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DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE FIRST APPELLATE DISTRICT

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SAYED ALI HUSAIN, ET AL,)
 Plaintiff/Respondent,)
 vs.) No.
MCDONALD'S CORPORTATION, ET AL,))
 Defendant/Appellant.)
_____)

REPORTER'S TRANSCRIPT ON APPEAL
FROM THE JUDGMENT OF THE SUPERIOR
COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF MARIN
DATED:

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

MARIN COUNTY JUDICIAL DISTRICT

HON. JOHN A. SUTRO, JR., JUDGE

DEPARTMENT H

--o0o--

SYED ALI HUSAIN, ET AL,)

Plaintiffs,)

vs.)

No. CV 096177

MCDONALD'S CORPORATION, ET AL,))

Defendants.)

_____)

REPORTER'S TRANSCRIPT OF EX PARTE HEARING

Tuesday, January 5, 2009

VOLUME 2, PAGES 13 THROUGH 27, INCLUSIVE

APPEARANCES:

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Reported by: CHRISTINA GILSON, CSR NO. 9824

1 TUESDAY, JANUARY 5, 2010

8:35 O'CLOCK A.M.

2 --o0o--

3
4 THE COURT: Is everybody here on Husain versus
5 McDonald's?

6 I need appearances, please.

7 MR. BOULTER: Robert Boulter on behalf of the
8 Husains.

9 THE COURT: Good morning, Mr. Boulter.

10 MR. KEEGAN: Chris Keegan of Kirkland and Ellis.
11 With me is my partner, Jonathan Bunge from the Chicago
12 office.

13 THE COURT: There is an ex parte here, unopposed,
14 for Mr. Bunge's pro hac vice admission. It's granted.

15 MR. BUNGE: Thank you, your Honor.

16 THE COURT: I'll sign the order.

17 You can all have seats if you want.

18 All right. As I understand it, the matter is on
19 this morning on an application. It says for order
20 shortening time, but it appears to me from the papers that
21 the defendant is seeking an immediate injunction regarding
22 Mr. Husain's continued occupation of the restaurant in
23 Novato and his continued operation under the McDonald's
24 logo; is that correct?

25 MR. BUNGE: That's right, your Honor.
26

1 THE COURT: And, Mr. Boulter, you're seeking to
2 put this off so that you can file an opposition to the
3 relief that the defendant has requested?

4 MR. BOULTER: Yes, your Honor. We believe due
5 process requires us an opportunity to respond to this and
6 that the ex parte application is --

7 THE COURT: You need to tell me on what basis do
8 you believe your client has a right to continue operating
9 as a McDonald's when he no longer is licensed to do so by
10 McDonald's.

11 MR. BOULTER: Well, your Honor, we believe that
12 the contract at issue in the matter provides Mr. Husain
13 with a right to renew and that McDonald has and we're
14 entitled to specific performance of that renewal.

15 THE COURT: Wait. Back up a minute. That was the
16 issue that I had to resolve about a week or so ago, is you
17 can't force McDonald's to continue to do business with Mr.
18 Husain if they don't want to. And I don't know where
19 you're going to get any authority that supports the Court's
20 issuing or granting specific performance in favor of your
21 client in this matter. I just don't think that's possible.

22 MR. BOULTER: We would respectfully appreciate the
23 opportunity to try, your Honor, and submit an opposition, a
24 proper opposition, to the motion.

25 THE COURT: Well, what concerns me is that what
26 you're trying to do is force McDonald's to continue to

1 allow Mr. Husain to operate this restaurant when they've
2 already terminated the franchise agreement with them and
3 have stated very clearly, not just recently, but months
4 ago, that they had -- they were not going to renew the
5 franchise. And Mr. Husain ignored the warnings. He
6 apparently thought he could convince McDonald's to change
7 its mind, which he was unsuccessful in doing. So he put
8 himself in a pretty bad position because he ended up
9 with no time to try to sell the franchise to somebody else.

10 And now he's trying to force McDonald's to allow
11 him to stay there. Now, that's one thing.

12 If McDonald's has done something to violate Mr.
13 Husain's rights in terminating the franchise, he can sue
14 them for damages. And I know, because there are two
15 lawyers involved in this case who had a case just like
16 this, or in Los Angeles, where a franchisee was terminated
17 and sued McDonald's for damages and got a big verdict from
18 a jury, which was reversed on appeal, partially, and the
19 case settled, so --

20 MR. BOULTER: May I speak, your Honor?

21 THE COURT: Yes. I'm not sitting here giving you
22 a lecture. I'm stating to you my concern, at this point,
23 that your client is continuing to operate under the
24 McDonald's logo catering to the general public. He has no
25 connection with McDonald's whatsoever. Really, it's like
26 someone is in your house and they don't belong there and

1 they're trying to force you to let them stay there.

2 And I don't know -- I realize this is short
3 notice, but to a large extent, this matter was argued
4 before and the Court ruled, I think implicitly, if not
5 explicitly, that Mr. Husain has no right to continue to
6 operate as a franchisee of McDonald's in that location.

7 And I think that, obviously, it follows from that
8 that he has no business staying and continuing to put
9 himself out as a McDonald's franchisee when he has no right
10 to do so.

11 MR. BOULTER: Couple of points, your Honor. One
12 is, my partner and I actually tried a case in federal court
13 under, not the exact same circumstances, but under similar
14 circumstances, where a franchisee was at the end of the
15 term, the franchisor refused to renew and the Court found,
16 in essence, that the franchisor had waived its rights and
17 the Court had the power to order them to order a renewal
18 under the existing terms of the old franchise agreement.

19 So there is some authority out there for specific
20 performance of franchise agreements and --

21 THE COURT: You have a case in mind that you can
22 cite to me?

23 MR. BOULTER: At this point in time, I do not have
24 the case at the tip of my tongue, but again, we would
25 appreciate the opportunity to -- I can tell you the case
26 that my partner and I tried. It's not a published

1 decision.

2 THE COURT: And that's no kind of precedent for me
3 to follow.

4 MR. BOULTER: Understood, your Honor.

5 THE COURT: I'm fully aware this is a serious
6 matter insofar as your client is concerned and this is an
7 unusual request, at least in my experience, to some extent,
8 because it's not a question of my issuing an injunction
9 that maintains the status quo, but I'm ordering something
10 be done. So it's mandatory injunction instead of just a
11 restraining order.

12 But the thing that concerns me is that the law is
13 very clear that your client has no right to specific
14 performance of his so-called right to renew, and I really
15 think that if he's been wronged here, his remedy is
16 damages. But I'll give you a very short period of time
17 here to come up with a case, otherwise, as I say, I have
18 considerable concern that your client is, in a sense,
19 stealing McDonald's property brazenly and catering to
20 members of the public believing that they are really doing
21 business with McDonald's.

22 And I think that this puts McDonald's in a very
23 difficult position. Whether they were right or wrong in
24 terminating Mr. Husain, his remedy is in damages, as I see
25 it.

26 But I'll give you a chance to come up with

1 authority, Mr. Boulter, but I'm only going to give you a
2 couple of days.

