

1 PETER C. LAGARIAS (SBN 77091)
2 ROBERT S. BOULTER (SBN 153549)
3 LAGARIAS & BOULTER, LLP
4 1629 Fifth Avenue
5 San Rafael, California 94901-1828
6 Telephone: (415) 460-0100
7 Facsimile: (415) 460-1099

8 Attorneys for Plaintiffs and Cross-Defendants Syed
9 Ali Husain and Khursheed Husain

10 **SUPERIOR COURT OF CALIFORNIA – UNLIMITED JURISDICTION**

11 **COUNTY OF MARIN**

12 SYED ALI HUSAIN, an individual, and
13 KHURSHEED HUSAIN, an individual,

14 Plaintiffs,

15 v.

16 McDONALD’S CORPORATION,
17 McDONALD’S USA LLC, a Delaware limited
18 liability company, MWAFFAK KANJEE, an
19 individual, and DOES 1-20;

20 Defendants.

21 MCDONALD’S CORPORATION, a Delaware
22 Corporation; and MCDONALD’S USA, LLC, a
23 Delaware limited liability company,

24 Cross-complainants,

25 vs.

26 SYED ALI HUSAIN, an individual; and
27 KHURSHEED HUSAIN, an individual,

28 Cross-defendants.

Case No. CIV 096177

The Honorable John A Sutro, Jr.

**PLAINTIFFS’ MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO MCDONALD’S
MOTION FOR A PRELIMINARY
INJUNCTION**

Date: Jan. 7, 2010

Time: 8:30 a.m.

Dept: Courtroom H

Complaint Filed: December 8, 2009

Trial Date: Not Set

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

I. SUMMARY..... 1

II. FACTS..... 2

III. ARGUMENT..... 2

 A. Permitting The Husains To Operate As A McDonald’s During The
 Pendency Of The Litigation Is A Permitted And Appropriate Remedy As
 Well As The Most Equitable Remedy 2

 B. The Court Has The Authority To Order Specific Performance of The
 Renewal Obligation. 7

 C. The Standards for Mandatory Injunctions Are High, And McDonald’s Has
 Not Met Them..... 8

 1. McDonald’s Is Not Likely To Prevail On Its Lanham Act Claim..... 9

 2. McDonald’s Is Not Likely To Prevail On Its Breach of Contract
 Claim, But The Husains Will Likely Win Theirs 10

 3. McDonald’s Is Not Likely To Prevail On Its Trespass Or Ejectment
 Claims 13

 D. The Equities Do Not Favor Injunctive Relief..... 13

 E. The Husains Will Suffer Irreparable Harm By The Injunction 14

IV. CONCLUSION..... 14

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

CASES

Agricultural Labor Relations Bd. v. Ruline Nursery Co.
115 Cal.App.3d 1005, 171 Cal.Rptr. 793 (1981)..... 8

Auslen v. Johnson
118 Cal.App.2d 319, 257 P.2d 664 (1953) 12

Automotive Elec. Service Corp. v. Ass'n of Automotive Aftermarket Distributors
747 F.Supp. 1483 (E.D.N.Y. 1990) 5, 6

Ben-Zvi v. Edmar Co.
40 Cal.App.4th 468, 47 Cal.Rptr.2d 12 (1995)..... 10

Bleecher v. Conte
29 Cal.3d 345 (1981) 8

Boyd v. Bevilacqua
247 Cal.App.2d 272, 55 Cal.Rptr. 610 (1966)..... 12

Bray v. QFA Royalties LLC
486 F. Supp. 2d 1237 (D. Colo. 2007)..... 2, 4

Carlo C. Gerald Corporation v. Miller Brewing Company
421 F.Supp. 233 (D.N.J.1976)..... 6

Continental Baking Co. v. Katz
68 Cal.2d 512, 67 Cal.Rptr. 761 (1968) 8

Craig v. Brown & Root, Inc.
84 Cal.App.4th 416, 100 Cal.Rptr.2d 818 (2000)..... 11

Davis v. Blue Cross of Northern California
25 Cal.3d 418, 158 Cal.Rptr. 828 (1979) 13

Elliano v. Assurance Co. of America
3 Cal. App. 3d 446, 83 Cal. Rptr. 509 (1970)..... 13

Ellis v. Mihelis
60 Cal.2d 206 (1963) 12

Engalla v. Permanente Medical Group, Inc.
15 Cal.4th 951, 64 Cal.Rptr.2d 843 (1997) 13

Ersa Grae Corp. v. Fluor Corp.
1 Cal.App.4th 613, 2 Cal.Rptr.2d 288 (1991)..... 12

