

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

EASTERN SHORE RESTAURANTS,	)	
INC.,	)	
	)	
Plaintiff,	)	
	)	Case No.: 1:15-CV-7
v.	)	
	)	
STEAK N SHAKE ENTERPRISES, INC.	)	<u>JURY TRIAL DEMANDED</u>
and BIGLARI HOLDINGS INC.,	)	
	)	
Defendants.	)	

COMPLAINT

Plaintiff Eastern Shore Restaurants, Inc., by and through its undersigned attorneys, respectfully states as follows for its Complaint against Steak n Shake Enterprises, Inc. and Biglari Holdings Inc. (collectively, “Steak n Shake” or “Defendants”):

Nature of the Action

1. This is a case brought by a franchisee against Steak n Shake for unilaterally implementing a policy that takes away the franchisee’s right to set menu prices and mandates that franchisees follow all franchisor-generated promotions as published. Another federal district court already determined that implementation of this policy was wrongful, as Steak n Shake has no contractual authority to do so.

The Parties

2. Defendant Biglari Holdings Inc. (formerly “The Steak n Shake Company”) is incorporated in, and a citizen of, the State of Indiana, with, upon information and belief, its principal place of business located in San Antonio, Texas.

3. Defendant Steak n Shake Enterprises, Inc. is a wholly-owned subsidiary of Biglari Holdings Inc. (formerly “The Steak n Shake Company”) and is incorporated in, and a citizen of, the State of Indiana, with its principal place of business located at 107 S. Pennsylvania Street, Suite 400, Indianapolis, Indiana.

4. Defendants operate, and grant franchises to operate, Steak n Shake restaurants nationwide.

5. Plaintiff Eastern Shore Restaurants, Inc. (“Eastern Shore” or “Plaintiff”) is an Alabama corporation with its principal place of business located at 3125 Government Boulevard, Mobile, Alabama.

6. Since 2007, Eastern Shore has owned and operated three Steak n Shake franchises – two in Mobile, Alabama and one in Pensacola, Florida – which operate under the terms of a multi-unit franchise agreement with Steak n Shake set to expire in 2027.

Jurisdiction and Venue

7. Jurisdiction is conferred on this Court by 28 U.S.C. § 1332(a) because Plaintiff is not a citizen of the same state as any Defendant and the amount in controversy exceeds \$75,000.00, exclusive of interests and costs.

8. Venue lies in this district pursuant to 28 U.S.C. § 1391, because Steak n Shake is subject to personal jurisdiction in, and therefore resides in, this judicial district.

Facts Common to All Counts

I. Overview

9. Since 1939, when Steak n Shake opened its first franchise in Springfield, Illinois, until approximately October of 2010, all Steak n Shake franchisees in the country, including Eastern Shore, were permitted to set their own prices for menu items, and, in many instances,

maintained “custom menus” (e.g., offering product pricing specific to the locale). Additionally, franchisor-generated product promotions have always been optional.

10. Pursuant to federal law, franchisors are required to provide Uniform Franchise Offering Circulars (“UFOCs”) – now more commonly referred to as Franchise Disclosure Documents (FDDs) – to prospective franchisees fourteen days before the franchisee executes a binding franchise agreement. The purpose of the UFOC is to protect franchisees from being misled or investing in a franchise without knowing what they are getting into.

11. As required by law, Steak n Shake provided Eastern Shore with a UFOC before Eastern Shore entered into a Steak n Shake franchise agreement. The UFOC instructed the franchisee to read the UFOC carefully and explicitly stated that it *summarized the terms* of Steak n Shake’s franchise agreement – a contract with a twenty-year term.

12. To induce franchisees to sign a franchise agreement, Steak n Shake touted the franchisees’ contractual right to set their own menu prices in the UFOC.

13. Critically, the Steak n Shake UFOC presented to Eastern Shore stated: ***“Franchisees are free to set consumer prices different from prices on company-owned restaurant menus and several do so.”***

14. The ability to set menu prices was (at the time Eastern Shore entered into the Franchise Agreement) and continues to be material to Eastern Shore to account for differing labor, operational and overhead costs and other expenses that vary based on location, and to otherwise realize earnings in the manner represented by Steak n Shake.

15. Nothing in the franchise agreement attached to the UFOC and executed by Eastern Shore – or, upon information and belief, in any other franchisee’s agreement executed from 1939 to 2009 – contradicts Steak n Shake’s representation that “[f]ranchisees are free to set consumer prices” or gives Steak n Shake the contractual right to (a) set maximum or minimum prices on menu items, whether imposed through promotions or otherwise; or (b) require Eastern Shore to participate in all promotions as published by the franchisor.

