shake restaurants, and to use the Steak n Shake Marks in connection therewith, falsely holding their restaurants out to the public as authorized and authentic Steak n Shake restaurants when they are not.

43. Defendants also refuse to perform or to comply with their respective post-termination covenants not to compete under the franchise agreements and area development agreement. Instead, defendants continue to operate competitive businesses at the same locations as their former franchised Steak n Shake restaurants, and to offer products and services that are identical to those offered by defendants at their former franchised Steak n Shake restaurants.

44. Defendants also continue to use SNS Enterprises' proprietary and confidential information in connection with the operation of their competitive businesses.

COUNT I - TRADEMARK INFRINGEMENT

45. SNS Enterprises and SNS repeat and reallege ¶¶ 1 through 44 of their Amended Complaint as and for this ¶ 45, as if fully set forth herein.

46. Defendants' acts, practices, and conduct constitute an infringing use in interstate commerce of the Steak n Shake Marks, and are likely to cause consumer confusion or mistake and deceive the public in violation of Section 32(1) of the Lanham Act, 15 U.S.C. § 1114(1).

47. Defendants' acts were, and continue to be, knowing and willful.

48. As a direct and proximate result of defendants' infringement, SNS Enterprises and SNS have been and will continue to be substantially injured in their business, including their business reputation and goodwill associated with the Steak n Shake Marks, resulting in lost revenues and profits, and diminished goodwill.

49. SNS Enterprises and SNS have no adequate remedy at law because the Steak n Shake Marks are unique and represent to the public the Steak n Shake identity, reputation, and goodwill, such that damages alone cannot fully compensate SNS Enterprises and SNS for defendants' misconduct.

50. Unless enjoined by the Court, defendants will continue to use and to infringe the Steak n Shake Marks to SNS Enterprises' and SNS' irreparable injury. This threat of future injury to SNS Enterprises' and SNS' business, identity, goodwill, and reputation requires injunctive relief to prevent defendants' continued use of the Steak n Shake Marks, and to ameliorate and mitigate SNS Enterprises' and SNS' injuries.

COUNT II - UNFAIR COMPETITION

51. SNS Enterprises and SNS repeat and reallege ¶¶ 1 through 50 of their Amended Complaint as and for this ¶ 51, as if fully set forth herein.

52. Defendants' acts, practices, and conduct constitute unfair competition, and false or misleading descriptions or representations of fact, in that they are likely to cause confusion or mistake, to deceive others as to the affiliation, connection, or association of the parties, and/or to misrepresent the nature, characteristic, qualities, or geographic origin of the parties' goods, services and commercial activities, all in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

53. Defendants' acts were, and continue to be, knowing and willful.

54. As a direct and proximate result of defendants' unfair competition, SNS Enterprises and SNS have been and will continue to be substantially injured in their business, including their goodwill and reputation, resulting in lost revenues and profits, and diminished goodwill.

55. SNS Enterprises and SNS have no adequate remedy at law because the Steak n Shake Marks are unique and represent to the public the Steak n Shake identity, reputation, and goodwill, such that damages alone cannot fully compensate SNS Enterprises and SNS for defendants' misconduct.

56. Unless enjoined by the Court, defendants will continue to compete unfairly with SNS Enterprises and SNS to their irreparable injury. This threat of future injury to SNS Enterprises' and SNS' business, identity, goodwill, and reputation requires injunctive relief to prevent defendants' continued unfair competition, and to ameliorate and mitigate their injuries.

COUNT III - BREACH OF CONTRACT – SPECIFIC PERFORMANCE

57. SNS Enterprises and SNS repeat and reallege ¶¶ 1 through 56 of their Amended Complaint as and for this ¶ 57, as if fully set forth herein.

58. Defendants' failure and refusal to comply with their post-termination obligations under the franchise and license agreements, including their obligations under their noncompetition covenants, the obligation to de-identify their restaurants, the obligation to cease all use of the Steak n Shake Marks, and the obligation to cease all use of SNS Enterprises' proprietary and confidential information, constitute material breaches of the franchise and license agreements.

59. As a result of defendants' continuing breaches, SNS Enterprises and SNS have suffered and will continue to suffer actual, substantial, and irreparable harm, including but not limited to loss of customer goodwill and loyalty, franchise system instability, the inability to rebrand the territory formerly serviced by defendants' franchised Steak n Shake restaurants, lost profits, diminution in the value of its proprietary and confidential information, and loss of competitive advantage.