Mahroom v. Best Western Intern., Inc.
2009 WL 248262 (N.D.Cal. 2009) 4

1	<i>Martin v. Kehl</i>	13
	145 Cal.App.3d 228, 193 Cal.Rptr. 312 (1983).....	
2	<i>McDonald's Corp. v. Robertson</i>	9
3	147 F.3d 1301 (11th Cir. 1998)	
4	<i>Music Tree, Inc. v. Tallman Piano Store, Inc.</i>	12
5	45 Or. App. 651, 608 P.2d 1228 (1980)	
6	<i>Palo Alto Town & Country Village, Inc. v. Bbtc Company</i>	11
	11 Cal.3d 494, 113 Cal.Rptr. 705 (1974)	
7	<i>Paschall v. Kansas City Star Co.</i>	6
8	441 F.Supp. 349 (D.C.Mo. 1977)	
9	<i>Precision Tune Auto Care, Inc. v. Radcliff</i>	5
	731 So.2d 744 (1999).....	
10	<i>Prudence Corp v Shred-it America, Inc.</i>	8
11	Bus. Franch. Guide ¶ 13, 986 (C.D. Cal 2008).....	
12	<i>Rains v. Arnett</i>	12
	189 Cal.App.2d 337, 11 Cal.Rptr. 299 (1961).....	
13	<i>Republic Molding Corporation v. B. W. Photo Utilities</i>	13
14	319 F.2d 347 (9th Cir. 1963)	
15	<i>Robbins v. Superior Court</i>	8
	38 Cal.3d 199, 211 Cal.Rptr. 398 (1985)	
16	<i>Rollins v. Stokes</i>	11
17	123 Cal.App.3d 701, 176 Cal.Rptr. 835 (1981).....	
18	<i>Santa Cruz Fair Bldg. Assn. v. Grant</i>	8
	104 Cal. 306 (1894).....	
19	<i>Shoemaker v. County of Los Angeles</i>	9
20	37 Cal.App.4th 618, 43 Cal.Rptr.2d 774 (1995).....	
21	<i>Spruce Pine Indus. Park, Inc. v. Explosives Supply Co. Inc.</i>	12
	634 S.E.2d 264 (2006)	
22	<i>Strong v. Theis</i>	10
23	187 Cal.App.3d 913, 232 Cal.Rptr. 272 (1986).....	
24	<i>Teachers Ins. & Annuity Assn. v. Furlotti</i>	9
	70 Cal.App.4th 1487, 83 Cal.Rptr.2d 455 (1999).....	
25	<i>Thayer Plymouth Center, Inc. v. Chrysler Motors Corp.</i>	4
26	255 Cal.App.2d 300, 63 Cal.Rptr. 148 (1967).....	
27	<i>Woolley v. Embassy Suites, Inc.</i>	5
	227 Cal.App.3d 1520, 278 Cal.Rptr. 719 (1991).....	

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STATUTES

Cal. Code Civ. Proc. § 634 13
Cal. Code Civ. Proc. § 662 13
Cal. Code Civ. Proc § 3367(2)..... 7

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. SUMMARY

The Court should deny McDonald's motion for a mandatory preliminary injunction ordering Mr. Husain to quit the franchise premises for several reasons. The Court has expressed particular concern about the Court's ability to order the parties to maintain their franchise relationship pending resolution of this dispute. There are a number of cases that hold in circumstances similar to those here, that a Court may exercise its equitable power in favor of maintaining the business relationship because of the extreme irreparable harm and inadequacy of monetary damages suffered when permitting a business to fail. In addition, the Court has the authority to order specific performance of the renewal obligation and is not limited to awarding damages.

For completeness, the Husains finally examine the contours of McDonald's claim for injunctive relief. First, the general purpose of the preliminary injunction is to preserve the status quo of the parties until a trial on the merits can be held. Here, the status quo is the last uncontested status which preceded the pending controversy -- the Husains' operating the franchise. As the Court has recognized, the motion prayed for is mandatory and would serve to alter the parties' relative positions. Mandatory injunctions are rarely granted and this case does not justify departing from the rule.

The Husains submit that McDonald's is not likely to prevail on the merits of its claims, McDonald's relative harm pales in comparison to the harm to the Husains and their employees will suffer should the injunction be granted. McDonald's further accepted performance from the Husains and should therefore be estopped to deny the renewal obligation. The Husains, not McDonald's, will suffer great and irreparable injury if the Husains are ordered to quit. For these reasons, the Husains respectfully request that the Court deny McDonald's motion.

1 **II. FACTS**

2
3 The following facts are found in the accompanying declaration of Ali Husain. This
4 dispute arises out of a McDonald's franchise in Novato, California owned and operated by Ali
5 and Khursheed Husain. The Husains are long time excellent McDonalds' franchisees in San
6 Francisco and Marin. The Husains purchases the Novato franchise in 2005 as part of a package
7 deal for 7 Marin County franchises with the agreement, reflected in the written assignment
8 agreement executed by McDonald's Corporation, that they would be granted a rewrite long term
9 renewal for the franchises. Based on this understanding, the Husains paid \$10,500,000 to the
10 previous franchisee and, at McDonald's Corporation's demand, invested an additional \$1,650,000
11 in making physical improvements to the restaurants. With McDonald's knowledge and approval,
12 Mr. Husain borrowed these sums to finance the purchase and improvements. The Novato
13 location McDonald's now seeks to convert to its own profit is one of the best franchises in the
14 package and is necessary for Mr. Husain to meet the loan obligations that were incurred at
15 McDonalds' behest.