16. After a corporate takeover, upon information and belief, Biglari Holdings needed cash flow and intended to get it by increasing Steak n Shake’s franchisee royalty stream, under the premise that reducing prices would increase customer traffic and revenues. Steak n Shake’s royalties are calculated as a percentage of a franchisee’s revenue, not profits, which explains why Steak n Shake wants to increase customer volume through the sale of lower-priced food without concern as to whether franchisees actually make a reasonable profit.

17. Steak n Shake’s new executive leadership, led by current CEO Sardar Biglari, decided that it would set all of its franchisees’ menu prices and require franchisees to follow all promotions as published (the “Policy”) – despite the contrary representation in its UFOC, the lack of any such authority in its franchise agreements, and over seventy years of course of dealing and performance to the contrary.

18. Over strenuous objection, Eastern Shore – like so many other Steak n Shake franchisees – was and continues to be forced to comply with the Policy or face termination of its franchises.

19. From the time of its forced enactment, the Policy has caused Eastern Shore significant damage.

20. The Policy is so harmful to franchisees that another Steak n Shake franchisee, Stuller, Inc., filed a lawsuit in the United States District Court for the Central District of Illinois and obtained a preliminary injunction preventing implementation of the Policy on its five franchises in Illinois. *Under materially the same agreements that are at issue in this case*, the Court found that Stuller is not required to comply with the Policy. See Stuller, Inc. v. Steak N Shake Enterprises, Inc., No. 10-CV-3303, 2012 WL 2872634 (C.D. Ill. July 12, 2012) (granting summary judgment for franchisee), *vacated*, No. 10-CV-3303, Doc. 141 (C.D. Ill. Apr. 3, 2013) (Agreed Order vacating summary judgment opinion pursuant to settlement); see also Stuller, Inc. v. Steak N Shake Enterprises, Inc., 695 F.3d 676 (7th Cir. 2012) (affirming district court's order granting a preliminary injunction against enforcement of the Policy).

21. Yet, even after the United States District Court for the Central District of Illinois, on July 12, 2012, entered a judgment pronouncing that Steak n Shake has *no material evidence* to support its contention that its franchise agreements give it the right to enforce the Policy against its franchisees, Steak n Shake has held steadfast in its ongoing, and system-wide, breach of those agreements by continuing to force its franchisees to abide by the Policy.

22. Other franchisees have also filed lawsuits based on this harmful and improper policy. See Druco Restaurants, Inc. v. Steak n Shake Enterprises, Inc., et al., No. 1:13-cv-00560-LJM-DML; People Sales & Profit Company, Inc. v. Steak n Shake Enterprises, Inc., No. 1:13-cv-00654-LJM-DML; Scott's S&S, Inc. v. Steak n Shake Enterprises, Inc., et al., No. 1:13-cv-00655-LJM-DML.

II. Steak n Shake's UFOC

23. As required by law, before Eastern Shore executed its franchise agreement, Steak n Shake provided it with a UFOC, which had a standard form Steak n Shake franchise agreement attached as an exhibit. A copy of the 2007 Steak n Shake UFOC given to Eastern Shore is attached as **Exhibit A**.

24. Eastern Shore was required to sign a "Receipt" verifying that it had received the UFOC. See Exhibit A, Item 23, p. 54.

25. In bold, the UFOC Receipt advises franchisees to "**READ THIS OFFERING CIRCULAR AND ALL AGREEMENTS CAREFULLY.**" **Exhibit A**, Item 23, p. 54; see also Exhibit B, Addendum to Franchise Agreement, ¶ 6 (acknowledging receipt of UFOC dated January 1, 2007).

26. In bold, the UFOC Receipt also states that the UFOC "**SUMMARIZES CERTAIN PROVISIONS OF THE FRANCHISE AGREEMENT AND OTHER INFORMATION IN PLAIN LANGUAGE.**" **Exhibit A**, Item 23, at p. 54.

27. The UFOC given to Eastern Shore contains an "Item 19," which is titled "Earnings Claims." **Exhibit A**, at pp. 35-39.

28. The Earnings Claims section sets forth information about some of the differences in the operation of Steak n Shake's corporate stores versus its franchised locations. Within this section, the UFOC states, in part:

Furthermore, there are some differences between the operations of a franchised restaurant and a company-owned restaurant. . . . ***Franchisees are free to set consumer prices different from prices on company-owned restaurant menus and several do so.***

Exhibit A, Item 19, p. 36 (hereinafter sometimes referred to as the “Item 19 Representation”) (emphasis added).

