

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

MEINEKE FRANCHISOR SPV, LLC as
successor-in-interest to MEINEKE CAR
CARE CENTERS, LLC, as successor-in-
interest to MEINEKE DISCOUNT
MUFFLER SHOPS, INC.,

Plaintiff,

vs.

CALM 3322, INC., CALM 4839, INC.,
CHARLES OLSON, MIDTOWN
AUTOMOTIVE SERVICE
AND EXHAUST, INC., and
ELITE AUTOMOTIVE SERVICE AND
EXHAUST, INC.,

Defendants.

Case No. _____

COMPLAINT

Plaintiff, Meineke Franchisor SPV, LLC, as successor-in-interest to Meineke Car Care Centers, LLC, as successor-in-interest to Meineke Discount Muffler Shops, Inc. (“Meineke”), for its Complaint against Defendants, CALM 3322, Inc. (“CALM 3322”), CALM 4839, Inc. (“CALM 4839”), Charles Olson (“Individual Defendant”), Midtown Automotive Service and Exhaust, Inc. (“Midtown”), and Elite Automotive Service and Exhaust, Inc. (“Elite”), (collectively all Defendants shall hereinafter be referred to as “Defendants”), alleges and says as follows:

THE PARTIES

1. Meineke is a limited liability company organized and existing under the State of North Carolina, with its principal place of business located at 440 South Church Street, Suite 700, Charlotte, Mecklenburg County, North Carolina.

2. Meineke is a North Carolina limited liability company, and its sole member is Driven Systems, LLC. Driven Systems, LLC is a Delaware limited liability company, and its sole member is Driven Brands Funding, LLC. Driven Brands Funding, LLC is a Delaware limited liability company, and its sole member is Driven Funding HoldCo, LLC. Driven Funding HoldCo, LLC is a Delaware limited liability company, and its sole member is Driven Brands, Inc. Driven Brands, Inc. is a Delaware corporation with its principal place of business located at 440 S. Church Street, Suite 700, Charlotte, North Carolina 28202-2059. Thus, for jurisdictional purposes, Driven Brands, Inc., and in turn, Meineke, is a citizen of both Delaware and North Carolina.

3. CALM 3322, Inc., is a corporation existing under Nebraska law with its principal office located at 3322 Leavenworth Street, Omaha, Nebraska 68105, and is therefore a citizen of Nebraska.

4. CALM 4839, Inc., is a corporation existing under Nebraska law with its principal office located at 4839 North 90th Street, Omaha, Nebraska 68134, and is therefore a citizen of Nebraska.

5. Individual Defendant is a citizen and resident of the State of Nebraska residing at 745 Surrey Road, Elkhorn, Nebraska 68022. He is the President of CALM 3322.

6. Midtown is a corporation existing under Nebraska law with its principal office located at 3322 Leavenworth Street, Omaha, Nebraska 68105, and is therefore a citizen of Nebraska.

7. Elite is a corporation existing under Nebraska law with its principal office located at 4839 North 90th Street, Omaha, Nebraska 68134, and is therefore a citizen of Nebraska.

8. Individual Defendant operates and controls CALM 3322, CALM 4839, Midtown, and Elite.

JURISDICTION AND VENUE

9. This Court has *in personam* jurisdiction over this action, and of the parties hereto, because Meineke's claims arise out of promises made by Defendants to be performed within the Court's jurisdiction by virtue of Rule 4(k)(1)(A), Federal Rules of Civil Procedure.

10. Additionally, this Court has personal jurisdiction over Defendants, as they are citizens of the State within this judicial district.

11. This Court has subject matter jurisdiction over Defendants pursuant to 28 U.S.C. § 1332 because there is complete diversity of citizenship between the parties and the amount in controversy exceeds the requisite sum or value of \$75,000.00, exclusive of interest and costs.

12. In addition, this Court has jurisdiction over the subject matter of this action pursuant to: (a) 28 U.S.C. § 1331 because this is an action arising under the laws of the United States and supplemental jurisdiction pursuant to 28 U.S.C. § 1367; (b) 15 U.S.C. § 1121 and 28 U.S.C. § 1338(a) because of Meineke's claims arising out of the Defendants' violations of the Lanham Act; and (c) 28 U.S.C. § 1338(b) because this action presents one or more claims of unfair competition that are joined with one or more substantial and related claims under the Lanham Act.

13. Venue of this action in this judicial district and division is proper under and by virtue of 28 U.S.C. §1391(b)(2), because, among other things, a substantial part of these events or omissions giving rise to the claims in this action occurred in this judicial district.

14. Venue of this action in this judicial district is proper in accordance with 28 U.S.C. § 1391(b)(2) because Defendants CALM 3322, CALM 4839, and Individual Defendant negotiated for a long-term franchise and contractual relationship which required obligations to be performed in this district, namely operating two automobile repair and maintenance centers, and Defendants Midtown and Elite are working in concert with CALM 3322, CALM 4839, and Individual Defendant to breach the non-compete covenants and unfairly compete with Meineke in this district.

GENERAL ALLEGATIONS

The Nature of Meineke's Business

15. Meineke grants franchises to qualified persons to establish and operate automobile maintenance and repair centers under a standard, unique, and uniform system Meineke developed, and grants to those persons the right to use Meineke's federally-registered trade name, trademark, logo, and other proprietary marks.

Meineke's Protected Trademarks, Trade Dress, Logos, and Color Scheme

16. Since its founding, the Meineke franchise system has extensively used, caused to be advertised, and publicized throughout the United States certain distinctive color schemes, logos, and symbols as trademarks, service marks, and trade dress to identify the source, origin, and sponsorship of its system's facilities and services (the "Meineke Marks").