16
17 **III. ARGUMENT**

18 **A. Permitting The Husains To Operate As A McDonald's During The Pendency**
19 **Of The Litigation Is A Permitted And Appropriate Remedy As Well As The**
20 **Most Equitable Remedy**

21 Numerous cases support the proposition that a court may use its equitable power to
22 require parties in a franchisor/franchisee or distributor/supplier relationship to work together
23 pending resolution of litigation involving termination and/or renewal rights. For example, the
24 district court in *Bray v. QFA Royalties LLC*, 486 F. Supp. 2d 1237, 1247 (D. Colo. 2007) ordered
25 that the continued performance of a franchise relationship is a permissible remedy pending trial
26 on the merits of a termination claim. In *Bray*, the plaintiffs were Quiznos franchisees who posted
27 a deceased franchisee's suicide note on the Internet in which the franchisee had attributed his
28 suicide to litigation he had against Quiznos. Quiznos summarily terminated the franchisees. In a

1 quotation worthy of repeating in full, the district court rejected the arguments McDonald's makes
2 here.

3
4 Courts have recognized that the threatened loss of a franchise
5 business before the lawfulness of a termination can be determined
6 constitutes irreparable harm sufficient to warrant injunctive relief.
7 *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1207 (2d
8 Cir.1970) (having run the business for 20 years, family's loss of car
9 dealership was not entirely measurable in monetary terms). Quiznos
10 responds that because the value of Plaintiffs' lost businesses, should
11 it come to that, is calculable, Plaintiffs cannot establish irreparable
12 harm, citing *Heideman v. South Salt Lake City*, 348 F.3d 1182,
13 1189 (10th Cir.2003).

14 The Second Circuit in *Semmes* rejected precisely this argument. In a
15 persuasive and sensitive passage, Judge Friendly wrote:

16 Ford's contention that Semmes failed to show irreparable injury
17 from termination is wholly unpersuasive. Of course, Semmes' past
18 profits would afford a basis for calculating damages for wrongful
19 termination, and no one doubts Ford's ability to respond. But the
20 right to continue a business in which William Semmes had engaged
21 for twenty years and into which his son had recently entered is not
22 measurable entirely in monetary terms; the Semmes want to sell
23 automobiles, not to live on the income from a damages award. *See*
24 *Madsen v. Chrysler Corp.*, 261 F.Supp. 488, 507 (N.D.Ill.1966),
25 *vacated as moot*, 375 F.2d 773 (7 Cir.1967). Moreover, they want
26 to continue living. As Judge Goodrich said, a 'judgment for
27 damages acquired years after his franchise has been taken away and
28 his business obliterated is small consolation to one who, as here,
has had a Ford franchise' for many years, *Bateman v. Ford Motor*
Co., 302 F.2d 63, 66 (3 Cir.1962). *Semmes*, 429 F.2d at 1205.

29 In the instant case, where Plaintiffs' operation of Quiznos stores
30 was a livelihood and not just a job, this same analysis obtains.
31 Moreover, there is a way of looking at the facts in the instant case
32 where Plaintiffs' injury in being terminated in retaliation for the
33 posting of the Baber letter does not merely flow *from* the alleged
34 breach, but *is* the breach. *See Wisdom Import Sales Co. LLC v.*
35 *Labatt Brewing Co. Ltd.*, 339 F.3d 101, 114 (2d Cir.2003)(money
36 damages were inadequate remedy for the loss of a contractual right
37 to control a business). Where a franchisee's right to continue,
38 uninterrupted, in business is terminated in retaliation for the acts of
other franchisees, the interruption and "black eye" of termination
itself is an injury that cannot adequately be remedied by damages,
and further supports the finding of irreparable harm in this case.

1 Bray, 486 F.Supp.2d at 1247-1248.

2 The *Bray* Court therefore entered a preliminary injunction in the *franchisees'* favor,
3 preventing Quiznos from terminating the plaintiffs' franchises and rights to sell Quiznos products.
4 "I find Plaintiffs will each suffer irreparable injury unless they are permitted to continue operating
5 under the terms of their respective Franchise Agreements until a trial on the merits of their
6 wrongful termination claims can be had. I further find that the threatened injury to Plaintiffs in the
7 absence of such an injunction outweighs whatever harm the proposed injunction may cause
8 Quiznos and I reject any contention that injunction, if issued, is adverse to the public interest." *Id.*
9 at 1253-54. Significantly, the court permitted the franchisees to operate with the Quiznos
10 trademarks notwithstanding the alleged termination.

11 The district court in *Mahroom v. Best Western Intern., Inc.*, 2009 WL 248262, *3
12 (N.D.Cal. 2009) reached similar conclusions regarding irreparable harm in a franchise case.

