PREPARING FOR WINNING AND DEFENDING AGAINST PRELIMINARY INJUNCTIONS

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I. GENERAL INTRODUCTION

Temporary restraining orders and preliminary (or temporary) injunctions have become critical weapons in the battles between franchisors and franchisees. Franchisors use injunctive relief—or the threat of injunctive relief—as a way to keep franchisees in line, either pre- or post-termination. Indeed, with injunctive relief available to ensure system compliance, trademark and trade dress infringement, as well as to prevent competition in violation of a non-competition provision within a franchise agreement, lawsuits and arbitration proceedings seeking injunctive relief along with monetary damages have become quite common. But while it is true that injunctions are more frequently filed against a franchisee by the franchisor, franchisees also realize the power and importance of injunctive relief to prevent termination, arbitration, and other actions by a franchisor.

Preliminary injunction hearings, in particular, set the stage and tone for the later trial on the merits, if such trial is even reached. Temporary restraining order and preliminary injunction hearings generally require particular and immediate attention to the most relevant facts of the case, the players, and the discovery to be conducted. In preparing for and trying the issues in these hearings, the strengths and weaknesses of each side’s case come into focus. Current and former franchisees may have an opportunity to rehabilitate the conduct that caused the franchisor to file for an injunction in the first place. Rehabilitation, along with other concessions, may even allow for dismissal of the injunction action through compliance or settlement of the claims prior to a trial on the merits.

Importantly, the outcomes of these hearings tend to forecast the party likely to be successful after a trial on the merits. A successful franchisee at the preliminary injunction stage gains momentum and confidence it may not previously have had, potentially shifting settlement negotiations in favor of the franchisee. Similarly, a court order requiring certain behavior of a current or former franchisee may neutralize the subject behavior such that further proceedings become unnecessary.

This article addresses injunctions first from the franchisor perspective and then from the franchisee perspective. Since both parties commonly pursue or have to defend against claims seeking injunctive relief, this paper provides an overview of conduct and claims that may give rise to injunctive relief and the most effective strategies to pursue or defeat those claims. Additionally, the paper will focus on evidence collection, identification of witnesses, working with in-house counsel, and means of proving and attacking the four injunction elements.

II. FRANCHISOR’S PERSPECTIVE

A. Introduction

Franchisors typically seek injunctive relief in three situations: (1) to stop a former franchisee from using the franchisor’s trademark, including trade dress, after the franchise has been terminated; (2) to compel an existing franchisee to comply with system standards; and (3)

1 This article does not cover injunctions sought by either of these parties against others. While the authors recognize that, for instance, franchisors have sought injunctions against states to declare statutes unconstitutional, Wine and Spirits Retailers, Inc. v. Rhode Island, 418 F.3d 36 (1st Cir. 2005), and against employees or former employees of a franchisee under non-competition agreements or trade secret statutes, these situations are beyond the scope of this paper.

2 Mr. Schumacher wishes to recognize Wiggin and Dana LLP partner Kevin M. Kennedy and associate Nicole M. Lanzalotti for their invaluable assistance in the preparation of this paper.
to enforce post-termination covenants not to compete. In each instance, an injunction is an invaluable tool to aid the franchisor in protecting the integrity of the franchise system and the value of the franchisors' trademarks. For example, if a properly terminated franchisee continues to hold itself out as a member of the franchise system, there is an obvious risk of public deception, because consumers expect uniformity when relying on a business owner’s use of a recognized trademark. Similarly, if an existing franchisee fails to follow the franchisor’s operational standards—especially those affecting the public’s health and safety—allowing the situation to continue will undermine the integrity of the franchisor’s brand and pose a risk to the entire system. Likewise, if a franchisor allows a former franchisee to violate a post-termination non-compete to the detriment of existing franchisees, those franchisees will rightly question the franchisor’s commitment to protecting their businesses from unfair competition.

When a franchisee fails to comply with system standards, a franchisor typically has two avenues for seeking injunctive relief. The first is a standards enforcement action, in which the franchisor does not terminate the franchisee, but simply seeks to compel the franchisee to comply with the franchisor’s operational requirements. This course likely makes sense in those situations where the franchisee is otherwise complying with the franchise agreement (e.g., paying royalties), has a good compliance track record, and can readily remedy the operational deficiencies. In the alternative, a franchisor may choose to terminate the franchise agreement and then file a breach of contract and trademark infringement action (if the franchisee continues using the marks after termination) seeking damages for any past due amounts, estimated lost future royalties, attorneys’ fees, and costs plus injunctive relief to prevent the franchisee from using the franchisor’s trademarks and to enforce post-termination provisions.