29. Nothing in the UFOC controverts the Item 19 Representation. The UFOC does not state anywhere that Steak n Shake reserves the right to, at any time, take away the franchisees’ right to set their own prices.

30. Tellingly, Steak n Shake’s more recent UFOCs and form franchise agreements – revised by Steak n Shake after its franchisee Stuller, Inc. filed a suit similar to this one against Steak n Shake in November 2010 – are dramatically different than those given to Eastern Shore.

31. The 2010 UFOC states five times that the franchisor can set menu prices. The form franchise agreement, attached to the 2010 UFOC as an exhibit, states four times that the franchisor can set menu prices.

32. This drastic change of language further evidences that the franchise agreements governing Eastern Shore’s relationship with Steak n Shake do not give the franchisor the right to set menu prices.

III. Eastern Shore’s Franchise Agreement with Steak n Shake

33. After receiving the UFOC, on September 10, 2007, Eastern Shore entered into its franchise agreement with Steak n Shake to own and operate Steak n Shake franchises located at 3125 Government Boulevard, Mobile, Alabama (the “Government Boulevard Store”), 2057 Airport Boulevard, Pensacola, Florida (the “Pensacola Store”), and 655 Schillinger Road, Mobile, Alabama (the “Schillinger Store”).

34. True and accurate copies of the operative Multi Unit Franchise Agreement dated September 10, 2007, and the various supplements, addenda, and amendments thereto (collectively the “Franchise Agreement”) are attached hereto as **Exhibit B**.

35. The Franchise Agreement is governed by Indiana law. **Exhibit B**, Multi Unit Franchise Agreement, § 14.17, at p. 35.

36. Section 1.3 of the Franchise Agreement obligates Eastern Shore to operate the restaurants in accordance with the Steak n Shake “System.” **Exhibit B**, Multi Unit Franchise Agreement, § 1.3, at p. 3.

37. The term “System” is defined in the Franchise Agreement as:

The Company has created and developed a unique restaurant concept, including buildings with a distinctive architectural design, decorative color scheme and trade dress, and has standardized methods of preparing and serving certain food products and beverages for on-premises and off-premises consumption in manuals and other materials of the Company (the “**Operating Standards Manual**”) as issued and revised from time to time (hereinafter collectively referred to as the “**System**”).

Exhibit B, Recitals, at p. 1 (emphasis in original).

38. The definition of “System” in the Franchise Agreement does not include “menu prices.” Id.

39. The Franchise Agreement also obligates Steak n Shake, as the franchisor, to provide Eastern Shore with a copy of its Operating Standards Manual, and authorizes Steak n Shake to modify its Operating Standards Manual and other applicable manuals and publications during the term of the franchise. **Exhibit B**, Multi Unit Franchise Agreement, § 5.1, at pp. 10-11.

40. Section 5.1 of the Franchise Agreement, however, expressly limits Steak n Shake’s right to modify the Operating Standards Manual and other manuals and publications to changing products, services and standards of product quality and service – not menu pricing. **Exhibit B**, Multi Unit Franchise Agreement, § 5.1, at p. 10.

41. In fact, pricing is not mentioned anywhere in the Franchise Agreement. **Exhibit B**, *passim*.

42. In sum, the Franchise Agreement does not give Steak n Shake the right to set menu prices or require franchisees to follow all promotions as published. *Id.*

43. Indeed, even Steak n Shake's Director of Real Estate, Franchise and Litigation Law, Tonya Sallee, admitted in Stuller that the franchise agreement does not "specifically contain" the right for Steak n Shake to set maximum menu prices.

IV. The Policy

44. On June 17, 2009, Mr. Sardar Biglari began making all investment and other capital allocation decisions for The Steak n Shake Company. Less than one year later, on April 8, 2010, The Steak n Shake Company changed its name to "Biglari Holdings Inc.," effective immediately.

45. Not long thereafter, Mr. Biglari announced that Steak n Shake would be enacting the Policy.

46. With its enactment of the Policy, for the first time in its 70 years of franchising, Steak n Shake's new management made the proclamation, contradicted by at least fifteen years of UFOCs and prior representations, that its franchise agreements gave it the authority to dictate menu prices.

47. The Policy purports to require all franchisees, including Eastern Shore, to follow a set menu and pricing and to offer all company promotions as published. See Policy, attached as **Exhibit C**; see also Amended Policy, attached as **Exhibit D** (taking away franchisees' ability to set prices for breakfast items).