3 MR. BOULTER: Your Honor, just a couple points.

4 One, Mr. Husain is now operating -- I'm not sure
5 the Court knows that or not -- is now operating 10 or so
6 McDonald's restaurants.

7 THE COURT: I'm aware of that.

8 MR. BOULTER: He is paying his royalties to
9 McDonald's. He is performing under the contract with the
10 contract that he has with McDonald's, the contract that he
11 should have with McDonald's.

12 THE COURT: Well, he doesn't have it.

13 MR. BOULTER: Well --

14 THE COURT: That's the problem.

15 MR. BOULTER: McDonald's, when they signed this
16 agreement, they expressly promised there would be a
17 rewrite. It's an unconditional right to a rewrite.

18 THE COURT: I don't see that. The letter that
19 you're referring to is not susceptible of any such
20 interpretation.

21 MR. BOULTER: This is the assignment.

22 THE COURT: I'm not talking about the assignment.
23 I'm talking about the January 2006 letter, I believe, that
24 concerned a renewal of the --

25 MR. BOULTER: Understood, but there is the
26 assignment which happened before that. There was, we

1 believe -- granted him an unconditional rewrite, a right to
2 a rewrite.

3 The other part of it is that, as late as June of
4 2009, McDonald's was happily accepting Mr. Husain's
5 improvement of the restaurant in question. He spent
6 \$169,000 improving that restaurant and McDonald's accepted
7 it, so --

8 THE COURT: In the end here though, Mr. Boulter, I
9 think the problem that you've got to deal with, that I have
10 to deal with, is that all you're talking about is if there
11 has been some breach of an obligation that McDonald has to
12 Mr. Husain back in -- he has an action for damages.

13 What you're seeking here to do is to try to keep
14 him in that restaurant. And you have got to come to grips
15 with that. All these other things that you're talking
16 about are subject to remedy by damages. And what you're
17 trying to do is force McDonald's to keep -- to allow Mr.
18 Husain to continue his business relationship with it as a
19 franchisee in that location. And I understand he's got
20 nine or ten other locations, as well. I think there are
21 two of them that, besides the one in question, with respect
22 to which McDonald's has already indicated an intent not to
23 renew the franchise.

24 So, I mean, be realistic here. Do you think that
25 the relationship between Mr. Husain and McDonald's, at this
26 point, is such that there is a shining future for it? I

1 mean, maybe you can sit down as lawyers and work something
2 out, but I have to deal with forcing someone to do
3 something.

4 I can't negotiate. I have to make rulings based
5 on the facts and the law.

6 So I think that, as I see it, your client has a
7 substantial problem with finding any legal authority that
8 justifies his continuing to operate a franchise store that
9 he no longer -- with respect to which he no longer has a
10 franchise and that McDonald's, its rights and the value of
11 its trademark are being diluted and damaged by his
12 continuing to operate when he's not a McDonald's franchisee
13 any longer.

14 So I will give you, as I say, a couple of days to
15 come up with some authority, if you think you can, to show
16 that the Court has the power here to force McDonald's to
17 keep him in his restaurant, I'd be glad to consider that.

18 MR. BOULTER: We can submit briefing in opposition
19 to the preliminary injunction motion, your Honor.

20 THE COURT: All right. But understand, I don't
21 want to hear a lot of argument about they're violating his
22 rights. You have got to prove to me that your client has a
23 right to force McDonald's, against its will, to keep him as
24 a franchisee in that store.

25 All the authority I've seen so far makes it very,
26 very clear that you can't force people into business

1 relationships like that that are based, to a large extent,
2 on the parties' cooperating with each other. It's not a
3 simple matter.

4 MR. BOULTER: Understood, your Honor. McDonald's
5 I don't think is contending that they would not cooperate
6 with Mr. Husain or Mr. Husain would not cooperate with them
7 in accordance with their course of doing business. Perhaps
8 they are. But in the global view of their relationship,
9 Mr. Husain is going to be a McDonald's partner until 2025,
10 I believe, in his other stores.

11 THE COURT: Again, I don't know why McDonald's did
12 what it did. They did it. And --

13 MR. BOULTER: But Mr. -- the big picture is, he
14 invested -- he borrowed \$10 million.

15 THE COURT: Damages. You're talking about
16 damages.

17 MR. BOULTER: This situation of taking this amount
18 of income out of Mr. Husain's pocket, with which he uses to
19 pay his debt, has the potential to have a domino effect.

20 THE COURT: I read that. I'm aware of that
21 already. I understand that. And the bottom line is, is
22 one of the ways of resolving that problem for the Court to
23 issue an order requiring that McDonald's renew his
24 franchise? And all the authority I saw says that it would
25 be beyond the Court's power to order specific performance
26 in a case where Mr. Husain's alleged harm can be remedied

1 by damages. It's not that complicated, I don't think.

2 MR. BOULTER: We definitely appreciate the Court's
3 opportunity to brief the issue.

4 THE COURT: As I told you, you've got to come to
5 grips with that issue, because I think that is the issue
6 you have to deal with here.

7 MR. BOULTER: May we have until Friday to brief
8 the issue?

9 THE COURT: Okay, but I have not given the
10 defendant an opportunity to be heard here.

11 I don't know if there is anything you want to say,
12 Mr. Bunge.

13 MR. BUNGE: Your Honor, I'll be brief.

14 Obviously, we agree with the comments that you
15 made.

16 As a threshold point, there was representation as
17 to what McDonald's position was with respect to Mr.
18 Husain's cooperation. I think it's obvious from the papers
19 that our position is that Mr. Husain has no franchise
20 agreement. He should be removed immediately, that the
21 Lanmack (sp?) case, the California cases on trademark law
22 presumes, as a matter of law, that there is irreparable
23 harm occurring day by day as Mr. Husain remains at that
24 franchise.

25 And not only is Mr. Husain's presence at the
26 franchise not authorized by any contract, because none

1 exists, we believe it's a clear matter of defiance of your
2 Honor's prior ruling in which your Honor explicitly said
3 that Mr. Husain, one, had no right to stay beyond 12-26;
4 two, that there is no authority that would authorize the
5 remedy sought by plaintiff which was to extend the
6 franchise lease agreements.

7 We believe we are being harmed irreparably. The
8 law clearly states that. I could continue, if you'd like,
9 your Honor.

10 THE COURT: No, I appreciate that. I think
11 that -- I think your position is well taken, as I've tried
12 to explain to Mr. Boulter. And it concerns me -- this is
13 somewhat of an unusual situation, but I think that the
14 Court of equity ought to be able to deal with it.

15 I really don't know how you're going to get around
16 the points that Mr. Bunge has made. And he's right, I've
17 already ruled on the essence of the problem here. And in a
18 sense, Mr. Husain is defying the Court's order denying him
19 a temporary restraining order against his removal as a
20 franchisee.