13 Moreover, intangible benefits such as business goodwill, reputation
14 and advertising presence often are not quantifiable, and thus their
15 loss may amount to irreparable harm. [Citations.] If the Mahrooms
16 ultimately prevail on all claims, it is possible that some significant
17 portion of the intangible benefits that arise from being a member of
18 the BWI network will have suffered and be difficult to valuate
19 going forward. [Citation.] Finally, the Mahrooms' long tenure as a
20 Best Western member may prove to be an intangible benefit that
21 may be preserved only through full reinstatement into the BWI
22 membership program. *See Semmes Motors, Inc. v. Ford Motor Co.*,
23 429 F.2d 1197, 1205 (2d Cir.1970) ("[T]he right to continue a
24 business in which [plaintiff] had engaged for twenty years ... is not
25 measurable in monetary terms.").

26 *Mahroom* also considered the import of *Thayer Plymouth Center, Inc. v. Chrysler Motors*
27 *Corp.*, 255 Cal.App.2d 300, 63 Cal.Rptr. 148 (1967) for the proposition that injunctive relief is
28 inappropriate when the parties are adversaries but distinguished *Thayer* because maintaining the
franchise relation at issue would not "require constant supervision, as membership is renewed
annually and the parties would not engage in daily, face-to-face interactions. *Ibid.* *Mahroom*
further noted that, "the relevance of *Thayer* is questionable as it was decided two decades prior to
the enactment of the CFRA. A violation of CFRA, which prohibits termination of franchise
agreements without "good cause," may permit injunctive relief as a remedy. [Citation.]" Here,

1 constant supervision of the Husains' operations is not necessary and there is no daily face to face
2 interaction with McDonald's personnel. Husain Decl., ¶ 39. Cf. *Woolley v. Embassy Suites, Inc.*,
3 227 Cal.App.3d 1520, 278 Cal.Rptr. 719 (1991) (constant face to face interaction). McDonald's
4 personnel rarely come to store locations, visiting about three days per year. Husain Decl., ¶ 39.
5 Further, as the Husains may have a claim under the California Franchise Relations Act, new
6 counsel is the process of preparing an amended complaint.

7 *Precision Tune Auto Care, Inc. v. Radcliff*, 731 So.2d 744 (1999) was an action for
8 breach of a franchise agreement where the franchisor moved to dissolve a temporary injunction
9 preventing termination. The Court of Appeal held that the trial court acted within its discretion in
10 enforcing the temporary injunction. "In *Burger Chef* we recognized that temporary injunctions
11 can be appropriate in franchise cases in order to preserve the status quo during the ongoing
12 litigation. *Bateman v. Ford Motor Co.*, 302 F.2d 63 (3d Cir.1962); *Semmes Motors, Inc. v. Ford*
13 *Motor Co.*, 429 F.2d 1197 (2d Cir.1970)." *Id.* at 746.

14 In *Automotive Elec. Service Corp. v. Ass'n of Automotive Aftermarket Distributors*, 747
15 F.Supp. 1483, 1514 (E.D.N.Y. 1990) the plaintiff was a warehouse distributor of automotive parts
16 whose membership in a trade organization was unjustly terminated and threatened the existence
17 of the entire enterprise. The district court entered a permanent injunction of reinstatement on
18 considerations also present in this case.

19 The Court finds that absent membership in AAAD and the
20 opportunity to service the Goodyear stores, which account for
21 almost one-third of the plaintiff's gross sales, it may have to
22 terminate its business. This is not a case of mere lost profits, but
23 rather the basic existence of a seventy year old business may be
24 threatened. **The evidence reveals that in order to prepare to**
25 **service the substantial Goodyear account, the plaintiff added a**
26 **night shift, placed a two million dollar mortgage on their**
27 **warehouse and became involved with a factor with a running**
28 **balance owed of approximately \$700,000. Like the plaintiffs in**
***Semmes*, the Judelsons have a virtually unmeasurable interest**
in continuing to operate their business and a damage award
would, in this Court's view, be inadequate to afford complete
relief. In this regard, the Court notes that the remedy of
reinstatement by way of an injunction was also found appropriate in
***Van Daele*.**

1 *Id.* at 1514 (emphasis added).

2 Likewise here, the Husains borrowed some \$12,000,000 (current balance some 9,600,000)
3 mortgaging all of their McDonald's franchises to finance the purchase of the franchises. Husain
4 Decl., ¶¶ 11-12. This is not a case of mere lost profits, rather the existence of the entire Husain
5 franchise enterprise that may be affected by the termination of this single franchise. Husain Decl.,
6 ¶¶ 34-38. The Husains rely on the income from the Novato location to pay their debt. Husain
7 Decl., ¶ 35.