48. The Policy was met with system-wide resistance from the Steak n Shake franchisee community.

49. Several franchisees, including Eastern Shore, formed a franchise association, the One Voice Franchise Association (“OVFA”), comprising 51 of the then 70 franchise locations, to voice their collective objection to the Policy, including that the Steak n Shake franchise agreements do not give Steak n Shake the right to set menu prices.

50. The OVFA informed Steak n Shake that lower menu prices would mean financial disaster for many franchisees and sought to negotiate an amicable resolution. *Id.*

51. In the end, Steak n Shake made the decision to bully, rather than bargain, and made clear that it would terminate any franchisee that refused to adopt the Policy.

52. Since Eastern Shore has been forced to comply with the Policy, Steak n Shake has dramatically lowered menu prices and/or failed to increase menu prices where necessary (i.e., due to increased local or national food costs) and required franchisees to actually give away many food products as promotions, yet – paradoxically – made decisions that significantly increase food costs.

53. For instance, in June of 2010, Steak n Shake eliminated its own distribution facility and contracted with another company, Sygma, to be the single distributor of products to its company-owned and franchised restaurants. Per the terms of franchisees’ franchise agreements with Steak n Shake, franchisees, including Eastern Shore, are required to purchase all of their products from Sygma at the price negotiated by Steak n Shake. As a result, Steak n Shake effectively controls the franchisees’ cost of all goods sold.

54. By virtue of its mandate that Sygma is the exclusive supplier of all products to franchisees, together with its Policy requiring all franchisees to follow set menu pricing on every item on their menu, Steak n Shake effectively controls both the buy and sell prices for every food item sold by franchisees.

55. As a result of Steak n Shake's ongoing breach of the Franchise Agreement, Eastern Shore has been significantly damaged.

56. Eastern Shore has continued to object to Steak n Shake's breach of its Franchise Agreement and has sought an amicable resolution.

57. Because attempts to resolve this dispute have failed, as a last resort and with more than 13 years left under the terms of its Franchise Agreement, Eastern Shore seeks this Court's intervention.

**COUNT I: REQUEST FOR DECLARATORY JUDGMENT
AND PERMANENT INJUNCTION**

58. Plaintiff incorporates Paragraphs 1 through 57 of this Complaint by reference as if fully stated herein.

59. In cases of actual controversy such as this one, the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., grants the Court the power to issue judgments declaring the rights and other legal relations of any interested party, whether or not further relief is or could be sought.

60. By means of the foregoing, actual controversies have arisen and presently exist between Eastern Shore and Steak n Shake regarding whether Steak n Shake has the contractual right to impose the Policy on Eastern Shore and whether Eastern Shore's non-compliance with the Policy would constitute grounds for termination or an event of default under the terms of the Franchise Agreement.

61. Eastern Shore has a legally protectable interest at stake in resolving this controversy consisting of a pecuniary interest directly at issue and subject to immediate or prospective relief.

62. This judicial determination is necessary, appropriate, and ripe at this time so that the parties may resolve this ongoing dispute.

63. All parties having a direct interest in this matter are properly joined herein.

64. Eastern Shore will succeed on the merits of its claim; Eastern Shore has no adequate remedy at law available to otherwise resolve this matter and will suffer irreparable harm without an injunction; the balance of the harms favors entering an injunction; and entry of the injunction will not harm the public interest.

WHEREFORE, Eastern Shore respectfully requests that this Court:

- (1) Enter an Order and declaratory judgment that:
 - (a) Eastern Shore's Franchise Agreement with Steak n Shake does not permit Steak n Shake to set maximum or minimum menu prices, or require Eastern Shore to participate in all promotions as published;
 - (b) The Policy contradicts Steak n Shake's representations in the UFOCs that the franchisees are free to set their own prices;
 - (c) Eastern Shore is not required to comply with Steak n Shake's Policy under applicable law and/or its Franchise Agreement;
 - (d) Eastern Shore may set prices for its menu items, participate in such promotions, and have such custom menus as it deems fit in its discretion;
 - (e) Eastern Shore is not subject to default or termination for refusing to comply with the Policy; and

- (f) Under the parties' Franchise Agreement, Eastern Shore is entitled to its attorneys' fees, expenses and costs.
- (2) Enter a permanent injunction:
 - (a) barring Steak n Shake from forcing Eastern Shore to comply with the Policy or any policy that limits Eastern Shore's right to set its own menu prices (including through any forced updates or changes to the "Point of Sale" system by Steak n Shake or Steak n Shake's refusal to allow Eastern Shore to make updates or changes to its menu prices via the "Point of Sale" system), and from requiring Eastern Shore to adopt all promotions as published by Steak n Shake; and
 - (b) barring Steak n Shake from terminating Eastern Shore's franchises, or otherwise taking any adverse action against Eastern Shore due to its refusal to comply with the Policy.