17. Among the Meineke Marks, Meineke owns the marks and, as applicable, related logo for "Meineke" and "Meineke Car Care Center" that are registered with the United States Patent and Trademark Office – No. 78705702, 78705286, 78437010, and 76563372.

18. Meineke and its franchisees have continuously used and advertised the Meineke Marks throughout the United States and its Territories. Meineke's trademarks, trade dress, logos,

and distinctive color scheme strongly distinguish its franchises from similar businesses and are widely known and recognized by consumers.

19. Since 1972, all goods and services lawfully manufactured, distributed, or sold in the United States by Meineke and its authorized franchisees under the name “Meineke” and Meineke trademarks, trade dress, logos, and distinctive color scheme are done so pursuant to the licenses granted by Meineke under its franchise agreements.

20. Each franchisee or licensee who so manufactures, distributes, or sells such goods and services does so in association with the name “Meineke” and the Meineke Marks.

21. Meineke was the first to adopt and use the Meineke Marks as trademarks and service marks. Since that time, Meineke and its franchisees have spent many millions of dollars in the United States and abroad advertising, promoting, and publicizing the Meineke Marks, as well as Meineke automobile maintenance and repair centers and Meineke’s goods and services.

22. The substantial investment in advertising, promotion, and publicity, as well as in the development and implementation of the Meineke System, results in the Meineke Marks and the businesses, goods, and services associated with those marks enjoying valuable goodwill, approval, and public recognition. As a result of this substantial investment, the Meineke Marks are strong and distinctive and have acquired a secondary meaning, as the consuming public associates Meineke’s products and services with the Meineke Marks.

23. Meineke automobile maintenance and repair centers and those goods and services associated with the Meineke Marks are approved, recognized, and understood by the public to be produced, marketed, sponsored, or supplied by, and/or affiliated with Meineke. This approval, recognition, and understanding are valuable assets to Meineke.

24. All right, title, and interest in the Meineke Marks, as well as the design, decor, and image of Meineke automobile maintenance and repair centers, are owned by and remain solely vested in Meineke and/or its affiliates.

25. Meineke's franchise agreements contain a limited license to use and display the valuable and recognized Meineke Marks on signs, posters, uniforms, and other items and in advertising to the public through television, radio, and print media. Such use and display is only authorized in prescribed manners and at such locations and times as are expressly detailed by Meineke.

26. In no event is a franchisee authorized to use or display the Meineke Marks after the expiration or termination of its franchise. Such unauthorized use is expressly prohibited under the terms of all Meineke franchise agreements. In addition, each franchisee promises and agrees as a condition of the franchise agreement to strict control and approval by Meineke over the quality of the goods and services offered by the franchisee, as well as the quality of advertising in connection with those goods and services.

The Franchise Agreement

27. The relationship between Meineke and its franchisees is governed by the terms and conditions of the "Meineke® Franchise and Trademark Agreement" entered into between Meineke and each franchisee.

Meineke Center 395

28. On or about November 21, 2002, Meineke entered into a Meineke Franchise and Trademark Agreement with CALM 3322 whereby Meineke agreed to grant, and CALM 3322 agreed to assume, all of the obligations, terms and conditions contained therein (the "395 Franchise

Agreement”). A true and correct copy of the 395 Franchise Agreement is attached hereto as **Exhibit A** and incorporated by reference as if fully set forth herein.

29. Pursuant to the terms of the 395 Franchise Agreement, CALM 3322 became authorized to operate a maintenance and repair shop known as Meineke Shop 395 located at 3322 Leavenworth Street, Omaha, Nebraska 68105 (the “Center 395”) under the trade name “Meineke” for fifteen (15) years from the date of opening the shop. [**Exhibit A**, Section 2.1].

Meineke Center 622

30. On or about November 21, 2002, Meineke entered into a Meineke Franchise and Trademark Agreement with CALM 4839 whereby Meineke agreed to grant, and CALM 4839 agreed to assume, all of the obligations, terms and conditions contained therein (the “622 Franchise Agreement”). A true and correct copy of the 622 Franchise Agreement is attached hereto as **Exhibit B** and incorporated by reference as if fully set forth herein.

31. Pursuant to the terms of the 622 Franchise Agreement, CALM 4839 became authorized to operate a maintenance and repair shop known as Meineke Shop 622 located at 4839 North 90th Street, Omaha, Nebraska 68134 (the “Center 622”) under the trade name “Meineke” for fifteen (15) years from the date of opening the shop. [**Exhibit B**, Section 2.1].

Franchise Agreement Terms and Conditions

32. Like all Meineke® Franchise and Trademark Agreements, the 395 Franchise Agreement and the 622 Franchise Agreement (together, the “Franchise Agreements”) grant to CALM 3322 and CALM 4839 (together, the “Corporate Defendants”) the license to: (i) operate automobile maintenance and repair centers under the trade name “Meineke”; (ii) display the Meineke name, logo, and Meineke Marks; (iii) receive training and access to Meineke’s methods, procedures, and techniques (the “Meineke System”); and (iv) participate in an established

network of licensed automobile maintenance and repair centers, with a product and service for which Meineke has created substantial demand through maintenance of the highest quality standards and extensive advertising.

33. In exchange, Corporate Defendants agreed to, among other things: (i) pay Meineke on a weekly basis a continuing franchise fee, or royalty, at set percentages for identified categories of approved products and services [**Exhibits A and B**, Section 3.2]; (ii) pay a weekly advertising contribution at the rate of 8% of gross revenue [**Exhibits A and B**, Section 3.4]; and (iii) furnish Meineke with accurate weekly business reports of the shop's gross revenues with copies of invoices of work performed [**Exhibits A and B**, Section 9.3].