60. Further, SNS Enterprises and SNS have been and will be irreparably harmed by defendants' actions, and monetary damages are an insufficient remedy in that they cannot fully and adequately compensate SNS Enterprises and SNS for the continuing damage to the value of SNS Enterprises' and SNS' goodwill, reputation, proprietary and confidential information, and its inability to rebrand the territory, all of which are caused by defendants' ongoing breaches.

61. Absent injunctive relief enjoining their misconduct and ordering specific performance of their post-termination obligations, defendants' breaches will continue.

COUNT IV – BREACH OF CONTRACT – DAMAGES

62. SNS Enterprises and SNS repeat and reallege ¶¶ 1 through 61 of their Amended Complaint as and for this ¶ 62, as if fully set forth herein.

63. Defendants’ conduct constitutes material breaches of the franchise and license agreements.

64. As a direct and proximate result of defendants’ material breaches and the resulting termination of the franchise and license agreements, SNS Enterprises and SNS have sustained damages in an amount in excess of \$75,000, exclusive of interest and costs, to be proven at trial.

COUNT V – BREACH OF GUARANTY – DAMAGES

65. SNS Enterprises and SNS repeat and reallege ¶¶ 1 through 64 of their Amended Complaint as and for this ¶ 65, as if fully set forth herein.

66. Defendants Christopher Baerns’, Larry Baerns’, and Kathryn Baerns’ conduct constitute material breaches of their personal guarantees of Globex’s and Springfield’s obligations under their respective franchise and license agreements.

67. As a direct and proximate result of these defendants’ breaches of their guarantees, SNS Enterprises has sustained damages in an amount in excess of \$75,000, exclusive of interest and costs, to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, SNS Enterprises and SNS respectfully pray for the following relief against defendants, jointly and severally, as follows:

- A. A preliminary injunction enjoining defendants, and each of them, and their respective agents, servants and employees, and those people in active concert or participation with them from:
1. Using the Steak n Shake Marks, or any trademark, service mark, logo, or trade name that is confusingly similar to the Steak n Shake Marks;
 2. Otherwise infringing the Steak n Shake Marks or using any similar designation, alone or in combination with any other components;
 3. Passing off any products or services as those of Steak n Shake or Steak n Shake's authorized franchisees;
 4. Causing a likelihood of confusion or misunderstanding as to the source or sponsorship of their business, products, or services;
 5. Causing a likelihood of confusion or misunderstanding as to their affiliation, connection or association with Steak n Shake or Steak n Shake's franchisees, or with any of their products or services; and
 6. Unfairly competing with Steak n Shake or Steak n Shake's franchisees, in any manner;
- B. A preliminary injunction directing defendants, and each of them, and their respective agents, servants and employees, and those people in active concert or participation with them, to fully perform their post-termination obligations, including, without limitation, their obligations under their noncompetition covenants;

- C. An order pursuant to 15 U.S.C. § 1118 that all labels, signs, prints, packages, wrappers, receptacles, logo items, and advertisements in the possession of defendants, their agents, servants and employees, and any person in active concert or participation with them, bearing any of the Steak n Shake Marks, and all plates, molds, and other means of making the same, if any, be delivered to SNS at defendants' cost;
- D. An order that defendants file with the Court and serve upon SNS Enterprises' and SNS' counsel within ten (10) days after entry of any injunction or order issued herein, a written report, under oath, setting forth in detail the manner in which they have complied with such injunction or order;
- E. An order that defendants account and pay over to SNS all gains, profits and advantages derived by them as a result of their infringement of the Steak n Shake Marks and unfair competition to the full extent provided for by Section 35 of the Lanham Act, 15 U.S.C. § 1117;
- F. An order that defendants pay to SNS Enterprises and SNS such damages as they have sustained by reason of defendants' trademark infringement and unfair competition, and that, because of the willful nature of said infringement, the Court enter judgment for SNS Enterprises and SNS in an amount equal to three times the amount of said damages, pursuant to Section 35 of the Lanham Act, 15 U.S.C. 1117;
- G. An award of the costs and expenses, including reasonable attorneys' fees and costs, incurred by SNS Enterprises and SNS in connection with this action;

- H. Judgment in favor of SNS Enterprises and SNS and against defendants, jointly and severally, in amounts to be proven at trial; and
- I. Such other and further relief as the Court deems just and proper.

Dated: July 19, 2013

Respectfully submitted,

s/ Kimberly B. Still

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Attorneys for Plaintiffs Steak n Shake Enterprises,
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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 2013, a true and correct copy of the foregoing **AMENDED COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES** was duly served via U.S. Mail, first class postage prepaid, addressed to the following:

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