21 So I will give you to Thursday. And I don't know
22 that I'll want to put this matter back on -- actually, this
23 is a pretty narrow issue. I'm going to give you until
24 tomorrow afternoon at 3:00 o'clock to submit a brief to the
25 Court addressing the issue as to whether the Court can
26 specifically enforce -- or let me put it another way --

1 force McDonald's to renew its franchise agreement, because
2 that's what you're talking about here. If you can't, then
3 there is no reason that he should be permitted to stay in
4 there. Understood?

5 MR. BOULTER: Understood.

6 THE COURT: All right. And so you, please, get a
7 courtesy copy of the brief to the Court by tomorrow
8 afternoon at 3:00 o'clock, and then you need personally or
9 by fax or email to serve Mr. Bunge with anything that you
10 provide the Court. And I'll put the matter back on
11 calendar Thursday morning at 8:30.

12 MR. BOULTER: All right.

13 MR. BUNGE: Thank you, your Honor.

14 THE COURT: Okay. Thank you, gentlemen.

15 (Whereupon, the proceedings were concluded.)

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STATE OF CALIFORNIA)
) ss.
COUNTY OF MARIN)

I, CHRISTINA GILSON, an Official Shorthand Reporter for Marin County Superior Court, in and for the County of Marin, do hereby certify that the foregoing Reporter's Transcript is a full, true and correct transcription of my shorthand notes taken of the aforementioned proceedings at the time and place therein indicated.

IN WITNESS WHEREOF, I have hereunto set forth my hand this 5th day of January, 2010.



CHRISTINA GILSON, CSR NO. 9824

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DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE FIRST APPELLATE DISTRICT

--o0o--

SAYED ALI HUSAIN, ET AL,)
 Plaintiff/Respondent,)
 vs.) No.
MCDONALD'S CORPORTATION, ET AL,))
 Defendant/Appellant.)
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REPORTER'S TRANSCRIPT ON APPEAL
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

MARIN COUNTY JUDICIAL DISTRICT

HON. JOHN A. SUTRO, JR., JUDGE

DEPARTMENT H

--o0o--

SYED ALI HUSAIN, ET AL,)

Plaintiffs,)

vs.)

No. CV 096177

MCDONALD'S CORPORATION, ET AL,))

Defendants.)

_____)

REPORTER'S TRANSCRIPT OF EX PARTE HEARING

Tuesday, January 7, 2009

VOLUME 3, PAGES 28 THROUGH 64, INCLUSIVE

APPEARANCES:

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For the Defendant: JONATHAN BUNGE, ESQ.
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Reported by: CHRISTINA GILSON, CSR NO. 9824

1 THURSDAY, JANUARY 7, 2010

8:30 O'CLOCK A.M.

2 --o0o--

3
4 THE COURT: Husain versus McDonald's.

5 MR. BOULTER: Good morning, your Honor. Robert
6 Boulter for the plaintiff.

7 THE COURT: Good morning, Mr. Boulter.

8 MR. BOULTER: I would like to bring to the
9 attention of the Court, unfortunately, with the short
10 setting, I forgot about a case management conference that
11 I'm supposed to appear on at 9:00 o'clock. It was set for
12 9:30 and reset to 9:00 o'clock, but I don't want to --

13 THE COURT: In what department?

14 MR. BOULTER: It's in front of Judge Garrett,
15 Solano County.

16 THE COURT: You're not going to make that.

17 MR. BOULTER: I'm going to appear by court call,
18 if I can. I didn't want to cut myself and my client short
19 on the opportunity to ask questions and respond to the
20 Court's --

21 THE COURT: Why don't both counsel state your
22 appearances.

23 MR. BOULTER: Robert Boulter on behalf of the
24 Husains, the plaintiffs.

25 MR. BUNGE: Good morning, your Honor. Jon Bunge
26

1 from McDonald's.

2 THE COURT: Good morning.

3 What is the timing on your --

4 MR. BOULTER: The Court call appearance is at 9:00
5 o'clock. I can ask for priority.

6 THE COURT: All right. If we have to interrupt
7 this, that's no big deal. Don't worry.

8 You can both have a seat.

9 I've reviewed the papers submitted yesterday by
10 Mr. Boulter, and before we go any further, Mr. Bunge, you
11 might want to respond to those, I would imagine.

12 MR. BUNGE: Yes, I would, your Honor.

13 I have a few items I would like to refer to. Can
14 I provide you with copies? I have copies for Mr. Boulter.

15 THE COURT: Yes, that's fine.

16 This looks like a copy of the transcript that
17 occurred in two hearings that we've had on this already.

18 MR. BUNGE: That's right. And I also included
19 some authority that was referred to in our prior filings.

20 THE COURT: I'm obviously not going to have a
21 chance to go through this, so why don't you make the points
22 you want to make, Mr. Bunge.

23 MR. BUNGE: Right, I will.

24 Your Honor, you asked two days ago for the
25 plaintiff to address a narrow issue, that is whether or not
26 there was authority that would, in your words at the end of

1 that transcript that I just provided to you, that would
2 allow to you force McDonald's to renew or grant a new
3 franchise agreement to Mr. Husain, and said, rightly, I
4 believe, that if there was no authority that would allow
5 that to happen, that he has no business staying there.

6 Two point I'd like to make as threshold points
7 before I address some of the cases that have been cited by
8 the plaintiffs.

9 The first point, your Honor, is that this is not a
10 termination case. This is not a case where a franchisee
11 has been terminated and an existing contract is in place
12 and the franchisee is arguing that the franchisee was
13 wrongly terminated because there was not, for example, good
14 cause to terminate.

15 Instead, this is a case where there is no
16 franchise agreement. You have a franchise agreement, as
17 you have said before, the franchise agreement says
18 specifically -- it's attached to Exhibit C to Mr. Kujawa's
19 declaration -- that the franchise expired on 12/26. It
20 says that in a few places.

21 It also says, incidentally, that there is no right
22 to rewrite in paragraph nine and in paragraph 28A.

23 So what we have here, your Honor, is a case where
24 McDonald's is asking the Court to enforce the terms of a
25 franchise agreement that has the expiration date of 12/26.

26 Mr. Husain is asking the Court to enforce the

1 terms of an agreement that does not exist, a franchise
2 agreement that he says he was promised of indefinite
3 length, indefinite terms, et cetera. And we believe that,
4 under the circumstances, the Court should enforce the plain
5 language of the franchise agreement which expired.

6 The second point, your Honor, and I think this is
7 very important, is that the Court has already resolved the
8 issues that had been raised again in the brief filed
9 yesterday.

10 I've handed up to you the 12/15 transcript, your
11 Honor. I won't go through it in detail. But among other
12 things, at page -- I tabbed the pages, page 6 through 7 of
13 the 12/15 transcript -- the Court said, "It is
14 inappropriate for the Court to grant the relief sought by
15 Mr. Husain because," in the Court's words, "I think common
16 sense and the authorities are clear that if the case were
17 to go to trial or to hearing --" this is at page 7 "-- or
18 an order to show cause for preliminary injunction, that
19 it's simply not an appropriate remedy for the Court to
20 force McDonald's to continue a business relationship for
21 all the reasons stated and what I think are the cases in
22 point that are cited by the defense."

