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COMMENTARY

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Opposing a Franchisor's Motion for a Preliminary Injunction Against a Franchisee

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When a franchisee opposes a franchisor's motion for a preliminary injunction, the court should be made aware of the unique situation of this contractual relationship concerning the franchise agreement. It is unlike a regular contractual relationship for several reasons:

- There is usually a gross disparity in bargaining power between the franchisor and franchisee;
- The franchisee is usually not sophisticated in business;
- The franchisor typically does not permit the franchisee to negotiate the contract terms; and
- The injunctive provisions are not conspicuous.

In taking the relative positions of the franchisor and franchisee into account, the franchisee should bring to the court's attention that:

- The franchise agreement is a contract of adhesion and is so one-sided as to be void on its face;
- The agreement was obtained through fraud;
- Should the franchisor prevail at trial, monetary damages would be sufficient;
- The franchisor has unclean hands; and
- A preliminary injunction will cause greater harm to the franchisee than the franchisor will suffer if the preliminary injunction is not granted.

Typically the franchisor has made a motion to enforce a covenant not to compete, take over the telephone number used by a franchisee for his business, or cease the franchisee's use of the franchisor's trademarks and trade dress.

The franchisor's attempt through a preliminary injunction to enforce a non-compete covenant and/or take over the franchisee's business phone number should be argued to the court as to the relative harm to the franchisee vs. the benefit to the franchisor.

The usual case is that if the preliminary injunction is granted the franchisee will be out of business and unable to recover even if he is successful at trial. Quite simply, by the end of the trial the franchisee's business will have long since been destroyed if the injunction had been granted.

The franchisor typically will have other outlets in the vicinity so that it will not be greatly harmed pending the outcome of a trial. Therefore, the weighing of these two alternatives should come down on the side of the franchisee.

As to the use of the franchisor's trademarks and trade dress, the franchisee should argue that the franchisor is not being harmed. The franchisor will argue that the franchisee no longer has the contractual right to use the trademarks. The franchisee will argue that he is not harming the trademarks and that whether he has the right to use the trademarks is an issue to be decided at trial.

The franchisor will usually counter that the franchisee has poor quality control and is harming the trademarks. This will usually come down to the factual situation at the hearing

for the preliminary injunction as to whether the franchisee is harming the trademarks. If no harm is being done, the status quo should be maintained, and the injunction should not be granted.

The Legal Standard for a Preliminary Injunction

A preliminary injunction is an extraordinary and drastic remedy that is only granted where there is a clear showing of need. *Cooper v. Salazar*, 196 F.3d 809 (7th Cir. 1999), quoting *Mazurek v. Armstrong*, 520 U.S. 968 (1997).

Further, the purpose of a preliminary injunction is to preserve the status quo pending a hearing on the merits of the case, not to adjudicate the merits of the case itself. *Chatas v. Local 134 Int'l Bhd. of Elec. Workers*, 233 F.3d 508, 513 (7th Cir. 2000).

To obtain a preliminary injunction, a plaintiff must demonstrate a likelihood that it will prevail on the merits of the lawsuit, that there is no adequate remedy at law and that it will suffer irreparable harm without injunctive relief. If these requirements are met, the court must then balance the degree of irreparable harm to the plaintiff against the harm the defendant will suffer if the injunction is granted. *Incredible Techs. v. Virtual Techs.*, 400 F.3d 1007 (7th Cir. 2005). See also *Publications Int'l v. Meredith Corp.*, 88 F.3d 473 (7th Cir. 1996).

The leading case in the 7th Circuit on the burden of proof in preliminary-injunction cases is *Abbott Labs v. Mead Johnson & Co.*, 971 F.2d 6 (7th Cir. 1992). There, the U.S. Court of Appeals for the 7th Circuit clarified the role of the trial court in reviewing motions for preliminary injunctions, noting that at all times the court must make efforts to "minimize the costs of being mistaken." *Id.* at 11.

The appeals court adopted the now-familiar "sliding scale" approach to reviewing such motions, where the less likely it is that a plaintiff will prevail, the greater the proof of irreparable harm that is required. However, the "sliding scale" analysis is only employed once the plaintiff clears both the "likelihood of success" and "irreparable harm/no adequate remedy" hurdles. *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1453 (7th Cir. 1995).

In *Fasti USA v. Fasti Farrag & Stipsits GmbH*, 49 U.C.C. Rep. Serv. 2d 112, 2002 WL 31664494 (N.D. Ill. 2002), in addition to the requirements for the issuance of a preliminary injunction of a likelihood of success on the merits, an inadequate remedy at law and irreparable harm if the order is not granted, the court added that it must consider the public interest in denying or granting the injunction.

"Injunctive relief is 'an extraordinary remedy that should not be granted unless the movant, by a clear showing, carries the burden of persuasion,'" the court held, quoting *Mazurek*, 520 U.S. at 972.

It went on to say: "The public interest benefits from increased competition. See *Platinum Home Mortgage Corp. v. Platinum Fin. Group Inc.*, 149 F.3d 722, 726 (7th Cir. 1998) ('courts have generally recognized that the public substantially benefits from competition'). Considering the totality of the circumstances, the equities weigh in favor of denying FASTI USA temporary injunctive relief."

In *Proimos v. Fair Automotive Repair Inc.*, 1986 WL 15713 (N.D. Ill. Mar. 18, 1986), the court said, "A party seeking equitable relief must come into court with clean hands; relief cannot be granted to a party whose conduct is tainted with bad faith. See *Great W. Cities Inc. v. Binstein*, 476 F. Supp. 827 (N.D. Ill.), *aff'd*, 614 F.2d 775 (7th Cir. 1979)."

In *Roland Machinery Co. v. Dresser Industries Inc.*, 749 F.2d 380, 387 (7th Cir. 1984), the 7th Circuit stated:

In deciding whether to grant a preliminary injunction, the court must also consider any irreparable harm that the defendant might suffer from the injunction. ... But since the defendant may suffer irreparable harm from the entry of a preliminary injunction, the court must not only determine that the plaintiff will suffer irreparable harm if the preliminary injunction is denied — a threshold requirement for granting a preliminary injunction — but also weigh that harm against any irreparable harm that the defendant can show he will suffer if the injunction is granted.

Courts will not award preliminary injunctive relief where such relief would simply grant the requesting party the relief prayed for in the complaint because "[t]he purpose of a preliminary injunction is not to conclude the merits of the controversy, but merely to preserve the status quo until a more considered decision on the merits is possible." *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 264 (7th Cir. 1981).

In conclusion, a court should not grant a franchisor's motion for a preliminary injunction unless it meets the requirements stated.

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