COUNT II: BREACH OF CONTRACT

65. Eastern Shore incorporates Paragraphs 1 through 64 of this Complaint by reference as if fully stated herein.

66. As set forth above, Eastern Shore and Steak n Shake are parties to a multi-unit Franchise Agreement.

67. The Franchise Agreement does not give Steak n Shake the right to force or require Eastern Shore to follow the Policy.

68. Nonetheless, through continuous automatic "Point of Sale" system updates, threats of termination and other acts, Steak n Shake has required and continues to require Eastern Shore to implement the Policy, thereby breaching the Franchise Agreement.

69. Eastern Shore has performed its obligations under the Franchise Agreement.

70. As the result of Steak n Shake's actions, Eastern Shore has been and will be damaged.

WHEREFORE, Eastern Shore prays for judgment in its favor and against Steak n Shake on Count II, for an award of actual damages incurred as a result of Steak n Shake's forced implementation of the Policy, for its attorneys' fees and costs incurred in bringing this action pursuant to the terms of its Franchise Agreement, and for such further relief as the Court deems just and proper.

COUNT III: FRAUD

71. Eastern Shore incorporates Paragraphs 1 through 70 of this Complaint by reference as if fully stated herein.

72. In its 2007 UFOC, which purported to summarize the terms of Eastern Shore's twenty-year term Franchise Agreement, Steak n Shake made the following false statement of past or existing material fact: **"Franchisees are free to set consumer prices different from prices on company-owned restaurant menus and several do so."**

73. Steak n Shake made the statement to induce Eastern Shore to enter into the Franchise Agreement. As set forth above, the right to set menu prices was of paramount importance to Eastern Shore to account for differing labor, operational and overhead costs and other expenses that vary based on location, and to otherwise realize earnings in the manner represented by Steak n Shake.

74. Steak n Shake made this statement knowing it to be false or acting recklessly without knowledge as to its truth or falsity.

75. Eastern Shore justifiably relied and acted upon the statement by entering into a twenty-year term Franchise Agreement that Eastern Shore never would have entered into if it had known that Steak n Shake would later unilaterally withdraw its right to set menu prices.

76. Eastern Shore has suffered an injury in the form of lost profits as the result of Steak n Shake's fraud and will continue to suffer damages throughout the remainder of the term of the Franchise Agreement.

77. In making the false statement in its UFOC, Steak n Shake acted willfully, thus entitling Eastern Shore to punitive damages.

WHEREFORE, Eastern Shore prays for judgment in its favor and against Steak n Shake on Count III, for an award of damages incurred as a result of Steak n Shake's fraud, for punitive damages, for its attorneys' fees and costs incurred in bringing this action pursuant to the terms of its Franchise Agreement, and for such further relief as the Court deems just and proper.

**COUNT IV: VIOLATION OF THE
FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICE ACT**

78. Eastern Shore incorporates Paragraphs 1 through 77 of this Complaint by reference as if fully stated herein.

79. In its 2007 UFOC, which purported to summarize the terms of Eastern Shore's twenty-year term Franchise Agreement, Steak n Shake made the following statement: "Franchisees are free to set consumer prices different from prices on company-owned restaurant menus and several do so."

80. Steak n Shake made the statement to induce Eastern Shore to enter into the Franchise Agreement. As set forth above, the right to set menu prices was of paramount importance to Eastern Shore to account for differing labor, operational and overhead costs and

other expenses that vary based on location, and to otherwise realize earnings in the manner represented by Steak n Shake.

81. In making this statement and later forcing Eastern Shore to adopt the Policy in direct contravention of the statement, Steak n Shake engaged in an unfair and/or deceptive act or practice in the conduct of trade and commerce in violation of F.S.A. § 501.204.

82. In forcing Eastern Shore to adopt the Policy despite its previous representation that “[f]ranchisees are free to set consumer prices different from prices on company-owned restaurant menus,” Steak n Shake has caused Eastern Shore significant damage.

WHEREFORE, Eastern Shore prays for judgment in its favor and against Steak n Shake on Count IV, and, pursuant to F.S.A. §§ 501.211 and 501.2105, for an award of actual damages, attorneys’ fees and court costs, and for such further relief as the Court deems just and proper.

JURY DEMAND

Eastern Shore demands a jury trial on all Counts.

Dated: January 2, 2015

Respectfully submitted,

By /s/ Wayne C. Turner

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