23 Second, on the same page, the Court said, "This is
24 a case where money damages are appropriate," previously
25 found by the Court in this case. Again, reargued by Mr.
26 Husain in the brief from yesterday.

1 On page 8 the Court -- I tabbed this too -- among
2 other things, in discussing irreparable harm, said that the
3 irreparable harm stems from Mr. Husain's own actions
4 because Mr. Husain was told for over a year that he should
5 sell his franchise and he ignored that advice from
6 McDonald's, ignored those warnings and simply let this
7 matter sit until he filed his emergency TRO papers, which
8 the Court rightly rejected.

9 Page 9, the Court again, addressing the issue of
10 irreparable harm, says, "I think that Mr. Husain has been
11 guilty of inexcusable delay in asserting whatever rights he
12 believes he has based on his purported signing of the
13 acceptance of the January 2006 offer."

14 My point is, your Honor, that this -- that Mr.
15 Husain, day by day, is not only operating without a
16 franchise agreement, but he is operating in defiance of the
17 Court's prior explicit rulings, that the Court could not
18 extend the franchise beyond 12/26 and that there was no
19 authority that would allow the Court -- or that would
20 suggest that it would be appropriate for the Court to order
21 that the parties enter into a new business relationship
22 that is a new franchise agreement.

23 Now, on the specific issue that the Court asked
24 the plaintiff to address, that is -- and I've provided you
25 with the 1/5 transcript too, that is, in the Court's words:
26 Whether there was authority that would allow the Court to

1 force McDonald's to renew its franchise agreement.

2 There is only one part of the brief filed
3 yesterday that addresses that issue. It's at page 7, at
4 the bottom of page 7, top of page 8. It's one photograph.

5 Now, there are a variety of cases that are cited
6 by the plaintiff from other jurisdictions and, briefly, I
7 want to make some points about those cases. But the
8 overall point about those cases, besides -- I'll talk about
9 them in a second -- that they're inconsistent, in some
10 respects, with the California Appellate Court decisions
11 that are authority for this Court,

12 The overall point on those decisions is that the
13 decisions do not address the issue that the Court asked the
14 plaintiff to address, that is whether or not the Court can
15 order the renewal of a new business relationship. Those
16 are wrongful termination cases where the plaintiff in that
17 case is alleging that the plaintiff was terminated without
18 cause and, therefore, there was a breach of some sort of
19 agreement.

20 So the Bray case from Colorado involves the
21 wrongful termination of an existing Quiznos franchise. The
22 Gilardi case from New Jersey involves the alleged violation
23 of a 60-day notice provision under the New Jersey franchise
24 statute that relates to a Miller distributorship.

25 Obviously, here, there is no notice issue, since
26 Mr. Husain has been told for over a year that his

1 franchise -- that he should sell his franchise.

2 I won't go through all these cases, but Precision
3 Tune Auto Care, again, termination of existing franchise, a
4 Florida case.

5 The Mahroom case, termination of a franchise,
6 whether there was good cause to terminate.

7 The Automotive Electric Service Corporation case
8 is not a franchise case or distributor case at all or a
9 preliminary injunction case; it's a case where a business
10 was kicked out of a trade organization. And they argued
11 that this being expelled from the trade organization was a
12 violation of the agreement that allowed them to be members
13 of the organization and the Court put -- the Court allowed
14 them to stay in the trade organization until the wrongful
15 termination issue was decided.

16 Pascal was a case from Kansas that involved paper
17 routes. Again, a wrongful termination case. The only --

18 THE COURT: Let me just interrupt you. Unless I'm
19 mistaken, I did couch some of my statements as -- I mean,
20 the record speaks for itself in terms of the plaintiff's
21 attempting to force McDonald's to continue to do business
22 with them, but you say this is not a case involving a claim
23 of wrongful termination of a franchise. I think that's
24 what it's all about. That's why Mr. Husain came in just
25 before the franchise was to terminate to try to stop it
26 because he claimed that the termination was wrongful.

1 So I don't think you can distinguish the cases
2 that Mr. Boulter cited from pages 4 to 7 in his brief on
3 the basis of this is not an action for alleged wrongful
4 termination of a franchise.

5 So, go ahead with whatever other points you want
6 to make.

7 MR. BUNGE: My point is, your Honor, that there is
8 a difference because, in those cases, what you're talking
9 about is an existing franchise agreement. Here, there is
10 no question that there is not an existing franchise
11 agreement. It expired on 12/26.

12 The issue as pled in Count One of the complaint is
13 whether there was a promise to a new franchise agreement
14 and that, we think, is a different situation.

15 But let me talk about the California authority,
16 which I believe is binding on the Court.

17 The case that the plaintiffs cite at page 7-8 is
18 this Prudence Corporation case, which is citation to a
19 synopsis from a trade publication. The underlying facts
20 are not specified in that case and there is no indication
21 that there was any argument that the Court lacked the power
22 to order specific performance. It's unpublished, as I
23 said, and summarized in a trade publication.

24 In addition to that case, there was a franchise
25 fee apparently paid from a couple sentences that are in the
26 record. Here, there was no franchise fee. Under the

1 California statute, there has to be a franchise fee for a
2 valid contract to exist.

3 But, your Honor, the more important point is that
4 the cases that we've provided to your Honor previously from
5 California say that the Court cannot order specific
6 performance of this type of contract. And I provided your
7 Honor with the authority, some authority up there, that we
8 previously cited.

9 For one thing, there is a one-page statute that I
10 gave your Honor. There is a specific California statute,
11 3390, that's relied on by the cases that we've cited in our
12 TRO papers.

13 It says that the following obligations cannot be
14 specifically enforced, an obligation to render personal
15 service. In the cases, when they talk about
16 distributorships and franchise agreements, talk about this
17 statutory prohibition preventing the Court from ordering
18 specific performance.

19 I've also handed up to the Court the Woolley case,
20 a 1991 case from the California First District. And I
21 won't go through the whole thing, your Honor, but this is a
22 case where the manager of a hotel, similar to Mr. Husain
23 here, tried to get an injunction that would prevent the
24 owners of the hotel from terminating his management
25 contract.

26 And the First District, at the yellow tabs that

1 I've given you, your Honor, said, at page 8 of the opinion,
2 "It is a fundamental rule that specific performance cannot
3 be decreed to enforce a contract for personal services
4 regardless of which party seeks enforcement," in other
5 words, regardless of whether or not the franchisee or
6 franchisor seeks enforcement, in our case.

7 And it goes on to say that the reasons for this
8 are, among other things, that the Court will have to
9 monitor any such order, that there is a violation of a 13th
10 Amendment.

11 One can imagine, for example, if McDonald's, on
12 this record, came in and said to your Honor that it should
13 force Mr. Husain to be a franchisee for the next 20 years,
14 it would be an absurd request on its face.

15 Also, the Court in Woolley gave the same rationale
16 that was picked up by your Honor on December 15th, which is
17 that the Court cannot order or should not order two
18 parties, in a situation like this, to continue a business
19 relationship.

