

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

STEAK N SHAKE ENTERPRISES, INC.,)
)
Plaintiff,)
) CASE NO. 1:09-cv-404 / SEB-TAB
v.)
)
THE VARNSON GROUP, LLC,)
)
Defendant.)
_____)
THE VARNSON GROUP,)
)
Counterclaim Plaintiff,)
)
v.)
)
STEAK N SHAKE ENTERPRISES, INC.)
)
Counterclaim Defendants.)
_____)
THE VARNSON GROUP,)
)
Third-Party Plaintiff,)
)
v.)
)
SARDAR BIGLARI, individually,)
)
Third-Party Defendant.)

**VARNSON’S ANSWER, AFFIRMATIVE DEFENSES, AND
COUNTERCLAIM/THIRD-PARTY COMPLAINT
IN RESPONSE TO PLAINTIFF’S VERIFIED COMPLAINT
FOR IMMEDIATE DECLARATORY RELIEF**

Defendant, The Varnson Group (“Varnson”), by counsel, for its Answer to the
Verified Complaint for Immediate Declaratory Relief filed by Plaintiff, Steak n Shake

Enterprises, Inc., (hereinafter “Plaintiff’s Complaint”) repeats the allegations in Plaintiff’s Complaint and answers those allegations as follows:

I. VARNSON’S ANSWER

1. This action for immediate declaratory relief is brought pursuant to Ind. Trial Procedure Rule 57 and Ind. Code § 34-14-1-1 *et seq.* for the purpose of determining a question of actual controversy between and among the parties. The complaint is solely about obtaining Steak n Shake’s proprietary information from Varnson, who is wrongfully retaining Steak n Shake’s proprietary information.

RESPONSE:

Paragraph 1 of Plaintiff’s Complaint asserts legal conclusions to which no response is required. To the extent there are factual allegations to which a response is required, Varnson denies the allegations contained in Paragraph 1 of Plaintiff’s Complaint.

The Parties

2. Steak n Shake is an Indiana corporation with its principal place of business located in Indianapolis, Marion County, Indiana.

RESPONSE:

Varnson admits the allegations contained in Paragraph 2 of Plaintiff’s Complaint.

3. Varnson is a limited liability company with its principal place of business located in Buford, Gwinnett County, Georgia.

RESPONSE:

Varnson admits that its principal place of business is located in Buford, Gwinnett County, Georgia. However, Varnson denies that it is a limited liability company. Rather, Varnson is a sole proprietorship owned by Alan Varnson.

The Agreement

4. On or about November 18, 2008, Steak n Shake entered into an Agreement for Advertising Services (the “Agreement”) with Varnson, whereby Varnson agreed to provide, manage and coordinate advertising, promotional and marketing services for Steak n Shake. A copy of the Agreement is attached hereto as Exhibit A.

RESPONSE:

Varnson responds by stating that the Agreement for Advertising Services (the “Agreement”) between Steak n Shake and Varnson speaks for itself. To the extent there are factual allegations to which a response is required, Varnson denies the allegations contained in Paragraph 4 of Plaintiff’s Complaint.

5. Section XXII of the Agreement provides as follows:

This Agreement is made under and in all respect shall be interpreted, construed and governed by and in accordance with the laws of the State of Indiana. Any suit brought by either party to enforce the terms of this Agreement or to cure any breach hereof shall be venued only in the state or federal courts located in Marion County, Indiana and the parties hereby submit to the exclusive jurisdiction of such courts over any dispute between them.

Therefore, this Court has personal jurisdiction over Varnson and venue is proper.

RESPONSE:

Varnson responds by stating that the Agreement speaks for itself. Moreover, Paragraph 5 of Plaintiff’s Complaint asserts legal conclusions to which no response is required. To the extent there are factual allegations to which a response is required, Varnson denies any allegations contained in Paragraph 5 of Plaintiff’s Complaint that are inconsistent with the Agreement.