8 In *Carlo C. Geraldi Corporation v. Miller Brewing Company*, 421 F.Supp. 233, 236
9 (D.N.J.1976) the plaintiff distributor moved for an injunction against termination under the New
10 Jersey franchise statute and the district court stated:

11 "This Court finds that the loss of business and good will, and the
12 threatened loss of the enterprise itself, constitute irreparable injury
13 to the plaintiff sufficient to justify the issuance of a preliminary
14 injunction. See, e. g., *Semmes Motors, Inc. v. Ford Motor Co.*, 429
15 F.2d 1197, 1205 (2d Cir. 1970); *Interphoto Corp. v. Minolta Corp.*,
16 417 F.2d 621, 622 (2d Cir. 1969); *Brennan Petroleum Prods. Co. v.*
17 *Pasco Petroleum Co.*, 373 F.Supp. 1312, 1316 (D.Ariz.1974); *N.*
18 *W. Controls, Inc. v. Outboard Marine Corp.*, 317 F.Supp. 698, 703
19 (D.Del.1970); cf. D. Dobbs, *Remedies* s 12.18, at 884-5 (1973).
20 Furthermore, the balance of hardships tips decidedly in favor of the
21 plaintiff's position. The plaintiff would clearly suffer major losses
22 without preliminary relief, since Miller products constitute
23 approximately eighty per cent (80%) of the plaintiff's total sales
24 volume. An injunction, on the other hand, would cause little, if any,
25 harm to Miller. **In fact, Miller could be said to benefit insofar as**
26 **it derived profits from the continued sales to the plaintiff.**
27 **Certainly the public would benefit from the uninterrupted**
28 **availability of Miller products. Finally, we must also consider**
that failure to grant preliminary relief would result in economic
hardship for the plaintiff's employees."

23 *Id.* (emphasis added).

24 Similarly, in *Paschall v. Kansas City Star Co.*, 441 F.Supp. 349, 358 (D.C.Mo. 1977), the
25 Plaintiff newspaper carriers moved for preliminary injunction against termination pending trial of
26 an antitrust suit against newspaper.

27 The testimony at the hearing convinces this Court that irreparable
28 harm would result to plaintiffs should a preliminary injunction not

1 issue. Many plaintiffs paid thousands of dollars for their routes.
2 Some borrowed money to finance the purchase and are still paying
3 off their loans. Several testified that they employed others to assist
4 them with the physical delivery of the papers.... Therefore, to
5 deprive these contract carriers of their business until a final decision
6 is reached in this case would be unconscionable.

7 *Id*

8 Like in *Geraldi*, permitting the status quo to continue would not harm McDonald's and
9 can be viewed as benefitting it to the extent profits are paid. Moreover, the court can consider the
10 harm to the approximately thirty-five employees working at the Novato location who would
11 become immediately unemployed. Husain Decl., Ex. ¶ 38. If the Husains' other franchises are
12 jeopardized, as is feared, some 270 other employees may be in peril. Husain Decl., Ex. ¶ 38.
13 McDonald's attempts to counter this real world harm with the hypothetical harm it might suffer
14 by alleged "unauthorized" use of the trademarks. But McDonald's has no cause for alarm, as the
15 Husains are longstanding and reliable multi-unit operators that will conduct business as usual.
16 Husain Decl., Ex. ¶ 33. Indeed, McDonald's recently granted one of the Husains franchises a
17 twelve year extension. Husain Decl., Ex. ¶ 33. In addition, nothing will prevent McDonald's
18 from applying to the court for relief should a specific issue arise.

19 The Husains face losses strikingly similar to the losses deemed irreparable by the above
20 courts. Like the Plaintiffs in *Mahroom, Bray, Paschal, Semmes* and *Geraldi*, the Husains are
21 challenging the lawfulness of the termination/nonrenewal by its franchisor. In each of these
22 cases, the effect of the Court order was a continuation of the business relationship between the
23 parties despite one party's attempt to terminate. Here, there is no evidence that Mr. Husain has
24 done or will do anything contrary to the course of conduct the parties have been operating under
25 for years. Indeed, the evidence is to the contrary. Husain Decl., Ex. ¶ 33.

26 **B. The Court Has The Authority To Order Specific Performance of The**
27 **Renewal Obligation.**

28 California courts will award specific performance when appropriate even in franchise
cases where strict mutuality may not be present. Code Civ. Proc § 3367(2) ("Specific relief is
given: . . . (2) by compelling a party himself to do that which ought to be done . . .").

1 For many years this view was adopted by the courts. One party to a
2 contract could not obtain specific performance if that remedy was
3 unavailable to the other party. (See, e.g., *Roy v. Pos* (1920) 183 Cal.
4 359, 364 [191 P. 542].) However, the Restatement of Contracts
5 rejected this rule. “The fact that the remedy of specific enforcement
6 is not available to one party is not a sufficient reason for refusing it
7 to the other party.” (Rest., Contracts, § 372, subd. (1). See also 7
8 Witkin, Summary of Cal. Law (8th ed. 1974) pp. 5274-5276.)
9 ¶] In 1969, the California Legislature discarded the rigid and
10 outdated requirement of mutuality of remedy with respect to
11 specific performance..... Under existing precedent, a trial court may
12 include terms in a decree which adjust the equities between the
13 parties so as to bring about substantial justice. [Citation.]

14 *Bleecher v. Conte*, 29 Cal.3d 345, 352 -353 (1981).

15 Thus, for the same reasons noted above, the Court may include terms in a decree that
16 adjust the equities between the parties in order to bring about substantial justice. Specific
17 performance of a renewal obligation is therefore permissible. See also, *Prudence Corp v Shred-it*
18 *America, Inc.*, Bus. Franch. Guide ¶ 13, 986 (C.D. Cal 2008) (Ordering specific performance of
19 renewal of franchise).