20 And I won't go through the whole case, but they
21 talk about how this rule has been applied in a variety of
22 contexts involving managers, involving support provided by
23 owners, and that's exactly what we have here. Mr. Husain
24 is a manager of a franchise.

25 If you look at his TRO papers, he asked
26 specifically that McDonald's be required to provide it with

1 support, that McDonald's does provide. And that support,
2 your Honor, is extensive.

3 I'd ask your Honor to look at page 4 of
4 Mr. Kujawa's declaration, as well as the franchise
5 agreement itself, if there is any issue on that.

6 What Mr. Kujawa lays out and what the franchise
7 agreement lays out is that there are inspections. Mr.
8 Husain says in his declaration there have been three here
9 in the declaration from last night. The record before you
10 shows that, in the recent past, McDonald's has gone there
11 repeatedly.

12 Mr. Husain's lawyers have advised him not even to
13 discuss the issue of the quality of his products and the
14 service in his restaurant with McDonald's.

15 Beyond that, as Mr. Kujawa says, McDonald's does
16 financial reviews, it requires monthly reporting on
17 financial matters, it has business reviews in its offices,
18 it requires training of Mr. Husain's managers by McDonald's
19 personnel. It goes on and on.

20 The very essence of this system here, your Honor,
21 is one where there is a deep and close relationship between
22 the franchisor and franchisee, because that's how
23 McDonald's -- that's the franchise system. That's how
24 McDonald's maintains control of its marks. It controls
25 what the franchisee sells, how they sell it, how they do
26 it. And the point of that is the very essence of the

1 business is to make sure that McDonald's across the country
2 provide a uniform, consistent, high-quality product. And
3 that's how they do it.

4 Beyond that, I won't go -- I'll go into these
5 cases, if you'd like, your Honor, but we have also cited
6 the Thayer case, which is a franchisor-franchisee case in
7 which a -- I'm sorry.

8 THE COURT: Where?

9 MR. BUNGE: Where have we cited it?

10 THE COURT: Yes.

11 MR. BUNGE: We cited it in our TRO papers before
12 Your Honor resolved the issue on December 15th as to
13 whether or not the Court can order specific performance in
14 this type of circumstance.

15 And, frankly, by the time we filed our PI papers,
16 that issue, as far as we were concerned, had been resolved.

17 But the Thayer case is a Chrysler franchise
18 agreement case, a California case. I provided your Honor
19 with the case itself from the Fourth District.

20 In that case, a franchisee said they were
21 wrongfully terminated. The California court, applying
22 California law, said the Court could not order specific
23 performance of the agreement.

24 THE COURT: Okay. Exactly where is that case, Mr.
25 Bunge? I have an awful lot of paper here. I don't know
26 whether -- I don't want to take up a lot of time trying to

1 find it.

2 MR. BUNGE: Well, what I've handed to your Honor
3 is -- I've handed you three copies of cases. I handed you
4 the statute, okay, and these were all cases that we cited
5 and discussed in our filings before.

6 THE COURT: Do you have a copy of the Thayer case
7 there?

8 MR. BUNGE: Yes, it's the second case.

9 THE COURT: All right.

10 MR. BUNGE: I tabbed the parts that -- the case
11 discusses this issue in general, but I tabbed the parts
12 that I meant to go through, if your Honor likes, which
13 talks about the inability of the Court to issue an
14 injunction in a circumstance like this.

15 THE COURT: Okay. Let me just take a moment to
16 look at the case.

17 MR. BUNGE: Also, the Woolley case from '91 is the
18 first case that I put in there. That's the case I just
19 talked about with the hotel manager.

20 Then I've also attached the statute from
21 California in those materials that I gave you, and a
22 Supreme Court case, a California Supreme Court case.

23 MR. BOULTER: Excuse me, your Honor. It's 9:00
24 o'clock.

25 THE COURT: All right. Why don't you go attend to
26 that. We'll take a break here.

1 MR. BOULTER: All right, your Honor. I'm be back
2 as soon as possible.

3 THE COURT: All right. I'm going back to chambers
4 until Mr. Boulter gets back.

5 MR. BOULTER: Thank you.

6 (Whereupon, a brief recess was taken.)

7 - - -

8 THE COURT: Everything went okay?

9 MR. BOULTER: It was fine. I was able to get
10 priority. I appreciate the Court's --

11 THE COURT: That's quite all right.

12 Mr. Bunge, do you have anything more you want to
13 say?

14 MR. BUNGE: Briefly, your Honor.

15 THE COURT: Yeah, briefly. Right.

16 MR. BUNGE: You're suspicious, I know.

17 It's a matter of, as you might guess, some extreme
18 importance to my clients, so I just want to make sure I --

19 THE COURT: I think I surmised that. I think it's
20 a matter of extreme importance to both sides. So, go
21 ahead.

22 MR. BUNGE: Could I make just a few more points?

23 THE COURT: Yes.

24 MR. BUNGE: We left off, your Honor, where I was
25 talking about the California authority. I just want to
26 make sure that you have --

1 THE COURT: I did. I looked at it.

2 MR. BUNGE: To be clear, the authority that I've
3 provided you is authority that we cited in our December
4 brief before you resolved the issue where you said -- I
5 think it was the authority you were referring to where you
6 said California authority wouldn't support specific
7 performance.

8 THE COURT: Right.

9 MR. BUNGE: Among other things, we cited the
10 statute, California statute, Woolley, from the First
11 District, which says it's a fundamental rule --

12 THE COURT: I've looked at that, as well.

13 MR. BUNGE: Thayer, which talks about, in the
14 context of a distributorship for a Chrysler franchise,
15 applies the rule again; Long Beach, which is a Supreme
16 Court case that applies the rule in the context of a Rexall
17 distributorship.

18 So our position, your Honor, is that the
19 California authority does not permit this type of remedy
20 because it would order a continuing relationship.

21 Beyond that, as your Honor has already found, the
22 injunction would be inappropriate because there is an
23 appropriate remedy of money damages. And Thayer -- I've
24 specifically tabbed the cite -- says that in a relationship
25 like this, a distributorship relationship, that money
26 damages are presumed to be adequate. And your Honor

1 already found money damages would be adequate in your 12/15
2 ruling.

3 Beyond that, and I won't reargue the points, but
4 likelihood of success on the merits, again, there is no --
5 we believe there is no enforceable contract here because
6 there is no contract. And under California law, there is
7 nothing -- we believe, if anything, there is an
8 unenforceable agreement to agree.

9 If I could just make two minor points to address
10 things that were beyond the scope of what your Honor asked
11 the plaintiff to address but that are in the brief
12 submitted yesterday, just to make sure there is no
13 misunderstanding.

14 On irreparable harm, which was not something you
15 asked the plaintiffs to address, but they did in the brief
16 yesterday, your Honor has already found that any harm was
17 caused by Mr. Husain's own delay and the harm here can be
18 compensated through money damages.

19 There is an additional argument or statement made
20 in Mr. Husain's declaration that McDonald's -- that
21 employees will lose their jobs if this injunction is
22 granted.