34. In exchange for, among other things, the use of the Meineke System, the Franchise Agreements also prohibit Corporate Defendants from owning a legal or beneficial interest in, managing, operating, or consulting with any enterprise that competes with Meineke at the locations used by Corporate Defendants to operate their Meineke centers, within six (6) miles of the location used by Corporate Defendants to operate their Meineke centers, or within six (6) miles of any other Meineke center existing at the time of termination or expiration for a period of one (1) year after the termination or expiration of the Franchise Agreements. [**Exhibits A and B**, Section 11.4].

35. The Franchise Agreements also direct that the Franchise Agreements will be governed by and construed under the laws of the State of North Carolina, regardless of the judicial district in which either party brings an action. [**Exhibits A and B**, Section 17.1].

36. The Franchise Agreements further entitle Meineke to recover its reasonable attorney's fees, court costs, and litigation expenses should it prevail in a judicial proceeding to enforce the terms and conditions of the Franchise Agreements. [**Exhibits A and B**, Section 17.6].

37. Pursuant to the Franchise Agreements, Meineke requires all Meineke Car Care Centers, including Corporate Defendants, to use a proprietary point of sales system for the operation of the center and assist in the reporting of gross revenues. [Exhibits A and B, Section 9.2]. Similar to all other Meineke franchisees, Corporate Defendants are required to pay a monthly fee of \$217.00 for the use of the point of sales system (“Monthly POS Fees”).

Breach of the Franchise Agreements

Failure to Pay Amounts Owed

38. Corporate Defendants breached their obligations under the Franchise Agreements by failing to pay outstanding royalty fees, marketing fund contributions, and Monthly POS Fees.

Abandonment of Center 395

39. CALM 3322 also materially breached the Franchise Agreement by voluntarily abandoning and ceasing all operation of Center 395 as a Meineke Car Care Center. The abandonment of the center before the expiration of the 395 Franchise Agreement’s term is a material breach of Article 13 of the Franchise Agreement because that section requires the continuous operation of the Center through the end of the term of the 395 Franchise Agreement.

Breach of the Non-Compete Provisions

40. Despite the opportunity to do so, Corporate Defendants elected not to renew their Franchise Agreements. As a result, the Franchise Agreements expired on November 21, 2017. By notice dated December 1, 2017, Meineke requested Corporate Defendants to close Center 395 and Center 622, respectively, in accordance with the Franchise Agreements.

41. Although CALM 3322 claims it de-identified Center 395 as an authorized Meineke Car Care Center, CALM 3322 continues to operate an automobile maintenance and repair center in violation of Section 11.4 of the 395 Franchise Agreement without Meineke’s

consent. Individual Defendant and CALM 3322 operate the business using Midtown.

42. Although CALM 4839 claims it de-identified Center 622 as an authorized Meineke® Car Care Center, CALM 4839 continues to operate an automobile maintenance and repair center in violation of Section 11.4 of the 622 Franchise Agreement without Meineke's consent. Individual Defendant and CALM 4839 operate the business using Elite.

43. Basically, the only thing that changed for Corporate Defendants is that they placed their new company names, Elite and Midtown, over the Meineke name and logo at each location. Aside from covering the Meineke name and logo, Corporate Defendants and Individual Defendant continue to operate the centers in the same location, using the same distinct color scheme, signage and telephone numbers as when the centers were operated as authorized Meineke centers, in direct violation of the Franchise Agreements. Hereinafter, Corporate Defendants and the Individual Defendant will together be referred to as the "Franchise Defendants."

*The Irreparable Harm Being Caused to Meineke
by Defendants' Violations of the Post-Term Covenant Not to Compete*

44. Meineke provided Franchise Defendants with specialized training, as well as the proprietary and confidential information for the operation of their Meineke Centers using the Meineke System. Meineke expended considerable time, effort, and resources providing that training to Franchise Defendants.

45. During their term as authorized Meineke franchisees, Franchise Defendants obtained or had access to detailed knowledge of the Meineke System and its confidential information, including information regarding training programs, policies, sales promotion aids, business forms, accounting procedures, marketing reports, informational bulletins, product developments, suppliers' discounts, inventory systems, pricing, operating procedures, marketing

methods, and financial data used in the operation of a Meineke automobile maintenance and repair shop.

46. Franchise Defendants are using that training and Meineke's confidential information in the operation of their competing businesses.

47. Franchise Defendants continue to operate the Center beyond the date Meineke terminated their right to do so. In addition, Franchise Defendants are using and displaying certain of Meineke's trade dress, signage, distinctive color scheme, and telephone numbers.

48. In Section 4.4 of the Franchise Agreements, the parties agreed that Meineke would arrange for telephone service to be provided to the center which the franchisee would have the right to use during the term of the agreement. Furthermore, Franchise Defendants expressly agreed that "all telephone numbers and directory listings for your Shop are our property, and we have the right to transfer, terminate or amend such telephone numbers and directory listings only on termination or expiration (without renewal) of this Agreement." Franchise Defendants continue to use the telephone numbers (402) 342-6220 and (402) 571-0944, which are owned by Meineke, in connection with their unlawful competing businesses, Midtown and Elite.

49. In Article 15 of the Franchise Agreement, Franchise Defendants agreed that upon the effective date of termination:

15.1 You agree to pay us and our Affiliates immediately upon termination or expiration (without grant of a successor franchise) of this Agreement, all royalties, MAF payments, amounts owed for purchases from us or our Affiliates, interest due on any of the foregoing and all other amounts owed to us or our Affiliates which are then unpaid.