The Proprietary Information Varnson Is Wrongfully Retaining

6. Currently, Varnson is wrongfully retaining possession of significant amounts of Steak n Shake’s recent advertising and promotional data and information, including electronic data and information created by Varnson and Steak n Shake’s

advertising agency in the form of Steak n Shake's marks, promotional materials, photographs, coupon templates and other print advertisement templates (the "Advertising Digital Asset Library").

RESPONSE:

Varnson denies the allegations contained in Paragraph 6 of Plaintiff's Complaint.

7. The Advertising Digital Asset Library consists of advertising materials which are irreplaceable and essential to Steak n Shake's advertising and marketing activities. Without the use and access to the Advertising Digital Asset Library, executing marketing or advertising efforts is pragmatically difficult. Varnson should return the Advertising Digital Asset Library to Steak n Shake on the original hard drive that was provided to Varnson.

RESPONSE:

Varnson responds by stating it is no longer in possession of the original hard drive provided to Varnson by Steak n Shake. The hard drive was returned to Steak n Shake. Varnson is presently without sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 7 of Plaintiff's Complaint and, therefore, denies the same.

8. Additionally, Varnson refuses to release Steak n Shake's website domain, <http://www.steaknshakevaluevault.com>, where customers can access and print online coupons for menu items (the "Domain Name").

RESPONSE:

Varnson denies the allegations contained in Paragraph 8 of Plaintiff's Complaint.

9. Steak n Shake considers the Advertising Digital Asset Library and the Domain Name to be proprietary information of Steak n Shake.

RESPONSE:

Varnson is without knowledge as to what Steak n Shake “considers” to be proprietary information. Thus, Varnson is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 9 of Plaintiff’s Complaint and, therefore, denies the same.

10. The Advertising Digital Asset Library and Domain Name are proprietary information of Steak n Shake. *See* Section XVII(1) of the Agreement (stating that information is proprietary including “without limitation, technical, financial or business information, specifications, drawings, data, computer programs, customer information, or other documentation belonging to [Steak n Shake] or others which [Steak n Shake] or such other person considers proprietary”) and Section XVII(1)(b), which contemplates the inclusion of marketing and advertising materials into the scope of proprietary information.

RESPONSE:

Paragraph 10 of Plaintiff’s Complaint asserts legal conclusions to which no response is required. Moreover, the Agreement speaks for itself. To the extent there are factual allegations to which a response is required, Varnson denies the allegations contained in Paragraph 10 of Plaintiff’s Complaint.

11. The Advertising Digital Asset Library and Domain Name are hereinafter collectively referred to as the “Proprietary Information.”

RESPONSE:

Paragraph 11 of Plaintiff’s Complaint contains no factual allegations against Varnson to which a response is required. To the extent there are factual allegations to which a response is required, is presently without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 11 of Plaintiff’s Complaint and, therefore, denies the same.

12. Under no circumstances shall Varnson have an ownership interest or other interest in the Proprietary Information, as Section XVII(4) of the Agreement clearly

states, “Nothing contained in this Agreement shall be construed as granting or conferring any rights by license or otherwise in any [Proprietary] Information disclosed to [Varnson].”

RESPONSE:

Paragraph 12 of Plaintiff’s Complaint asserts legal conclusions to which no response is required. Moreover, the Agreement speaks for itself. To the extent there are factual allegations to which a response is required, Varnson denies the allegations contained in Paragraph 12 of Plaintiff’s Complaint.

13. The Proprietary Information is invaluable in effectively and efficiently providing marketing and advertising services, and Varnson wrongfully retaining the Proprietary Information unreasonably impedes upon Steak n Shake’s current advertising and marketing efforts and makes them pragmatically difficult.

RESPONSE:

Varnson denies that it wrongfully retained the “Proprietary Information.” Varnson is presently without sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 13 of Plaintiff’s Complaint and, therefore, denies the same.

Varnson Must Immediately Return The Proprietary Information

14. Varnson must immediately return the Proprietary Information to Steak n Shake because the Agreement clearly provides that Varnson must do so when Steak n Shake makes the request. *See* Section SVII(4) of the Agreement, which states, “[U]pon request, [Varnson] will return all [Proprietary] Information in tangible form to [Steak n Shake].” (emphasis added).