20 C. **The Standards for Mandatory Injunctions Are High, And McDonald’s Has**
21 **Not Met Them**

22 The purpose of a preliminary injunction is to preserve the status quo pending a trial on the
23 merits. *Continental Baking Co. v. Katz*, 68 Cal.2d 512, 528, 67 Cal.Rptr. 761, 771 (1968). The
24 status quo has been defined as the “last uncontested status which preceded the pending
25 controversy.” *Agricultural Labor Relations Bd. v. Ruline Nursery Co.*, 115 Cal.App.3d 1005,
26 1015, 171 Cal.Rptr. 793 (1981). The court examines all of the material before it in order to
27 consider “whether a greater injury will result to the defendant from granting the injunction than to
28 the plaintiff from refusing it. . . .” *Santa Cruz Fair Bldg. Assn. v. Grant*, 104 Cal. 306, 308
(1894).

Two interrelated factors are evaluated by the trial court in deciding whether to issue a
preliminary injunction. The first is the “reasonable probability” that the plaintiff will prevail on
the merits at trial. *Robbins v. Superior Court*, 38 Cal.3d 199, 206, 211 Cal.Rptr. 398 (1985). “...
The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied
as compared to the harm that the defendant is likely to suffer if the preliminary injunction were

1 issued.' [Citation.]" *Shoemaker v. County of Los Angeles*, 37 Cal.App.4th 618, 624-625, 43
2 Cal.Rptr.2d 774 (1995). And significantly higher burdens follow requests for mandatory
3 injunctions. "We emphasize that [a] preliminary *mandatory* injunction is rarely granted, and is
4 subject to stricter review on appeal. The granting of a mandatory injunction pending trial is not
5 permitted except in extreme cases where the right thereto is clearly established." *Teachers Ins. &*
6 *Annuity Assn. v. Furlotti*, 70 Cal.App.4th 1487, 1493, 83 Cal.Rptr.2d 455, 458 (1999) (citations
7 and internal quotations omitted).

8
9 1. McDonald's Is Not Likely To Prevail On Its Lanham Act Claim.

10 In order to show a likelihood of prevailing on this claim, McDonald's must first show that
11 the nonrenewal of the Husains' franchise was proper. *McDonald's Corp. v. Robertson*, 147 F.3d
12 1301, 1308 (11th Cir. 1998). "In considering this issue for the first time, we find that the Lanham
13 Act's requirement that a franchisor demonstrate that *unauthorized* trademark use occurred to
14 prevail on the merits of a trademark infringement claim against a franchisee necessitates some
15 type of showing that the franchisor properly terminated the contract purporting to authorize the
16 trademarks' use, thus resulting in the *unauthorized* use of trademarks by the former franchisee."
17 *Id.* at 1308. As held in cases such as *McDonald's* and *Bray*, a franchisor cannot use a wrongful
18 termination (or wrongful nonrenewal) as a basis for asserting a trademark infringement claim
19 against a former franchisee that continues to use the trademark. McDonald's stands in no better
20 position to assert that the trademark use here is unauthorized.

21 At minimum, questions of fact exist regarding the propriety of the nonrenewal. The
22 Husains challenge the nonrenewal on multiple grounds. First, the Husains assert an express
23 contractual right to renew. Second, McDonald's nonrenewal violates the California Franchise
24 Relations Act. Bus. & Prof. Code § 20025 (b) (1) (i.e. no nonrenewal for purposes of converting
25 franchisee business to franchisor employees). This claim will be made in the amended to be filed
26 amended complaint. Third, McDonald's is estopped from denying the promise to renew and the
27 result McDonald's seeks is so unjust as to be unconscionable and an unlawful forfeiture. Finally,
28 the injunction can be denied as McDonald's does not have clean hands and has not done equity.

1 As McDonald's trademark infringement claims falls, so does its claims for false designation and
2 dilution.

3
4 2. McDonald's Is Not Likely To Prevail On Its Breach of Contract Claim, But
The Husains Will Likely Win Theirs

5 McDonald's alleges the Husains have breached the contract by holding over in the
6 premises. The Husains claim that McDonald's has breached the contract by refusing to
7 acknowledge the rewrite. The Husains submit they have the better argument but the resolution
8 will turn on questions of fact in any event.

9 The general rule is that a contract must be interpreted to give effect to the mutual,
10 expressed intention of the parties. "The purpose of the law of contracts is to protect the reasonable
11 expectations of the parties." *Ben-Zvi v. Edmar Co.*, 40 Cal.App.4th 468, 475, 47 Cal.Rptr.2d 12
12 (1995). "The court must avoid an interpretation which will make a contract extraordinary, harsh,
13 unjust, or inequitable. [Citation.]" *Strong v. Theis*, 187 Cal.App.3d 913, 920-921, 232 Cal.Rptr.
14 272 (1986). It makes little sense that the Husains would borrow millions of dollars to purchase
15 restaurants that would not be renewed. McDonald's clearly understood this. Husain Decl., Ex. ¶
16 6 -9. Indeed, it is undisputed that McDonald's provided Mr. Husain with a renewal letter. Husain
17 Decl., Ex. ¶ 13. The interpretation and nonrenewal urged by McDonald's Corporation would
18 render the contract harsh, unjust and inequitable and result in the effective forfeiture of millions
19 of dollars by the Husains to McDonald's. That is clearly an inequitable result.