23 There is no support whatsoever for that statement
24 in the record and, frankly, it is, with all due respect,
25 ridiculous.

26 What McDonald's is trying to do here and has been

1 telling Mr. Husain to do, is transfer the franchise to
2 another franchisee. McDonald's doesn't want to take it for
3 its own benefit. McDonald's doesn't want to shut down the
4 franchise and board it up and fire all the employees.

5 McDonald's wants the franchise to continue under a
6 franchisee with a legitimate contract. If anyone is
7 threatening the livelihood of those employees, it's
8 Mr. Husain because he could have and should have sold this
9 franchise a year ago.

10 Instead, what we're doing here is we're in an
11 emergency situation where papers are being filed, where the
12 future of this franchise is jeopardized because Mr. Husain
13 waits to the last minute to file a TRO, and then when he
14 loses the TRO, disregards the Court's prior order.

15 The final point is on this mandatory injunction
16 argument that's made in the brief, again, beyond the scope
17 of what your Honor asked for. Two responses.

18 The first is, the status quo here is that
19 Mr. Husain's franchise expired on 12/26. That was the
20 agreement in place prior to litigation between the parties.

21 What Mr. Husain is asking your Honor to do is,
22 despite that prior -- that relationship that existed prior
23 to the litigation, to enforce some sort of undefined new
24 franchise agreement. The status quo is the 12/26
25 expiration.

26 Secondly, regardless of how this injunction is

1 classified, as mandatory or prohibitory or however, the
2 case law is clear that an injunction is an appropriate
3 remedy here because of the trademark issue.

4 The Lanham Act cases go on and on and on
5 recognizing, and the statute does itself recognize, that an
6 injunction is appropriate to protect the market of a
7 franchisor in a situation like this.

8 The California cases say the exact same thing. We
9 cited Jay Bharat and other cases.

10 In sum, unless your Honor would like me to address
11 a particular question, what we'd ask is that you once
12 again, once again, just as did you on 12/15, make it clear
13 to Mr. Husain that he has no right to stay in a franchise
14 where he has no franchise agreement. He can sue us for
15 money damages if he likes, but we need to have control of
16 our marks and we ask that you enter the preliminary
17 injunction.

18 THE COURT: All right. Let me just make a few
19 comments before I hear anything further from you, Mr.
20 Boulter.

21 I don't think there is any question that the
22 authorities that you cite from pages 4 to 7 of your brief
23 that was submitted yesterday are in point here and that
24 other courts have found, under circumstances similar to
25 this, at least from the quotes that you have put in your
26 brief, that some courts in a situation like this enjoined

1 the franchisor from terminating a franchisee when the
2 franchisee makes is showing of irreparable injury. And
3 that money damages are not sufficient to cover the kinds of
4 injury that your client has stated in the record.

5 The fact that he's been a longstanding franchisee
6 of McDonald's, he wants to continue in that, that if he
7 loses his Novato franchise, it's going to jeopardize his
8 whole financial situation and so forth. But I think that
9 certainly there is language in the cases that you've cited
10 where courts have said in cases like this that money
11 damages aren't really adequate. And I'm not going to read
12 to you the quotes. They're in your papers.

13 Another thing that's puzzled me -- and I'm just
14 going to empty out the waste basket here -- another thing
15 that's puzzled me is that while McDonald's is terminating
16 Mr. Husain is his Novato Redwood Highway franchise, it's
17 continuing to have a business relationship with him in nine
18 other locations. So that I think one would have to put on
19 blinders to say that it wouldn't be possible for
20 McDonald's, at least for the time being, to continue in a
21 business relationship with him, this Novato franchise,
22 while the problems in this lawsuit are being straightened
23 out.

24 Another thing that troubles me is that -- a couple
25 of things. First, if Mr. -- and I realize Mr. Husain has
26 certainly made it clear he wanted to maintain a good

1 relationship with McDonald's and that filing litigation
2 against McDonald's is like slitting your throat with them.
3 That's happened.

4 And while it's not -- well, that's happened.
5 That's water under the bridge. So that I can understand
6 why he delayed the way he did to bring suit, but the effect
7 of his having done so is to put the parties and the Court
8 in the position -- or the Court in the position of having
9 to make a ruling one way or the other which, in effect, at
10 this juncture, will, to a certain extent, decide the
11 outcome of the case.

12 In other words, if I do what your client asks,
13 I'm, in effect, telling McDonald's to continue its
14 franchise arrangement for the time being, at least during
15 pendency of the litigation.

16 And this matter, this situation could have been
17 avoided if your client hadn't waited until the last minute
18 to file suit. I mean that's a fact we're stuck with. And
19 I can understand why he delayed, but still, it's caused a
20 problem.

21 And the thing that, in the end, I don't think
22 there is any doubt that -- well, let me put it this way. I
23 think one of the problems that I have to deal with, at this
24 point, is I have to be careful. I have to keep in mind
25 that I don't know that much about all the facts. And I
26 only know what I've seen in papers here.

1 And it's sort of like a kaleidoscope. You shake
2 it and you get a different picture every time. Every time
3 I get some more input, then that changes the picture a
4 little bit.

5 But the purpose here, and bearing in mind that for
6 the Court to grant extraordinary relief here, at this point
7 in the case, one way or the other, the basic consideration
8 or the one thing that, if I do it, I should be trying to
9 maintain the status quo until the question of whether the
10 franchise was wrongfully terminated or not is resolved
11 because that's what the lawsuit is all about.

12 But the thing that troubles me in that regard, and
13 I said this before, I think at the first hearing, that
14 assuming the case goes to trial and Mr. Husain wins, what's
15 the relief? Is the relief for the Court to enter an order
16 that McDonald's is to continue its franchise relationship
17 with Mr. Husain? I don't see how the Court can do that.

18 So I say the same thing that I said before. If
19 that is the case, I'm unfairly prejudicing the defendant by
20 granting a temporary relief as to which there could never
21 be a permanent relief granted. That's what bothers me.

22 And I have in mind that I have no reason to
23 disbelieve anything your client has said in any of his
24 papers, that losing this one franchise is going to cause a
25 big problem for him.

26 Mr. Bunge has raised a couple of points. I really

1 don't know, in that regard, how things might shake out, but
2 you've made a strong argument and you've supported it with
3 facts from him.

4 But in the end, I don't see how I can grant
5 temporary relief when I could never grant permanent relief,
6 even if Mr. Husain prevailed at trial. I just do not see
7 any way of getting around that. So that's where I come
8 out.

9 And, you know, I've had in the back of my mind,
10 this could be an action for unlawful detainer, which is a
11 short cause case where the law is clear the Court would
12 have the power to enter judgment evicting Mr. Husain on
13 less notice than he's had really to argue his case, at this
14 point.

15 But it's a troubling case and, as I say, I think
16 you've made a very persuasive argument, but I just don't
17 see how I can enter a meaningful order, at this point,
18 because part of it would have to include, as was alluded to
19 in paragraph 3, I think it was, of the temporary
20 restraining order that your client requested and that is
21 ceasing required franchisor -- prohibiting defendant from
22 ceasing required franchisor support or harming plaintiff's
23 ability to operate the franchise.