RESPONSE:

Paragraph 14 of Plaintiff’s Complaint asserts legal conclusions to which no response is required. Moreover, the Agreement speaks for itself. To the extent there are factual allegations to which a response is required, Varnson denies the allegations contained in Paragraph 14 of Plaintiff’s Complaint.

15. In accordance with Section XVII(4) of the Agreement, Steak n Shake has formally requested that Varnson return all the Proprietary Information to Steak n Shake in a letter dated February 20, 2009, a copy of which is attached hereto as Exhibit B. Nonetheless, Varnson has refused to return the Proprietary Information despite its obligation to do so under Section XVII(4) of the Agreement.

RESPONSE:

Varnson denies the allegations contained in Paragraph 15 of Plaintiff's Complaint. Varnson further states that the letter dated February 20, 2009 from Steak n Shake speaks for itself.

16. Varnson has no further use for the Proprietary Information because it ceased providing advertising services under the Agreement. These services ceased when Steak n Shake sent a Notice of Termination letter to Varnson pursuant to the notice provisions under Section VIII of the Agreement on February 3, 2009, a copy of which is attached hereto as *Exhibit C*, and when Steak n Shake notified Varnson of its right to suspend Varnson's work under Section IX of the Agreement in a letter dated February 16, 2009, a copy of which is attached hereto as *Exhibit D*. Additionally, no monies are due and owing to Varnson under the Agreement or otherwise.

RESPONSE:

Varnson denies the allegations contained in Paragraph 16 of Plaintiff's Complaint. Varnson further states that the letters dated February 3, 2009 and February 16, 2009 from Steak n Shake speak for themselves.

17. Under the express terms of the Agreement, the "[Proprietary Information shall be used for the sole purpose of providing the Services, and [Proprietary] Information shall not at any time or in any manner be used for any other purpose." Section XVII(5) of the Agreement. Varnson has no interest in the Proprietary

Information. Varnson is no longer providing services under the Agreement, and Varnson has no purpose for retaining the Proprietary Information.

RESPONSE:

Varnson responds by stating that the Agreement speaks for itself. Moreover, Paragraph 17 of Plaintiff's Complaint asserts legal conclusions to which no response is required. To the extent there are factual allegations to which a response is required, Varnson denies the allegations contained in Paragraph 17 of Plaintiff's Complaint.

18. Varnson has expressly waived any rights to the Proprietary Information. See Section XVII(5), stating, "[Varnson] assumes full and complete responsibility for confirmation and verification of all [Proprietary] Information received or obtained by [Varnson] and expressly waives all rights of recourse against [Steak n Shake] with respect to the same."

RESPONSE:

Paragraph 18 of Plaintiff's Complaint asserts legal conclusions to which no response is required. Moreover, Varnson the Agreement speaks for itself. To the extent there are factual allegations to which a response is required, Varnson denies the allegations contained in Paragraph 18 of Plaintiff's Complaint.

**Varnson Has An Affirmative Contractual Obligation
To Return The Proprietary Information**

19. Even if Steak n Shake had not requested that Varnson return the Proprietary Information under the express language in Section XVII(4) of the Agreement, Varnson has an affirmative obligation to return the Proprietary Information to Steak n Shake under Section VIII(2) of the Agreement. *See* Section VIII(2) (stating that when the Agreement is terminated, Varnson must "transfer, assign and make available to [Steak n Shake] all property and materials (including incomplete approved work) in [Varnson's]

possession or control belonging to [Steak n Shake], and all information regarding [Steak n Shake's] advertising").

RESPONSE:

Paragraph 19 of Plaintiff's Complaint asserts legal conclusions to which no response is required. Moreover, the Agreement speaks for itself. To the extent there are factual allegations to which a response is required, Varnson denies the allegations contained in Paragraph 19 of Plaintiff's Complaint.

20. Therefore, under the terms of the Agreement, Steak n Shake is entitled to the return of the Proprietary Information, even without Steak n Shake's request.