20 The issues at hand are analogous to those involving irrevocable options. Here,
21 McDonalds granted the Husains the rewrite in two places. First, the Husains were promised the
22 right to a rewrite in the Assignment agreement. The Assignment is a tri-partite agreement
23 between McDonald's, the Husains, and the Magruders, and provides for an unconditional rewrite.
24 "In consideration of McDonald's consent to this Assignment **and the issuance of a rewrite to**
25 **Assignee**, Assignor waives, releases and disclaims any claim for a rewrite of [Corte Madera
26 location]. Husain Decl., Ex. B p.3 ¶ 17, emphasis added. This promise was accepted by the
27 Husains on payment for the stores at the time of transfer.

28 Second, McDonald's offered the Husains' an express option was offered under the 2005

1 Plan To Win. Husain Decl., Ex. I. The Plan to Win Program is described at Husain Decl., Ex. S.
2 The subject line is entitled "Owner/Operators Option to Elect a New 20 Year Term on Certain
3 Sales between Operators." The document goes on to state in pertinent part that:

4 The option to secure a new 20 year franchise is designed to provide
5 buyers with the assurance that McDonald's is willing to commit to a
6 longer term franchise than was available at the time of
7 purchase. The increased franchise tenure option is intended to
8 provide buying owner/operators with additional tenure so that they
9 can make long term decisions benefiting the consumer. Long term
10 decisions may include reimaging or remodeling restaurants beyond
11 the minimum requirements. Additionally, the available longer term
12 franchise may assist owner/operators in succession planning for
13 their next generation candidates.

14 Those buyers who have met the reinvestment conditions will
15 receive an offer notice... **The owner/operator must provide
16 written acceptance of the offer within 15 days of receipt of
17 offer.**

18 Emphasis added.

19 Mr. Husain has declared that he mailed the acceptance of the option. Husain Decl., Ex. ¶
20 14. Our Supreme Court has held the mailing of such an acceptance is proper **and effective on
21 deposit in the mail.** "To recapitulate, we hold first, that since pursuant to section 1582 the lease
22 prescribed no condition concerning the communication to the optionor of the exercise of the
23 option except that the notice be in writing, notice of acceptance by ordinary mail was a reasonable
24 mode of communication; and second, that pursuant to section 1583 defendant's exercise of the
25 option became effective when notice of acceptance was deposited in the mail." *Palo Alto Town
26 & Country Village, Inc. v. Bbtc Company*, 11 Cal.3d 494, 504-505, 113 Cal.Rptr. 705,
27 711 (1974). Moreover, disputes as to mailing are resolved by juries. "[T]rier of fact must then
28 weigh the denial of receipt against the inference of receipt arising from proof of mailing and
decide whether or not the letter was received." *Craig v. Brown & Root, Inc.*, 84 Cal.App.4th
416, 421-422, 100 Cal.Rptr.2d 818, 821 (2000).

In addition, an optionor can waive one or more of the terms. *Rollins v. Stokes*, 123
Cal.App.3d 701, 713, 176 Cal.Rptr. 835 (1981) Here, McDonald's acceptance of Mr. Husain's
performance and various improvements to the property, as late as June of 2009, Husain Decl., ¶¶

1 27-31, constituted a waiver. Further, if, after valid exercise of the option, the optionor refuses to
2 perform (here, fails to tender the franchise agreement), the optionee may sue to compel specific
3 performance of the option. See, *Auslen v. Johnson*, 118 Cal.App.2d 319, 321, 257 P.2d 664
4 (1953). Such is the case here. And regarding exercises of options with no specific duration, some
5 courts have ruled must exercise an option to renew by giving notice at some time during the
6 original lease term, up to and including the last day of the term. See, *Music Tree, Inc. v. Tallman*
7 *Piano Store, Inc.*, 45 Or. App. 651, 608 P.2d 1228 (1980). Thus, even if the rights granted by the
8 assignment are considered an option, the Husains have validly exercised them. Moreover, courts
9 have even found that holding over is exercise of the option and the tenancy continues. *Spruce*
10 *Pine Indus. Park, Inc. v. Explosives Supply Co. Inc.*, 634 S.E.2d 264 (2006).