1. Why Termination Is Not Always the Best Remedy for a Franchisor

Depending on, among other things, the severity and scope of a franchisee’s standards violations, its history of violations, its willingness and ability to improve operations and the availability of replacement franchisees, it may be in a franchisor’s best interests to seek to correct standards violations without resorting to a termination. Because termination is a drastic remedy that puts a franchisee’s livelihood at risk, a franchisee facing termination is more likely to aggressively defend an action and perhaps assert counterclaims than a franchisee that is simply being asked to correct operational defaults. Even if unfounded, a franchisee’s counterclaims may delay the termination process, will make the dispute more expensive to resolve, and will likely need to be disclosed on the franchisor’s UFOC. In addition, because of the high stakes involved, courts are often very reluctant to sanction a franchise termination, and often approach such disputes with a view towards protecting “the little guys” - the franchisees.

2. The Injunctive Relief Alternative

Injunctive relief seeking to compel compliance is a valuable alternative to termination. While still raising important issues, an action seeking a mandatory injunction to enforce system standards is simply asking the court to require the franchisee to do what he or she has agreed to do in the franchise agreement. As a practical matter, a franchisor that refrains from exercising its termination rights will likely undermine any defense that the enforcement action is pretextual. Moreover, because a franchisee’s livelihood is not put directly in jeopardy, injunction cases are much less likely to provoke counterclaims, and, if this is a routine method of standards enforcement, word will travel quickly through the franchise system that it is easier and less expensive to comply voluntarily than have the franchisor take them into court.
3. **Injunctions Versus Temporary Restraining Orders**

There are two types of injunctions: a temporary restraining order ("TRO") and a preliminary injunction. The purpose of a TRO is to preserve the status quo for a short time until the applicant franchisor can proceed on a more developed record to a preliminary injunction hearing. Franchisors typically seek a TRO where a particular violation of system standards is particularly egregious, or when notice of a given event or transaction is extremely short and the anticipated harm is sufficiently immediate and irreparable to justify immediate action. For example, a TRO may be appropriate where a franchisee's violation of system standards endangers the public's health or safety. Under some circumstances, a TRO may be issued with either very limited, or no notice to the other side. Because it is such a drastic remedy, under Federal Rule 65(b), a TRO expires within 10 days, unless extended for good cause shown by agreement of the defendant, and courts are required to hold a preliminary injunction hearing on the matter at the earliest possible date.

Unlike TROs, preliminary injunctions are granted after notice and an opportunity to be heard, often in conjunction with a full evidentiary hearing. The purpose of both a TRO and a preliminary injunction is to preserve the status quo pending the court's final determination on the merits of the plaintiff's action. An individual who has been given adequate notice of an injunction but fails to follow the court's orders may be punished for contempt of court. Additionally, a franchisor may be awarded its attorneys' fees for prosecuting a contempt motion when the contempt is willful.

### B. The Events Leading to Litigation and the Role of Preliminary Injunctions in Franchise Litigation

In response to the Supreme Court's 1832 decision in *Worcester v. Georgia*, President Andrew Jackson reportedly said, "John Marshall has made his decision, now let him enforce it." In the same vein, any franchisor with significant experience terminating franchisees likely has a first-hand understanding that a termination notice is not self-executing. The events leading to a dispute between a franchisor and a franchisee often develop as follows: (1) a franchise obtains a license to use the franchisor's trademarks and trade names in the franchisee's business; (2) the franchisee defaults on its financial obligations to the franchisor or fails to maintain quality standards set forth in the franchise agreement; (3) the franchisor terminates the franchisee for these contract breaches; (4) the involuntarily terminated franchisee refuses to remove signage and other promotional materials and items associated with the franchisor's system, on the grounds that the termination was improper, or that the franchisor's own breaches of the agreement caused the franchisee's defaults.

At that point, the franchisor has two choices: do nothing (which, in the vast majority of circumstances, is untenable) or bring an action to enjoin the former franchisee's unauthorized and continued use and infringement of the franchisor's marks.

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3 See Fed. R. Civ. P. 65(b).
4 See Fed. R. Civ. P. 65(b).
5 The court has the power to hold in contempt any person who disobeys or resists a court order, writ, rule, decree or command. 18 U.S.C. § 401(b) (1996).
6 31 U.S. 515 (1832).
7 Id.
8 See, e.g., Howard Johnson Co., Inc. v. Khimani, 892 F.2d 1512 (11th Cir. 1990).
1. **The Advantages of Injunctive Relief**

An injunction is an essential tool for franchisors to prevent public confusion and damage to the franchisor’s good reputation when a former franchisee holds itself out as authorized to market a franchisor’s goods and services by continued display or use of a franchisor’s marks. A court order preliminarily enjoining a former franchisee’s use of the franchisor’s marks benefits the franchisor by preventing the franchisee from using the franchisor’s marks until the case is fully resolved by trial, settlement, or the entry of a permanent injunction. Often when a franchisor obtains a preliminary injunction, the remaining issues against a terminated franchisee can be resolved quickly, because the franchised business ceases to exist, and the former franchisee therefore lacks the incentive and financial wherewithal to continue litigating the dispute.