RESPONSE:

Paragraph 20 of Plaintiff's Complaint asserts legal conclusions to which no response is required. To the extent there are factual allegations to which a response is required, Varnson denies the allegations contained in paragraph 20 of Plaintiff's Complaint. Moreover, the Agreement speaks for itself.

**Varnson's Refusal To Return The Proprietary Information
Requires Immediate Action**

21. There is no basis for Varnson to be withholding the Proprietary Information from Steak n Shake. Steak n Shake only seeks immediate return of the Proprietary Information. The Court can quickly and efficiently resolve this case by issuing a declaratory judgment ordering the immediate return to Steak n Shake of the Proprietary Information.

RESPONSE:

Paragraph 21 of Plaintiff's Complaint asserts legal conclusions to which no response is required. To the extent there are factual allegations to which a response is required, Varnson denies the allegations contained in paragraph 21 of Plaintiff's Complaint.

22. Due to Varnson's failure to return the Proprietary Information to Steak n Shake, Steak n Shake is incurring significant harm and significant damages, which also require immediate action.

RESPONSE:

Varnson denies the allegations contained in Paragraph 22 of Plaintiff's Complaint.

23. Because the Advertising Digital Asset Library consists of significant amounts of Steak n Shake's recent advertising and promotional data and information, Varnson's wrongful retention of the Advertising Digital Asset Library prevents Steak n Shake from efficiently proceeding with its advertising and marketing efforts.

RESPONSE:

Varnson denies that it wrongfully retained the Advertising Digital Asset Library. Varnson denies that it prevented Steak n Shake from efficiently proceeding with advertising and marketing efforts. Varnson is presently without sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 23 of Plaintiff's Complaint and, therefore, denies the same.

24. Without the Advertising Digital Asset Library, Steak n Shake is incurring expenses with its current advertising agency in the amount of \$135 per hour, excluding overtime and any rush charges which would result in a higher rate, for recreating digital assets needed for completing advertising service work.

RESPONSE:

Varnson is presently without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 24 of Plaintiff's Complaint and, therefore, denies the same.

25. Without Varnson's release of the Domain Name, the coupons that are available under the Domain Name are expiring, and Steak n Shake cannot access the

Domain Name to make changes to the expiration dates of coupons or to update the coupons available there.

RESPONSE:

Varnson denies the allegations contained in Paragraph 25 of Plaintiff's Complaint.

26. Steak n Shake has received numerous complaints from patrons and customers who are unable to obtain coupons because the coupons have expired. Additionally, Steak n Shake has been made aware that these problems are resulting in a loss of customer visits and sales.

RESPONSE:

Varnson is presently without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 26 of Plaintiff's Complaint and, therefore, denies the same.

27. Further, Steak n Shake has incurred additional administrative expenses and hurdles as a result of Varnson's failure to return the Proprietary Information.

RESPONSE:

Varnson denies the allegations contained in Paragraph 27 of Plaintiff's Complaint.

This Court Should Declare That Varnson Must Release The Proprietary Information

28. This dispute has arisen between the parties based upon Varnson's refusal to return the Proprietary Information to Steak n Shake pursuant to the Agreement.

RESPONSE:

Varnson denies the allegations contained in Paragraph 28 of Plaintiff's Complaint.

29. The conflicting contentions present a real and substantial controversy between the parties involving the respective rights and liabilities of them with respect to return of the Proprietary Information, which controversy may be quickly and efficiently determined by a declaratory judgment of this Court, without other suits.

RESPONSE:

Paragraph 29 of Plaintiff's Complaint asserts legal conclusions to which no response is required. To the extent there are factual allegations to which a response is required, Varnson is presently without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 29 of Plaintiff's Complaint and, therefore, denies the same.

WHEREFORE, Defendant, The Varnson Group, denies any and all material allegations in Plaintiff's Complaint not specifically admitted and requests that Plaintiff, Steak n Shake Enterprises, Inc., take nothing by way of its Complaint, that the Court enter judgment in favor of Varnson, that the costs of this action be assessed against Steak n Shake, and that Varnson be awarded all other just and appropriate relief.