11 The Husains do not contest that they must sign a new franchise agreement with
12 McDonald's should it be provided. "The fact that an agreement contemplates subsequent
13 documentation does not invalidate the agreement if the parties have agreed to its existing terms."
14 *Ersa Grae Corp. v. Fluor Corp.*, 1 Cal.App.4th 613, 624, 2 Cal.Rptr.2d 288, 295 (1991) (citations
15 omitted). Under California law, a contract will be enforced if it is sufficiently definite for the
16 court to ascertain the parties' obligations and to determine whether those obligations have been
17 performed or breached. *Boyd v. Bevilacqua*, 247 Cal.App.2d 272, 287, 55 Cal.Rptr. 610 (1966).
18 Here, the options are sufficiently certain to be enforced. The remedy of specific performance
19 reflects the principle that the parties should be placed in the same position as if the contract had
20 been performed. *Ellis v. Mihelis*, 60 Cal.2d 206, 220 (1963). Here, that means the Husains would
21 be granted the required rewrite.

22 Similarly, McDonald's refusal to provide a franchise agreement to the Husains violates a
23 key rule that one party cannot interfere with a condition precedent or performance to escape
24 liability. *Rains v. Arnett*, 189 Cal.App.2d 337, 347, 11 Cal.Rptr. 299 (1961) ("If he prevents or
25 makes impossible the performance or happening of a condition precedent, the condition is
26 excused"). McDonald's refusal to provide such a new franchise agreement and other conduct (i.e.
27 accepting and encouraging the Husains continued investment) can also be deemed a waiver.
28 Waiver can "mean the loss of an opportunity or a right as a result of a party's failure to perform an

1 act it is required to perform, regardless of the party's intent to ... relinquish the right... The
2 decisions likewise hold that the 'bad faith' or 'wilful misconduct' of a party may constitute a
3 waiver...." *Engalla v. Permanente Medical Group, Inc.*, 15 Cal.4th 951, 983, 64 Cal.Rptr.2d 843
4 (1997) (citations and internal quotations omitted). Finally, a finding of waiver "is ordinarily a
5 question of fact..." *Davis v. Blue Cross of Northern California*, 25 Cal.3d 418, 425-426, 158
6 Cal.Rptr. 828 (1979).

7
8 3. McDonald's Is Not Likely To Prevail On Its Trespass Or Ejectment Claims

9 Trespass and ejectment are common law actions based on wrongful entry or possession of
10 real property. The Husains deny that they are trespassing for the reasons set forth above. As a
11 consequence, a mandatory preliminary injunction is not an appropriate remedy.

12
13 **D. The Equities Do Not Favor Injunctive Relief**

14 Estoppel is based on the fundamental equitable principle that where the conduct of the
15 party to be estopped has induced another to take a position that will subject the other to injury,
16 then the party to be estopped should not be allowed to repudiate his or her acts. *Elliano v.*
17 *Assurance Co. of America*, 3 Cal. App. 3d 446, 83 Cal. Rptr. 509 (1970). Here, McDonald's
18 accepted the Husains substantial investments in the property, a position at odds with termination
19 and a forfeiture. McDonald's will be unjustly enriched to the tune of millions of dollars if it is
20 permitted to takeover the franchise and should be estopped from doing so.

21 Further, McDonald's does not have clean hands for the above reasons. The defense of
22 unclean hands applies where it would be inequitable to grant the plaintiff relief. *Martin v. Kehl*,
23 145 Cal.App.3d 228, 239-240, 193 Cal.Rptr. 312, fn. 1 (1983). The court must consider both the
24 degree of harm caused by the plaintiff's misconduct and the extent of the plaintiff's alleged
25 damages. *Republic Molding Corporation v. B. W. Photo Utilities*, 319 F.2d 347, 349-350 (9th
26 Cir. 1963). When doing so must consider the material facts affecting the equities between the
27 parties; the failure to do so is an abuse of discretion. See Code Civ. Proc., §§ 662, 634. A decision
28 based on bare "equity" unsupported by established precedent and lacking evidentiary support

1 does not disclose the proper exercise of discretion.

2 **E. The Husains Will Suffer Irreparable Harm By The Injunction**


3 In summary the Husains describe the following items of irreparable harm that will flow
4 from granting the injunction:

- 5 • They will be ejected from a family business they have worked hard to build and sustain
- 6 • They rely upon the Novato location to pay their loan obligations and without the income
7 from the Novato location they may end up in default of loans secured by the premises and
8 suffer credit damage as well as the potential for financial ruin
- 9 • Adverse credit decisions have already been made by lenders
- 10 • The ability to pass the business on to their son will be impaired
- 11 • Thirty-five employees will be put out of work creating hardship for them and their
12 families
- 13 • Employment relations at the Husains other franchises may be disrupted
- 14 • The Husains will suffer damage to their reputation and goodwill in the business and
15 community.

16
17 **IV. CONCLUSION**

18 There is ample authority for this Court to maintain the status quo and not eject the Husains
19 from their franchise pending a resolution on the merits. The relative harm to the Husains and
20 their employees far outweighs any potential harm McDonald's. For these reasons, the motion
21 should be denied. Respectfully submitted,

22
23 January 6, 2010

24 
25 _____
26 Robert S. Boulter
27 Attorney for Plaintiffs and Cross-Defendants
28 Syed Ali Husain and Khursheed Husain

27 N:\ACTIVE\Husain, Ali\Pleadings\MEMO OPP TO APP FOR ORDER SHORTENING TIME 12-31.doc