24 And it just -- even though they're in a business
25 relationship with your client elsewhere, in the long run, I
26 think one of the cases that -- I know one of the cases that

1 Mr. Bunge has cited points out that you can't expect
2 people, particularly after the ill will generated by a
3 lawsuit -- you can't force them to be in a continued
4 business relationship.

5 So I real don't see any way the Court can properly
6 prevent McDonald's, at this point, from -- or let me put it
7 another way, any way that I can properly keep your client
8 in that location in Novato.

9 MR. BOULTER: Thank you for the opportunity to
10 submit papers, your Honor, on this.

11 This is a very difficult issue that the Court is
12 the faced with. We completely acknowledge that.

13 I think there is -- I think, based on the
14 authority that we've provided in terms of the temporary
15 relief that is requested to -- I mean, the Bray case and
16 all the rest of the cases, do -- and those are, conceded,
17 those can be viewed as "in term" cases where there is a
18 contract that's in place.

19 But here we have -- Mr. Husain is challenging the
20 McDonald's decision not to honor the opt. He exercised the
21 option to renew. He's willing to sign the form franchise
22 agreement that McDonald's was supposed to provide to him.

23 THE COURT: I understand that. And I don't
24 understand why McDonald's is doing what it's doing.

25 MR. BOULTER: But it's a breach of contract.

26 THE COURT: I don't know that. Frankly, I think,

1 in looking at the matter in terms of whether injunctive
2 relief ought to issue, that I think, if you view it from
3 your client's perspective, that the harm to him is much
4 more than the harm would be to McDonald's, at this point.

5 And McDonald's makes some valid points, in that
6 regard, of his operating an outlet that he has no right to
7 operate, using their trademark. And particularly
8 considering the fact that he is operating as a McDonald's
9 operator at nine other locations.

10 But I'm still troubled by granting temporary
11 relief where I know I could never grant permanent relief.

12 MR. BOULTER: But I don't believe that's an
13 accurate statement of the Court's power.

14 I think the Court has to power to find that
15 McDonald's waived that right, which is what happened in the
16 Prudence case. We litigated that case on a non-renewal
17 issue and Judge Gilford in the Central District agreed that
18 specific performance was permitted in those instances. The
19 Thayer case was before the modification, the legislature
20 modified, in the Bleacher case. There was a quote from
21 page 8 of our brief. The Bleacher case said in 1969, which
22 is after the Thayer case, 1969, the California legislature
23 discarded the rigid, out-dated requirement of mutuality of
24 remedy with regard to specific performance.

25 And the Woolley case -- so you don't have to have
26 complete mutuality of remedy. Which means that an employer

1 cannot demand that an employee work for it under specific
2 performance, but at the same time, an employee may, under
3 certain circumstances, seek reinstated if they've been
4 discriminated or unlawfully terminated.

5 THE COURT: Yes, that's true.

6 MR. BOULTER: So it's akin. This is not a strict
7 agency relationship like you had in Woolley.

8 In Woolley, the Court was troubled by the specific
9 responsibilities and the day-to-day interaction that the
10 agent had with the employees of the owner. This isn't that
11 kind of a case.

12 This is a case where there are limited
13 day-to-day -- there are no day-to-day interactions, other
14 than the payment of money through ETF. McDonald's visits
15 Mr. Husain's site, as he stated, three times a year. There
16 is no face-to-face interaction. These parties could work
17 together given the opportunity or the direction of the
18 Court to do so for a period of time.

19 In fact, I doubt this case would ever get to
20 trial. I seriously believe that this case is one that
21 would be ripe for an immediate mediation or an immediate
22 settlement conference presided over by your Honor.

23 It's just not -- the level of the forfeiture that
24 is going to happen and the irreparable harm outweighs
25 the -- outweighs what McDonald's is seeking to do. And I
26 think your Honor has -- the Court has the authority under

1 the cases that we've cited to order a temporary
2 continuation of this relationship while the parties can try
3 to work things out.

4 And we would like the opportunity to provide the
5 Court with the arguments on waiver and estoppel.

6 McDonald's, as recently as 2007, which is after
7 this supposed notice that they weren't going to renew,
8 approved Mr. Husain for a \$9 million loan. They signed off
9 on this additional \$9 million loan that he took with
10 J.P. Morgan. And that loan had a term until 2014. And
11 they've accepted the various benefits at this location that
12 Mr. Husain has invested.

13 The irreparable harm is -- well, we've described
14 it in our papers. I understand the Court --

15 THE COURT: I think you've certainly made a good
16 case of that. The troubling thing is, I think you put your
17 finger on it. That's fine if the parties can work
18 something out. That would be fine. I'm supposed to make a
19 legal ruling, though, based on what I think the law allows.

20 And I can't say -- I've stated where I see things,
21 in that regard. I think I have some difficulty issuing a
22 temporary order when I really don't believe -- I don't
23 know -- you talk about the employment discrimination cases.
24 And I know that an employee can be reinstated, but I mean
25 that's, frankly, I think, unrealistic, but the employment
26 discrimination laws, for example, are pretty specific and

1 the penalties for violating them are pretty strict.

2 And so it's one thing to have to keep one employee
3 on; it's another thing to maintain a continuing business
4 relationship in a restaurant. So I don't think the
5 situations are exactly comparable.

6 I mean, McDonald's has survived for three weeks
7 now with your client in there, but on the other hand,
8 Mr. Bunge's points about control over their mark and so
9 forth are certainly salient.

10 You know, frankly, this might be a good matter to
11 take on an interim writ to the Court of Appeal, although
12 the record, unfortunately, I think, at this time, is
13 somewhat limited. There are certainly compelling reasons,
14 temporarily, at least, for the Court to stop the
15 destruction of Mr. Husain or the problems that he foresees
16 coming if he can't operate out of his Novato franchise.

17 But I'm not quite certain. See, this is the
18 problem. I don't have that many facts. I don't know what
19 would be involved from McDonald's standpoint if he were to
20 leave tomorrow. I mean, they don't want to shutter the
21 place. I think that it's probably important for McDonald's
22 to keep that open and operating. And I was under the
23 impression that Mr. Husain no longer had the right to sell
24 his franchise. But perhaps -- I mean, it sounded to me
25 like Mr. Bunge was talking about getting a new operator in
26 there and working with Mr. Husain in that regard. I don't

1 know.

2 But these are things that would be in both
3 parties' interests to try to maintain the status quo, other
4 than, you know, having the Court issue an order today
5 that Mr. Husain has got to vacate the premises by midnight
6 tomorrow.

7 MR. BOULTER: I can tell you, one, that Mr. Husain
8 has had back channel communications with McDonald's people
9 on his own and has -- I think there is an opportunity for a
10 resolution, but that it may become more difficult if this
11 Court orders that, you know, Mr. Husain to leave by
12 tomorrow night.