II. VARNSON'S AFFIRMATIVE DEFENSES

For its Affirmative Defenses to Plaintiff's Complaint, Varnson pleads the following:

1. Plaintiff's Complaint fails to state a claim upon which relief can be granted.
2. Plaintiff's damages, if any, were not proximately caused by Varnson's actions.
3. Varnson reserves the right to file a motion to dismiss based on lack of subject matter jurisdiction because there is no case or controversy to adjudicate.

4. Plaintiff's claims may be barred by its failure to meet conditions precedent and/or by Plaintiff's breach of the Agreement.

5. Plaintiff's claims may be barred in whole or in part by the doctrines of estoppel, equitable estoppel, release, waiver, accord and satisfaction, and payment.

6. Plaintiff's claims may be barred in whole or in part by the equitable doctrine of unclean hands.

7. To the extent the facts discovered support this defense, Plaintiff failed to mitigate, minimize or avoid any damages allegedly sustained.

8. Discovery and investigation are incomplete and Varnson cannot be reasonably expected to presently know whether additional affirmative defenses may be applicable. Varnson therefore reserves the right to add additional affirmative defenses as may be applicable and appropriate during the pendency of this action.

WHEREFORE, Defendant, The Varnson Group, requests that Plaintiff, Steak n Shake Enterprises, Inc., take nothing by way of its Complaint, that the Court enter judgment in favor of Varnson, that the costs of this action be assessed against Steak n Shake, and that Varnson be awarded all other just and appropriate relief.

II. VARNSON'S COUNTERCLAIM/THIRD-PARTY COMPLAINT

Counterclaim Plaintiff/Third-Party Plaintiff, The Varnson Group ("Varnson"), by counsel and for its Counterclaim and Demand for Jury Trial against Counterclaim Defendant, Steak n Shake Enterprises, Inc. ("Steak n Shake"), and Third-Party Defendant, Sardar Biglari, individually, states as follows:

Parties, Venue, and Jurisdiction

1. The Varnson Group is a sole proprietorship owned by Alan Varnson. Varnson's principal place of business is located at 554 W. Main Street, Building A Suite 300, Buford, Georgia 30518.
2. Varnson is in the business of providing advertising and marketing services.
3. Alan Varnson is an individual residing in Gwinnett County, Georgia.
4. Upon information and belief, Steak n Shake Enterprises, Inc., is an Indiana corporation, having its principal place of business in Indianapolis, Marion County, Indiana.
5. Steak n Shake is in the restaurant business and operates over 500 restaurants in 21 states, including over 60 franchised units. Steak n Shake's restaurants are located in Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, West Virginia and Wisconsin.
6. Upon information and belief, Defendant, Sardar Biglari ("Biglari"), is an individual residing in Marion County, Indiana.
7. At all relevant times, Biglari was the Chief Executive Officer of Steak n Shake.
8. This is a civil action seeking damages for breach of contract, fraudulent inducement, civil conversion, unjust enrichment, and violations of the Indiana and Federal Securities Act.

9. This action is between citizens of different states, and the amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

10. Accordingly, pursuant to 28 U.S.C. §1332, this Court has diversity jurisdiction over this action.

11. Defendants have regularly conducted business in the state of Indiana and within this district. Personal jurisdiction over Defendants is thus proper, as is venue in this district and division pursuant to 28 U.S.C. §1391(a).

Factual Allegations

12. In September of 2008, Varnson contacted Steak n Shake to discuss possible advertising opportunities. Shortly thereafter, Varnson was contracted to provide endorsement radio services to Steak n Shake.

13. In October of 2008, Varnson began discussing the possibility of an “Agency of Record” arrangement with Steak n Shake, wherein Varnson would be appointed as Steak n Shake’s agent in handling certain advertising products and services.

14. On or about November 1, 2008, Varnson entered into an Agreement for Advertising Services (“Advertising Agreement”) with Steak n Shake. A true and accurate copy of the Advertising Agreement is attached hereto as Exhibit A.