15.2 Upon any termination or expiration (without grant of a successor franchise) of this Agreement you will:

(a) not directly or indirectly at any time or in any manner use any Mark, any colorable imitation of any Mark or any other indicia of a Meineke Shop;

(b) take such action as may be required to cancel all fictitious or assumed name registrations related to your use of any Mark;

(c) notify the telephone company and all telephone directory publishers of the termination or expiration of any rights you may have to use any telephone number and any regular, classified or other telephone directory listings associated with any Mark and to authorize transfer of the number to us or at our direction. ...

(d) ... promptly remove from the Premises, and discontinue using for any purpose, all signs, fixtures, posters, décor items, advertising materials, forms and other materials and supplies which display any of the Marks or any distinctive features, images, or designs associated with Meineke Car Care Centers and, at your expense, make such alterations as may be necessary to distinguish the Premises so clearly from its former appearance as a Meineke Shop as to prevent any possible confusion by the public;

...
(f) immediately cease use of all Confidential Information and return to us all copies of the Operations Manual and any other confidential materials which we have loaned to you;

...
(h) comply with the post-term covenants as provided in Section 11.4;

...
[Exhibit 1, Article 15.1 and 15.2(a)–(d), (f), and (h)].

50. When Meineke loses a franchise center, it often seeks to open a replacement Meineke center in the same location in order to retain its goodwill and developed market share in the particular market. When a former franchisee is allowed to violate the covenant not to compete, such as Franchise Defendants here, Meineke's efforts to re-develop the market areas are severely hampered because of the former franchisees' continued operation utilizing the knowledge and training gained in the relationship with Meineke and the goodwill developed as Meineke centers.

51. In addition, the inability to re-develop and re-open licensed centers at the same locations of the Centers prohibits Meineke from performing warranty work for those customers who bring their vehicles to the Centers expecting to receive Meineke's warranted services for previous work completed prior to each Center's termination. One of the key purposes of the limited covenant against competition is to assist Meineke in its development of a replacement Meineke center.

52. No amount of money damages alone could compensate Meineke for the loss of valuable goodwill that Meineke has suffered, and will continue to suffer, with its other licensees and with the franchise-buying public in general as a result of Defendants' unauthorized conduct.

53. The harm that would result to Defendants from an Order of this Court directing them to cease the above-described breaches of the post-termination provisions of the Franchise Agreements and to cease engaging in the above-described acts of unfair competition is not sufficient to justify permitting them to continue to irreparably harm the rights and interests of Meineke and its existing franchisees.

Personal Guaranty

54. Contemporaneously with each of the Franchise Agreements, Individual Defendant executed a personal guaranty whereby Individual Defendant guaranteed Corporate Defendants' performance of all terms, conditions, and obligations contained in their respective Franchise Agreements as if he had been the original signor of each of the Franchise Agreements (the "Guaranty"). A true and correct copy of the Guaranty for CALM 3322 is attached hereto as **Exhibit "C,"** and incorporated by reference as if fully set forth herein. A true and correct copy of the Guaranty for CALM 4839 is attached hereto as **Exhibit "D,"** and incorporated by reference as if fully set forth herein.

Individual Defendant's Breach of the Guaranty

55. Meineke provided Individual Defendant with written notice of Corporate Defendants' material breaches of the Franchise Agreements.

56. Meineke provided Individual Defendant with the same opportunity to cure the material breaches of the Franchise Agreements.

57. Individual Defendant failed and/or refused to cure Corporate Defendants' material breaches of the Franchise Agreements.

Damages

58. Corporate Defendants and Individual Defendant's failure and/or refusal to comply with their obligations under the Franchise Agreements and Guaranty, respectively, directly and proximately damaged Meineke.

59. Pursuant to North Carolina law, Meineke is entitled to compensation for these injuries and is entitled to be placed in the same position it would have been in if the obligations under the Franchise Agreements and Guaranty were performed. These damages include: (a) the amounts owed to Meineke before Franchise Defendants stopped operating the Centers as Meineke Car Care Centers; (b) the future royalty fees and advertising contributions not paid as a result of CALM 3322's abandonment of the operation of Center 395 as a Meineke Car Care Center; and (c) damages resulting from Defendants' operation of automobile maintenance and repair centers from the very location of the Centers.

60. Meineke's prospective profits are not conjectural, remote, or speculative because Meineke is able to determine its lost profits with reasonable certainty. Using each Center's actual historical sales data, Meineke can calculate a reasonably certain amount of its lost profits by determining the average royalty and advertising fund contributions due to it from CALM 3322

and subtracting the incremental savings resulting from the premature closing of the Center.

61. The amount of Meineke's lost royalties is reasonably calculated by using the average weekly historical sales of the Center (the "Average Weekly Sales") multiplied by the specific continuing weekly royalty fees set forth in the schedule in Paragraph 3.2 of the 395 Franchise Agreement, for the remainder of the franchising period.

62. The amount of Meineke's lost weekly advertising contributions is reasonably calculated by taking the average weekly historical Gross Revenue, as defined by the Franchise Agreements, and multiply that by eight percent (8%), pursuant to Paragraph 3.4 of the 395 Franchise Agreement, and multiply that sum by the number of weeks remaining in the franchising period.

63. Therefore, Meineke is entitled to lost profits under the terms of the 395 Franchise Agreement because those lost profits are: (i) reasonably certain to have been realized except for the breach of contract; (ii) calculable and/or measurable with reasonable certainty; and (iii) were reasonably supposed to have been within the contemplation of the parties at the time CALM 3322 entered into the 395 Franchise Agreement.

Failure to Pay Amounts Due

64. Defendant CALM 3322 and Individual Defendant are in default under the 395 Franchise Agreement and Guaranty, respectively, by failing to pay Meineke the total amount of \$82,937.89, which consists of \$48,078.83 in unpaid advertising contributions; \$30,953.06 in unpaid royalty fees; and \$3,906.00 in unpaid Monthly POS Fees, as required by the 395 Franchise Agreement. A true and correct copy of the accounts receivable ledger identifying the amounts owed to Meineke is attached as **Exhibit "E"** and is incorporated by reference as if fully set forth herein.