13 The other comment your Honor made is that you
14 don't have enough facts. And Mr. Husain would like the
15 opportunity, if an evidentiary hearing would assist the
16 Court in making a decision, to go ahead and find out. The
17 stakes are very high here. These 35 people, although Mr.
18 Bunge, is it? How do you say it?

19 MR. BUNGE: That's good enough. Bunge, Bunge.

20 THE COURT: What's the right way?

21 MR. BUNGE: Depends who you talk to in my family,
22 but Bunge, I think is the --

23 MR. BOULTER: Bunge.

24 THE COURT: I sympathize with you because
25 sometimes I'm called Sutro. That might not make any
26 difference, so you're Bunge.

1 MR. BUNGE: Yes. It's two syllables.

2 THE COURT: At least we got something straightened
3 out this morning. All right.

4 MR. BOULTER: He made the comment that the, you
5 know, that they want to transition it to a new operator.
6 Who is going to get that two or three million dollars that
7 Mr. Husain paid for that? That's going to go right in
8 McDonald's pocket, unless he's suggesting that, you know,
9 they're going to pay that over to Mr. Husain.

10 But you have 35 employees who work for Mr. Husain
11 who are not going to have a job. They're not going to be
12 employed anymore. There is not going to be a business from
13 which Mr. Husain is going to be able to pay them. These
14 people have families. They have insurance. They have --
15 there are lots of repercussions that will flow from an
16 order that disrupts the status quo. The status quo is that
17 Mr. Husain has been a longstanding operator. He's been
18 operating this facility --

19 THE COURT: We're reploting --

20 MR. BOULTER: Yes.

21 THE COURT: You know, I think it might be a good
22 idea to take a break, at this point, and let me talk to
23 counsel in chambers.

24 MR. BOULTER: All right, your Honor.

25 (Whereupon, counsel and the Court have a
26 discussion in chambers off the record.)

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THE COURT: All right. We're going to go back on the record after meeting with counsel in chambers and what I'm going to do, at this time, is I'm going to order that the status quo be maintained.

And I think it should be obvious from the record that I have some concern about an order like this because it requires McDonald's to continue in a business relationship with someone that it's apparent that McDonald's does not want to continue in a business relationship with.

But I do think, as a court of equity, that for a brief period of time here, in spite of the fact that I have substantial misgivings about the Court's power to issue any kind of a long-term order in this regard, and including an order that McDonald's maintain Mr. Husain as a franchisee in the Novato Redwood Highway location, in essence force McDonald's into a long-term franchise arrangement with Mr. Husain, I think, in the short run here, counsel for plaintiff has persuaded me that there are some substantial problems that could be caused Mr. Husain by his eviction from the Novato location which the parties might -- which he might be able to work out with McDonald's if he was given time to do it.

And I think it's in both parties's interests here to try to work something out before any heavy-handed action

1 is taken by the Court one way or the other.

2 So what I'm going to do is order that the status
3 quo be maintained for 45 days. And I think that should
4 give the parties sufficient time to attempt to work this
5 matter out. As I've advised counsel, at the end of that
6 time, or close to the end of that time anyway, I'm not
7 going to even be on the bench anymore, so that this matter
8 is going to have to be reassigned.

9 And Mr. Boulter has talked about an evidentiary
10 hearing that he wishes to have to make a record on the
11 issue of irreparable injury to his client, which is fine,
12 but I don't think it's going to be this judge that's going
13 to hear it.

14 So what we could do now -- first of all, 45 days
15 from today's date would be the 22nd of February. That's a
16 Monday. So if you want an evidentiary hearing prior to
17 that date, I don't know how long the hearing would take.
18 Any idea, at this point?

19 MR. BOULTER: I think it would be a day. We would
20 like -- if we had McDonald's people here, it may take two
21 days.

22 MR. BUNGE: We certainly want to present evidence,
23 your Honor. We have a lot to present.

24 THE COURT: I understand, it would not just be Mr.
25 Boulter presenting evidence.

26 MR. BUNGE: I'm not sure a day would suffice.

1 MR. BOULTER: Two days then.

2 THE COURT: All right. I think what I'm going to
3 have to do is find out who would hear that, because even
4 though I'll be here, I don't know that, since the case will
5 be assigned to another judge to see through to conclusion,
6 that it would be appropriate for me to resolve the issue.

7 And for your information, there are quite a number
8 of -- there are three court holidays in February. The
9 12th, the 15th and the 17th. So that's going to cut quite
10 a chunk out of at least a continuous hearing.

11 I really don't think that it's practical for me to
12 hear the matter, as familiar as I am of it, at this point.
13 So we'll to have find another judge and we can pick a date
14 like -- I think that probably the best thing to do would be
15 for me to find out who would have this -- who will have
16 this case and then have you talk to the clerk about a date
17 in that regard.

18 MR. BOULTER: Understood.

19 THE COURT: So what that's the Court's order, at
20 this point, that the status quo be maintained until
21 February 22nd.

22 And at the end of that time, the franchise
23 agreements having been terminated, Mr. Husain has got to
24 turn over operation of the McDonald's store to McDonald's.

25 MR. BOULTER: So the Court's order is that on
26 February 22nd he'll have to --

1 THE COURT: Turn over operation of the Novato
2 store to --

3 MR. BOULTER: That would be obviously -- it would
4 be not obviously, but would be subject to revision by the
5 judge that's hearing the preliminary --

6 THE COURT: This is the Court's order, at this
7 time. And this is a matter that's in flux.

8 MR. BOULTER: Okay. Will there be a -- will there
9 be any type of a written order?

10 THE COURT: I think there ought to be. Mr. Bunge
11 should prepare a form of order.

12 MR. BOULTER: We'll have an opportunity to comment
13 on it?

14 THE COURT: You bet. Yes. And if there are any
15 problems that arise between the parties in the interim with
16 respect to what's going on at the Redwood location, or
17 anything else regarding the relationship between the
18 parties that you feel needs court intervention, as long as
19 I have the case, you can come in ex parte any morning at
20 8:30.

21 MR. BUNGE: All right. Thank you.

22 MR. BOULTER: So --

23 THE COURT: Again. Let me make it clear that the
24 principal purpose of this order is to give the parties an
25 opportunity to sit down and work things out, because I
26 think it's very definitely in the interests of both parties

1 to do that, to negotiate this matter.

2 MR. BOULTER: Understood.

3 THE COURT: Okay.

4 MR. BOULTER: Thank you, your Honor.

5 THE COURT: Thank you both.

6 (Whereupon, the proceedings were concluded.)

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STATE OF CALIFORNIA)
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COUNTY OF MARIN)

I, CHRISTINA GILSON, an Official Shorthand Reporter for Marin County Superior Court, in and for the County of Marin, do hereby certify that the foregoing Reporter's Transcript is a full, true and correct transcription of my shorthand notes taken of the aforementioned proceedings at the time and place therein indicated.

IN WITNESS WHEREOF, I have hereunto set forth my hand this 13th day of January, 2010.



CHRISTINA GILSON, CSR NO. 9824