15. The “Scope of Work” to be performed by Varnson under the Advertising Agreement is defined in Exhibit A to the Advertising Agreement. *See* Exhibit A to Advertising Agreement.

16. The compensation to be paid by Steak n Shake to Varnson under the Advertising Agreement is defined in Exhibit B to the Advertising Agreement. Specifically, for November and December of 2008, Varnson was to be paid \$55,000 per

month, with \$25,000 in cash and, at Steak n Shake's discretion, up to \$30,000 in Common Stock of the Steak n Shake Company ("Stock"). For services performed in 2009 and 2010 under the Advertising Agreement, Varnson was to be paid \$178,333 per month (hereinafter "Monthly Retainer"), with \$95,000 paid in Stock at Steak n Shake's discretion. *See* Exhibit B to Advertising Agreement.

17. Varnson had agreed to reduce its compensation in November and December of 2008 because Steak n Shake had to terminate its advertising relationship with Young & Laramore ("Y&L") to enter into the Advertising Agreement with Varnson, requiring Steak n Shake to pay a 90-day termination fee to Y&L.

18. Upon information and belief, immediately after entering into the Advertising Agreement, Biglari asked a former marketing executive of Steak n Shake to begin scheduling appointments with other advertising agencies.

19. In late November and early December of 2008, Biglari met with advertising agencies, including but not limited to J. Walter Thompson, Empower Media, Zimmerman, and ID Media. During these meetings, Biglari and/or Steak n Shake employees (under the direction of Biglari) represented to the agencies that they would get all of Steak n Shake's advertising business knowing that Steak n Shake had a 2-year Advertising Agreement with Varnson.

20. In entering into the Agreement, Biglari and Steak n Shake had no intention of fulfilling its obligations to Varnson under the Agreement.

21. Specifically, Biglari and Steak n Shake had no intention of having Varnson serve as "Agent of Record" for the duration of the contract.

22. In addition, prior to entering into the Agreement, Biglari and Steak n Shake had plans to take the marketing in-house, which they failed to disclose to Varnson.

23. To induce Varnson to agree to a reduced fee for November and December of 2008, however, Biglari and Steak n Shake knowingly misrepresented to Varnson that Steak n Shake intended to keep Varnson as “Agency of Record.”

24. Based on Biglari and Steak n Shake’s fraudulent acts, Varnson also agreed to provide advertising services to Steak n Shake at no cost in October of 2008.

25. From October 2008 through January 2009, Varnson produced in excess of 16 pieces of television creative.

26. Approximately three months into the Agreement, on or about February 3, 2009, Steak n Shake issued a Notice of Termination letter (“Notice of Termination”) providing Varnson with 90 days notice of Steak n Shake’s intent to terminate the Advertising Agreement. A true and accurate copy of the Notice of Termination is attached hereto as Exhibit B.

27. The Notice of Termination specifically states that the termination would be effective on May 5, 2009.

28. With the Notice of Termination, Steak n Shake also provided “a list of all of [sic] Services which the terminating party believes remain outstanding” (hereinafter “Varnson Transition Planning Sheet”). Consistent with the parties’ understanding of the effective termination date, the Varnson Transition Planning Sheet provided that all outstanding Services were to be completed by Varnson no later than May 5, 2009.

29. On March 2, 2009 (within thirty days of the Notice of Termination as provided for in the Advertising Agreement), Varnson provided Steak n Shake with a list

of invoices due and owing from Steak n Shake to Varnson, with copies of the actual invoices detailing the services provided. In total, there was \$1,620, 726.62 in fees due and owing from Steak n Shake to Varnson through the effective termination date of May 5, 2009.

30. On or about March 5, 2009, Steak n Shake sent an electronic payment to Varnson in the amount of \$25,778.80.

31. On or about March 11, 2009, Steak n Shake sent an electronic payment to Varnson in the amount of \$1,145,576.89, leaving a balance due and owing in the amount of \$449,370.93.

32. To date, Steak n Shake refuses to pay the balance due and owing.

33. Specifically, Steak n Shake has advised that it refuses to pay any Monthly Retainers to Varnson beyond February 17, 2009.