65. Defendant CALM 4839 and Individual Defendant are in default under the 622 Franchise Agreement and Guaranty, respectively, by failing to pay Meineke the total amount of \$106,706.05 which consists of \$63,324.61 in unpaid advertising contributions; \$39,909.44 in unpaid royalty fees; and \$3,472.00 in unpaid Monthly POS Fees, as required by the 622 Franchise Agreement. A true and correct copy of the accounts receivable ledger identifying the amounts owed to Meineke is attached as **Exhibit “F”** and is incorporated by reference as if fully set forth herein.

Abandonment of Center 395

66. CALM 3322’s pre-mature abandonment of the operation of Center 395 as a Meineke Car Care Center is (a) the sole and independent decision of CALM 3322 that was not caused by any action or inaction of Meineke and (b) a material breach of the 395 Franchise Agreement and Guaranty that entitles Meineke to recover its damages.

Breach of the Non-Compete Provisions

67. Corporate Defendants’ continued operation of the Centers as automobile maintenance and repair centers from the very location of the authorized Meineke Car Care Centers is a material breach of the Franchise Agreements, that directly and proximately damages Meineke in an amount, not yet known because, among other reasons, the breach is on-going.

68. Midtown and Elite knowingly and willfully assist the Franchise Defendants in violating the non-compete covenants and unlawful use of Meineke’s proprietary materials and trade dress.

69. In addition, Defendants’ use of the same locations, color scheme, signage and telephone numbers to mimic the previously operated Meineke centers creates a likelihood of confusion in the marketplace.

General Allegations

70. Meineke has engaged undersigned counsel and has agreed to pay counsel reasonable attorneys' fees for all services rendered in this action and otherwise in connection with enforcing the agreements between Meineke and Franchise Defendants, which costs and expenses are the obligation of Franchise Defendants under the Franchise Agreements and Guaranty.

71. All conditions precedent to the institution of this action have been satisfied, discharged, excused, and/or waived.

COUNT I

**(Against CALM 3322 for Breach of the 395 Franchise Agreement
for Failure to Pay Royalty Fees and Advertising Contributions)**

72. Meineke re-alleges and re-avers paragraphs 1 through 71 above, which are incorporated by reference as if fully set forth herein.

73. Meineke and CALM 3322 are parties to a valid and enforceable contract, the 395 Franchise Agreement.

74. Meineke performed all of its obligations under the 395 Franchise Agreement.

75. Despite Meineke's performance, CALM 3322 breached its material obligations and promises under the 395 Franchise Agreements by failing to pay all royalty fees, advertising fund contributions, and Monthly POS Fees that accrued. That amount owed totals \$82,937.89, which consists of \$48,078.83 in unpaid advertising contributions; \$30,953.06 in unpaid royalty fees; and \$3,906.00 in unpaid Monthly POS Fees.

76. As a result of CALM 3322's breach of the 395 Franchise Agreement, Meineke has been directly and proximately damaged.

WHEREFORE, Meineke hereby respectfully requests this Court enter judgment against CALM 3322 for: (a) all amounts due and owing under the 395 Franchise Agreement, including

past due royalty fees, advertising fund contributions, Monthly POS Fees, and other amounts; (b) costs and expenses of litigation; and (c) all other relief this Court deems just and proper.

COUNT II

(Against CALM 3322 for Breach of the 395 Franchise Agreement for Abandonment of Center 395)

77. Meineke re-alleges and re-avers paragraphs 1 through 71 above, which are incorporated by reference as if fully set forth herein.

78. Meineke and CALM 3322 are parties to a valid and enforceable contract, the 395 Franchise Agreement.

79. Meineke performed all of its obligations under the 395 Franchise Agreement.

80. Pursuant to the 395 Franchise Agreement, CALM 3322 was obligated to operate Center 395 for a period of fifteen (15) years, through and including November 21, 2017. [Exhibit A, Section 2.1]. The failure to do so is a material breach of the 395 Franchise Agreement. [Exhibit A, Section 13.1(j)].

81. Despite these obligations, CALM 3322 failed to operate Center 395 until the conclusion of the 395 Franchise Agreement. Upon information and belief, CALM 3322 ceased operating Center 395 as a Meineke Car Care Center on or about August 5, 2017.

82. As a result of CALM 3322's breach of the 395 Franchise Agreement, Meineke has been deprived of the benefit of its bargain under the Franchise Agreement, which consists of, among other things, future franchise fees, royalties, and advertising contributions from the date of the abandonment of the Franchise Agreement through and including November 21, 2017.

83. Meineke is reasonably certain that such lost royalty fees and advertising contributions would have been received but for CALM 3322's breaches of the contract.

84. Meineke's lost royalty fees and advertising contributions can be ascertained and measured with reasonable certainty, and reasonably should have been within the contemplation of the parties, at the time the 395 Franchise Agreement was executed, as the probable result of the breach.

85. Meineke's damages for lost royalty fees and advertising contributions flow directly from CALM 3322's breach of the 395 Franchise Agreement, and Meineke has exercised reasonable care and diligence to mitigate its damages.

WHEREFORE, Meineke hereby respectfully requests this Court enter judgment against Defendant CALM 3322, Inc. for: (a) future royalty fees and advertising fund contributions for the remainder of the term of the 395 Franchise Agreement; (b) costs and expenses of litigation; and (c) all other relief this Court deems just and proper.