34. Pursuant to the Advertising Agreement, the Advertising Agreement can only be terminated with ninety (90) days written notice to the non-terminating party.

35. In the event of termination, Steak n Shake is required to pay all fees incurred on a *pro rata* basis through the day of the month in which termination is effective.

36. Based on the date that the Notice of Termination was issued, termination of the Advertising Agreement is effective on May 5, 2009.

37. Thus, Steak n Shake is required to pay all fees incurred through May 5, 2009.

38. Specifically, Steak n Shake is required to pay the Monthly Retainer on a *pro rata* basis through May 5, 2009.

Count I: Breach of Advertising Agreement

For Count I of its Complaint against Counterclaim Defendant, Steak n Shake, Varnson alleges as follows:

39. Varnson incorporates each allegation contained in Paragraphs 1 through 38 above as if fully set forth herein.

40. By its acts and/or omissions, including without limitation Steak n Shake's failure to remit all fees due and owing to Varnson under the Advertising Agreement, Steak n Shake has breached its contractual obligations owed to Varnson.

41. Varnson has fully performed any and all contractual obligations owed to Steak n Shake under the Advertising Agreement.

42. As a result of Steak n Shake's breach of the Advertising Agreement, Varnson has been harmed.

WHEREFORE, Counterclaim Plaintiff, The Varnson Group, respectfully requests that the Court enter judgment against Counterclaim Defendant, Steak n Shake Enterprises, Inc., and in favor of Varnson in an amount sufficient to compensate Varnson for its damages resulting from Steak n Shake's breach of Advertising Agreement, and for all other relief just and proper in the premises.

Count II: Conversion
(Statutory and Common Law)

For Count II of its Complaint against Counterclaim Defendant, Steak n Shake Enterprises, Inc., Varnson alleges as follows:

43. Varnson incorporates each allegation contained in Paragraphs 1 through 42 above as if fully set forth herein.

44. Steak n Shake knowingly or intentionally exerted unauthorized control over Varnson's property by failing to compensate Varnson for the same.

45. Steak n Shake's use of creative and materials produced by Varnson without compensation constitutes a misappropriation in violation of the Indiana Offenses Against Property Act, Indiana Code §35-43-4-3.

46. Steak n Shake has committed conversion that has proximately caused Varnson to suffer irreparable harm and damages.

47. Varnson is entitled, as provided by Indiana Code §34-24-3-1, to recover treble damages, costs and attorneys' fees.

WHEREFORE, Counterclaim Plaintiff, The Varnson Group, respectfully requests that the Court enter judgment against Counterclaim Defendant, Steak n Shake Enterprises, Inc., and in favor of Varnson in an amount sufficient to compensate Varnson for its damages resulting from Steak n Shake's conversion of Varnson's property, for treble damages, for its costs and attorneys' fees, and for all other relief just and proper in the premises.

Count III: Unjust Enrichment

For Count III of its Complaint against Defendant, Steak n Shake Enterprises, Inc., Varnson alleges as follows:

48. Varnson incorporates each allegation contained in Paragraphs 1 through 47 above as if fully set forth herein.

49. Varnson has provided Steak n Shake with advertising and marketing services since October 2008 and continues to provide transition services to Steak n Shake pursuant to the Agreement.

50. Steak n Shake has benefited from Varnson's services without just compensation to the detriment of Varnson.

51. Such benefit constitutes a windfall to which Steak n Shake is not entitled, and Steak n Shake has been unjustly enriched as a result.

WHEREFORE, Counterclaim Plaintiff, The Varnson Group, respectfully requests that the Court enter judgment against Counterclaim Defendant, Steak n Shake Enterprises, Inc., and in favor of Varnson in the amount that Steak n Shake has been unjustly enriched, and for all other relief just and proper in the premises.

Count IV: Fraudulent Inducement

For Count IV of its Complaint against Counterclaim Defendant, Steak n Shake Enterprises, Inc., and Third-Party Defendant, Sardar Biglari, individually, Varnson alleges as follows:

52. Varnson incorporates each allegation contained in Paragraphs 1 through 51 above as if fully set forth herein.

53. Defendants made false statements of past or existing material fact with knowledge of their falsity for the purpose of inducing Varnson to enter into the Advertising Agreement, to continue business with Steak n Shake, and/or to continue performance under the Advertising Agreement.

54. Specifically, Defendants knowingly misrepresented to Varnson that Steak n Shake intended to fulfill its obligations under the Advertising Agreement when Steak n Shake had no intentions of having Varnson serve as "Agent of Record" for the duration of the contract.

55. Defendants knowingly misrepresented to Varnson that Steak n Shake intended to have Varnson serve as Agent of Record for the duration of the contract when Biglari and Steak n Shake had plans to take the marketing in-house.

56. These material misrepresentations were made for the purpose of inducing Varnson to enter into the Advertising Agreement, to continue business with Steak n Shake, and/or to continue performance under the Advertising Agreement.

57. Varnson relied on Defendants' misrepresentations in agreeing to a reduced fee for November and December of 2008.

58. Varnson further relied on Defendants' misrepresentations in agreeing to provide advertising services to Steak n Shake at no cost in October of 2008.

59. Varnson relied on Defendants' misrepresentations in producing an inordinate amount of television creative at the front end of the Agreement.

60. Varnson relied on Defendants' material misrepresentations in agreeing to accept Stock as part of the Monthly Retainer.

61. As a result of Defendants' material misrepresentations, Varnson has been harmed.

62. Pursuant to well-settled Indiana law, Biglari, an officer of Steak n Shake, is personally liable for the torts in which he participated or which he has authorized or directed. Thus, Biglari should be held liable individually for his tortious acts.

WHEREFORE, Counterclaim Plaintiff, The Varnson Group, respectfully requests that the Court enter judgment against Counterclaim Defendant, Steak n Shake Enterprises, Inc., and Third-Party Defendant, Sardar Biglari, individually, and in favor of Varnson in an amount sufficient to compensate Varnson for its damages resulting from

Defendants' fraudulent inducement, for punitive damages, and for all other relief just and proper in the premises.

Count V: Violations of the Indiana and Federal Securities Acts

For Count V of its Complaint against Counterclaim Defendant, Steak n Shake Enterprises, Inc., and Third-Party Defendant, Sardar Biglari, individually, Varnson alleges as follows:

63. Varnson incorporates each allegation contained in Paragraphs 1 through 62 above as if fully set forth herein.

64. Indiana Code §23-2-1-12 and Section 10(b) of the Federal Securities Exchange Act of 1934 ("Section 10(b)") make it unlawful for any person in connection with the offer, sale or purchase of any security (1) to employ any device, scheme or artifice to defraud, or (2) to make any untrue statements of a material fact or to omit to state a material fact necessary in order to make the statements ... not misleading, or (3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

65. Indiana Code §23-2-1-12 and Section 10(b) imposes private civil liability on those who commit a manipulative or deceptive act in connection with the purchase or sale of securities.

66. The Advertising Agreement provides for the sale of securities to Varnson.

67. Defendants actions in connection with to the Advertising Agreement constitute violations of I.C. §23-2-1-12.

68. Defendants' actions in connection with to the Advertising Agreement constitute violations of Section 10(b).

WHEREFORE, Counterclaim Plaintiff, The Varnson Group, respectfully requests that the Court enter judgment against Counterclaim Defendant, Steak n Shake Enterprises, Inc., and Third-Party Defendant, Sardar Biglari, individually, and in favor of Varnson imposing all civil penalty allowable pursuant to I.C. §23-2-1-12 and Section 10(b) of the Federal Securities Exchange Act, and for all other relief just and proper in the premises.

Varnson's Jury Demand

Varnson hereby requests a trial by jury.

Dated: April 9, 2009

Respectfully submitted,

s/ Sonia S. Chen

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CERTIFICATE OF SERVICE

I certify that on April 9, 2009, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system:

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