COUNT III

(Against CALM 3322 for Breach of the 395 Franchise Agreement for Violation of the Non-Compete Provision and Other Post-Termination Covenants)

86. Meineke re-alleges and re-avers paragraphs 1 through 71 above, which are incorporated by reference herein.

87. Meineke and CALM 3322 are parties to a valid and enforceable contract, the 395 Franchise Agreement.

88. Meineke performed all of its obligations under the 395 Franchise Agreement.

89. Pursuant to the 395 Franchise Agreement, CALM 3322 agreed it would not, among other things, own or operate an automobile maintenance and repair shop or other competitive business at the premises used for Center 395 or within six (6) miles of that location, or within six (6) miles from any other Meineke shop in operation at the time of termination or expiration for a period of one (1) year thereafter. [**Exhibit A**, Section 11.4].

90. Despite Meineke's performance, CALM 3322 has breached its obligations and promises under the 395 Franchise Agreement by continuing to operate an automobile maintenance and repair shop at the same location as Center 395.

91. As a direct and proximate cause of CALM 3322's conduct of owning and operating a competing business, Meineke has directly and proximately suffered actual damages.

92. CALM 3322 is also in breach of its post-termination obligations under Article 15.2 of the Franchise Agreement by: (i) continuing to display and use Meineke's trade dress on the exterior of the competing center; (ii) failing to notify the appropriate telephone company of the termination of rights to utilize the telephone number under which the former Center operated and failing to transfer the same telephone number to Meineke; (iii) failing to disassociate the competing center with all Meineke Marks, specifically Meineke's trade dress; (iv) failing to return the Meineke Operations Manual; (v) failing to comply with the post-termination restrictions contained in Article 11.4 of the Franchise Agreement; and (vi) failing to furnish evidence of their compliance with Article 15.2 of the Franchise Agreement.

93. These breaches have caused and continue to cause Meineke irreparable harm.

94. In addition to its financial damages, Meineke is entitled to a preliminary injunction directing CALM 3322 to (1) cease and refrain from, for a period of one (1) year from the date of compliance, directly or indirectly, any activity or conduct in which it may, "own a legal or beneficial interest in, manage, operate or consult with: (a) any Competitive Business located at the Premises; (b) any Competitive Business located within a radius of 6 miles of your Shop; [and] (c) any Competitive Business located within a radius of 6 miles of any Meineke Shop in operation on the effective date of termination or expiration..."; and (2) cease displaying and/or utilizing the Meineke Marks or trade dress in any way, shape, or form.

WHEREFORE, Meineke hereby respectfully requests this Court enter judgment against CALM 3322 for: (a) injunctive relief enjoining CALM 3322 from operating a competing business, including by or through Midtown and Elite, for one (1) year at Center 395's location, within six (6) miles of Center 395's location, or within six (6) miles of any other existing Meineke shop; (b) damages directly and proximately resulting from this breach of the Franchise Agreements; (c) costs and expenses of litigation; and (d) all other relief this Court deems just and proper.

COUNT IV

**(Against CALM 4839 for Breach of the 622 Franchise Agreement
for Failure to Pay Royalty Fees and Advertising Contributions)**

95. Meineke re-alleges and re-avers paragraphs 1 through 71 above, which are incorporated by reference as if fully set forth herein.

96. Meineke and CALM 4839 are parties to a valid and enforceable contract, the 622 Franchise Agreement.

97. Meineke performed all of its obligations under the 622 Franchise Agreement.

98. Defendant CALM 4839 is in default under the Franchise Agreement by failing to pay Meineke the total amount of \$106,706.05 which consists of \$63,324.61 in unpaid advertising contributions; \$39,909.44 in unpaid royalty fees; and \$3,472.00 in unpaid Monthly POS Fees, as required by the 622 Franchise Agreement.

99. As a result of CALM 4839's breach of the 622 Franchise Agreement, Meineke has been directly and proximately damaged.

WHEREFORE, Meineke hereby respectfully requests this Court enter judgment against CALM 4839 for: (a) all amounts due and owing under the 622 Franchise Agreement, including past due royalty fees, advertising fund contributions, Monthly POS Fees, and other amounts; (b) costs and expenses of litigation; and (c) all other relief this Court deems just and proper.

COUNT V

**(Against CALM 4839 for Breach of the 622 Franchise Agreement
for Violation of the Non-Compete Provision and Other Post-Termination Covenants)**

100. Meineke re-alleges and re-avers paragraphs 1 through 71 above, which are incorporated by reference as if fully set forth herein.

101. Meineke and CALM 4839 are parties to a valid and enforceable contract, the 622 Franchise Agreement.

102. Meineke performed all of its obligations under the 622 Franchise Agreement.

103. Pursuant to the 622 Franchise Agreement, CALM 4839 agreed it would not, among other things, own or operate an automobile maintenance and repair shop or other competitive business at the premises used for Center 622 or within six (6) miles of that location, or within six (6) miles from any other Meineke shop in operation at the time of termination or expiration for a period of one (1) year thereafter. [**Exhibit A**, Section 11.4].

104. Despite Meineke's performance, CALM 4839 has breached its obligations and promises under the 622 Franchise Agreement by continuing to operate an automobile maintenance and repair shop at the same location as Center 622.

105. As a direct and proximate cause of CALM 4839's conduct of owning and operating a competing business, Meineke has directly and proximately suffered actual damages.

106. CALM 4839 is also in breach of its post-termination obligations under Article 15.2 of the Franchise Agreement by: (i) continuing to display and use Meineke' trade dress on

the exterior of the competing center; (ii) failing to notify the appropriate telephone company of the termination of rights to utilize the telephone number under which the former Center operated and failing to transfer the same telephone number to Meineke; (iii) failing to disassociate the competing center with all Meineke Marks, specifically Meineke's trade dress; (iv) failing to return the Meineke Operations Manual; (v) failing to comply with the post-termination restrictions contained in Article 11.4 of the Franchise Agreement; and (vi) failing to furnish evidence of its compliance with Article 15.2 of the Franchise Agreement.

107. These breaches have caused and continue to cause Meineke irreparable harm.

108. In addition to its financial damages, Meineke is entitled to a preliminary injunction directing CALM 4839 to cease and refrain from, for a period of one (1) year from the date of compliance, directly or indirectly, any activity or conduct in which it may, "own a legal or beneficial interest in, manage, operate or consult with: (a) any Competitive Business located at the Premises; (b) any Competitive Business located within a radius of 6 miles of your Shop; [and] (c) any Competitive Business located within a radius of 6 miles of any Meineke Shop in operation on the effective date of termination or expiration..."; and (2) ceasing displaying and/or utilizing the Meineke Marks in any way, shape, or form.

WHEREFORE, Meineke hereby respectfully requests this Court enter judgment against CALM 4839 for: (a) injunctive relief enjoining CALM 4839 from operating a competing business, including by or through Midtown and Elite, for one (1) year at Center 622's location, within six (6) miles of Center 622's location, or within six (6) miles of any other existing Meineke shop; (b) damages directly and proximately resulting from this breach of the Franchise Agreements; (c) costs and expenses of litigation; and (d) all other relief this Court deems just and proper.

COUNT VI

(Against Charles Olson for Breach of the Individual Guaranty)

109. Meineke re-alleges and re-avers paragraphs 1 through 71 above, which are incorporated by reference as if fully set forth herein.

110. Pursuant to the terms of the Guaranty, Individual Defendant agreed to personally guaranty each of the Corporate Defendants' performance of all terms, conditions, and obligations contained in their respective Franchise Agreements applicable to the operation of the Centers.

111. As a result, Individual Defendant is obligated to ensure, among other things, that Corporate Defendants operate the Centers and pay all amounts due under the Franchise Agreements for the entire term of those Franchise Agreements.

112. Despite this obligation, Individual Defendant failed and/or refused to comply with his obligations under the Guaranty.

113. This breach has directly and proximately caused Meineke damages and deprived Meineke of the benefit of its bargain by causing Meineke to: (i) not collect amounts owed to it during the term of the parties' agreements; (ii) suffer, among other damages, future lost royalty fees, advertising fund contributions, and Monthly POS Fees; and (iii) suffer, among other damages, future lost royalty fees and advertising contribution from the date Defendants began operating a competing business.

114. In addition, Individual Defendant is in breach of the Guaranty by causing Corporate Defendants to operate and being personally involved in the operations of competitive businesses using the Meineke Marks in violation of the Franchise Agreements.

115. Pursuant to the Franchise Agreements, Corporate Defendants agreed they would not, among other things, own or operate an automobile maintenance and repair shop or other

competitive business at the premises used for either centers or within six (6) miles of those locations, or within six (6) miles from any other Meineke shop in operation at the time of termination or expiration for a period of one (1) year thereafter. [Exhibits A and B, Section 11.4].

116. Despite this obligation, Corporate Defendants, through Midtown and Elite, are operating an automobile maintenance and repair center from each center in the same locations in material breach of the Franchise Agreements.

117. Despite Meineke's performance, Corporate Defendants have breached their obligations and promises under the Franchise Agreements by continuing to operate automobile maintenance and repair shops, at the same location, telephone number and color scheme as Meineke centers previously operated.

118. As a direct and proximate cause of Corporate Defendants' conduct of owning and operating competing businesses, Meineke has directly and proximately suffered actual damages.

119. Corporate Defendants are also in breach of their post-termination obligations under Article 15.2 of the Franchise Agreements by: (i) continuing to display and use Meineke's trade dress on the exterior of their competing center; (ii) failing to notify the appropriate telephone company of their termination of rights to utilize the telephone number under which the former Center operated and failing to transfer the same telephone number to Meineke; (iii) failing to disassociate the competing center with all Meineke Marks, specifically Meineke's trade dress; (iv) failing to return the Meineke Operations Manual; (v) failing to comply with the post-termination restrictions contained in Article 11.4 of the Franchise Agreement; and (vi) failing to furnish evidence of their compliance with Article 15.2 of the Franchise Agreement.

120. Individual Defendant personally and unconditionally guaranteed to pay and perform each and every undertaking, agreement and covenant set forth in the Franchise

Agreements and to be personally bound by, and personally liable for each breach of, each and every provision in the Franchise Agreements.

121. These breaches have caused and continue to cause Meineke irreparable harm.

122. In addition to its financial damages, Meineke is entitled to a preliminary injunction directing Individual Defendant to: (1) cease and refrain from, for a period of one (1) year from the date of compliance, directly or indirectly, any activity or conduct in which he may, “own a legal or beneficial interest in, manage, operate or consult with: (a) any Competitive Business located at the Premises; (b) any Competitive Business located within a radius of 6 miles of your Shop; [and] (c) any Competitive Business located within a radius of 6 miles of any Meineke Shop in operation on the effective date of termination or expiration...”; and (2) cease displaying and/or utilizing the Meineke Marks in any way, shape, or form.

WHEREFORE, Meineke hereby respectfully requests this Court enter judgment against Individual Defendant, Charles Olson, for: (a) injunctive relief enjoining him from operating a competing business, including by or through Midtown and Elite, for one (1) year at either centers’ location, within six (6) miles of either centers’ location, or within six (6) miles of any other Meineke shop; (b) damages directly and proximately resulting from this breach of the Franchise Agreements; (c) costs and expenses of litigation; and (d) all other relief this Court deems just and proper.

COUNT VII

(Against all Defendants for Unfair Competition)

123. Meineke repeats and realleges paragraphs 1 through 71 above, as if fully set forth herein.

124. Meineke owns the Meineke Marks; which are famous and distinctive and properly registered with United States Patent and Trademark Office.

125. Meineke's trade dress has acquired a secondary meaning.

126. Meineke licensed the use and display of its trade dress to Franchise Defendants pursuant to the Franchise Agreements.

127. Meineke revoked the license to use the Meineke Marks from Franchise Defendants when it terminated the Franchise Agreements and issued its Notice of Termination.

128. Despite Meineke's revocation of the license to use the Meineke Marks, Defendants deliberately and intentionally continue to use and display Meineke's trade dress by displaying the same color scheme, signage, telephone numbers, and design as the Corporate Defendants previously did as authorized Meineke' Centers, in the same location and have merely covered the Meineke trademark in their signage.

129. Defendants continue to use Meineke's trade dress in connection with the sale, offering for sale, distribution, and advertising of goods and services.

130. Defendants continue to use Meineke's trade dress and goodwill in a manner likely to confuse consumers, including, reporting to consumers that they are providing the "Same Great Location. Same Outstanding Service and Values!," leading consumers to believe that only the name has changed.

131. Defendants' unauthorized use of Meineke's trade dress and goodwill creates confusion and is likely to deceive consumers as to the affiliation, connection, or association with Meineke which constitutes trade dress infringement and unfair competition in violation of, among other things, 15 U.S.C. § 1125(a).

132. As a direct and proximate result of Defendants' acts of trade dress infringement and unfair competition, Meineke has suffered actual pecuniary losses.

133. In addition, unless Defendants are restrained and enjoined from continuing to infringe Meineke's trade dress, telephone numbers, identifiable color scheme, and trade on Meineke's goodwill, Defendants' unlawful conduct will seriously erode and damage Meineke's valuable goodwill, commercial reputation, name, and marks, and will continue to cause confusion, mistake and deception among the consuming public, including particularly those persons seeking authorized Meineke products and services, thus causing Meineke to suffer irreparable harm, for which there is no fully adequate legal remedy.

134. By reason of the foregoing, Meineke is entitled to a preliminary injunction against Defendants immediately restraining and enjoining them from any further use of Meineke's trade dress, marks, color scheme, advertising, telephone listing, forms, manuals, products, computer software, merchandise, and all other things and materials of any kind which are identified or associated in the mind of the consuming public with Meineke.

135. Meineke is also entitled to a judgment against Defendants, jointly and severally, pursuant to 15 U.S.C. § 1117(a) for: (a) Defendants' profits; (b) any damages sustained by Meineke; and (c) costs of this action.

136. Meineke is further entitled to a judgment against Defendants, jointly and severally, pursuant to 15 U.S.C. § 1117(b), for (a) treble damages, (b) reasonable attorney's fees, and (c) prejudgment interest because Defendants intentionally used Meineke's trade dress in the sale, offering for sale, or distribution of goods and services knowing such usage was counterfeit and with the intent that Defendants' goods and services would be used and associated with Meineke's trade dress and goodwill.

137. Meineke has engaged the undersigned counsel and has agreed to pay counsel reasonable attorneys' fees for all services rendered in this action and otherwise in connection with enforcing its rights under the law.

WHEREFORE, Meineke respectfully requests that this Honorable Court enter judgment against Defendants, jointly and severally, for:

- (a) Preliminary and permanent injunctive relief, directing Defendants, their agents, servants, employees and attorneys, and all persons in active concert or participation with them who receive actual notice of said injunction, by personal service or otherwise:
 - i. Enjoining them from advertising, displaying, distributing, promoting, selling, or using any product or service bearing any of the Meineke Marks or any colorable imitation thereof;
 - ii. Enjoining them from displaying or using any of the Meineke Marks to advertise, identify, promote, or sell any product or service or any of its businesses;
 - iii. Enjoining them from directly or indirectly making or allowing to be made any statement or representation or performing any act likely to lead the public to believe Defendants, the Centers, and/or the products or services they provide are directly or indirectly associated with, affiliated, connected to, licensed, sponsored, authorized, or approved by Meineke;
 - iv. Directing them to recall and deliver to Meineke all advertising, promotional products, displays, point of purchase materials, signs, banners, labeling, packaging, and all other products which bear or make reference to any of the Meineke Marks or any colorable imitation thereof;

- v. Directing them to immediately notify the telephone company and all telephone directory publishers of the termination of the Defendants' rights to use the telephone numbers, (402) 342-6220 and (402) 571-0944, transfer Defendants' rights to all regular, classified, and other telephone directory listings associated with Meineke, and authorize the transfer of the phone numbers, (402) 342-6220 and (402) 571-0944, to Meineke;
 - vi. Permitting Meineke to enter the Center's premises at a reasonable time for the purpose of permitting Meineke to complete any and all changes, modifications, or other actions necessary to distinguish the premises from its appearance as a Meineke® auto repair business;
 - vii. Requiring an accounting and for them to pay over to Meineke all gains, profits, and advantages derived from their trade dress and service mark infringement and violation of the Lanham Act to the fullest extent provided by the Lanham Act; and
 - viii. Requiring Defendants to file with the Court and serve upon Meineke a written statement under oath setting forth in detail the manner in which Defendants have complied with the injunction within ten (10) days of its issuance.
- (b) Money damages plus three times the actual damages sustained as a result of their violation of the Lanham Act and trade dress and service mark infringement;
 - (c) Prejudgment interest;
 - (d) Judgment for Meineke's reasonable attorneys' fees together with court costs and expenses of litigation pursuant to the Lanham Act;
 - (e) All costs, disbursement, and other recoverable expenses of this action; and

(f) All other relief this Honorable Court deems just and proper.

Respectfully submitted,

s/ Theresa D. Koller

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