One important advantage of an injunction proceeding is that equity cases are decided by a judge without a jury, in which the franchisee’s counterclaims may be largely irrelevant to the count the franchisor seeks relief under or the court’s ultimate decision. From the franchisor’s standpoint, having a judge review the facts and law is generally preferable to leaving the matter to the whim of a jury, which may be swayed by its sympathy for the franchisee or be persuaded by the strength of the franchisees’ counterclaims. As a practical matter, a court is more likely to follow the well-developed body of case law and issue an injunction than a typical jury, especially where the franchisee’s deficiencies are related to health and safety. Furthermore, litigating the right to an injunction at the outset of a case is usually far more cost effective for a franchisor than litigating the merits of an entire dispute to a conclusion.

In seeking an injunction, a franchisor should be as specific as possible in delineating the franchisee’s obligations to “de-identify,” so that there is no ambiguity about the specific steps that the franchisee needs to take to comply with the court’s order. Typically, an injunction order will require former franchisees to remove all signage and promotional materials bearing a franchisor’s marks, remove all items and products used by a franchisee’s business that bear the franchisor’s marks, change websites and cease any actions suggesting to the general public that some association remains between the franchisor and former franchisee. In addition, franchisees are typically required to return to the franchisor’s operations manual and all other propriety information concerning the former franchised business.

2. **Strategic Considerations for Franchisors and Counsel Before Initiating Litigation and Moving for a Preliminary Injunction**

Before franchisors and their counsel start a lawsuit and move for a preliminary injunction, they should be:

- informed of all applicable state statutory restrictions on a franchisor’s right to terminate the applicable agreements;
- certain that the termination or non-renewal of the franchise was consistent with the contract and applicable law;
- sensitive to any standards enforcements issues that may be raised by the franchisee, including severity of non-compliance, waiver issues and discrimination issues;
- aware of the advantages and disadvantages of various forums for resolving the dispute; and
mindful of the likelihood and potential merits of counterclaims that the franchisees may assert.

Obviously, franchisors and their counsel should be well versed in the applicable state relationship laws that govern termination and non-renewal (which in some jurisdictions, are judged by similar standards). Assuming a franchisor has good cause to terminate or not renew the franchise agreement, the franchisor must also comply with the procedural requirements of termination (whether those requirements are contractual or statutory in nature). This often means giving advance written notice of termination, including in the notice all the reasons for termination and how much time, if any, the franchisee has to cure the default. Failure to comply with the notice requirements, alone, may violate state statutes, even if the franchisor had good cause to terminate. In addition, after the franchisor provides the franchisee with a proper written notice of termination, the franchisor must continue to do business with the franchisee and comply with its obligations under the franchise agreement until the termination takes effect.

a. **Venue: Franchisor vs. Franchisee Location**

Many franchise agreements contain venue selection clauses, which specify the judicial forum in which an action may be brought. Typically, a franchise agreement forum selection clause will provide that all disputes will be resolved in certain designated courts of the franchisor’s home state. Traditionally, courts have been willing to enforce such clauses, unless enforcement would be unreasonable under the circumstances. But, invalidated clauses do not mean there is no personal subject matter jurisdiction in the home state of the franchisor (e.g., the forum selected has no connection to the dispute, the clause was the product of fraud or overreaching.) However, franchisors should be aware that a significant number of states (including California, Connecticut, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, New Jersey, North Carolina, North Dakota, Rhode Island and South Dakota), restrict the franchisor’s right to select a venue outside the franchisee’s home state. For example, in the often-cited decision of *Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc.*, the New Jersey Supreme Court held that a forum selection clause requiring a New Jersey franchisee to litigate outside the state of New Jersey was presumptively unenforceable under the New Jersey Franchise Act.

Even if the franchise agreement permits the franchisor to bring an injunction action in its own home state, for tactical reasons the franchisor should consider whether it makes sense to sue in the franchisee’s forum. Although this may increase the initial expense of the lawsuit, it may ultimately expedite resolution by avoiding costly motion practice over jurisdiction and venue issues, and judges can be confident about their authority to issue enforceable orders granting the relief requested.

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12 Id. at 15.
b. Obtaining Injunctive Relief in Arbitration

As an alternative to forum selection clauses, many franchisors include broad arbitration clauses in their franchise agreements. The Commercial Rules of the American Arbitration Association and the JAMS Arbitration Rules and Procedures give arbitrators broad authority to award interim relief, and various state statutes and judicial doctrines also provide for injunctive relief “in aid of” arbitration. Thus, once the parties select an arbitrator, a franchisor that chooses to arbitrate could conceivably move for injunctive relief, subject to the same standards that a court would apply in evaluating an injunction motion. However, in practice, the franchisor’s theoretical right to obtain an injunction in arbitration is usually far less effective than if pursued in court. This is because of the absence of formal discovery and the nature of the arbitration process. Arbitrators are often reluctant to issue broad injunctive relief before a full hearing on the merits, even if clearly warranted by the facts and existing law. Moreover, because arbitrators are generally not required to follow the federal rules of civil procedure at all, a franchisor has considerably less certainty of success than if the same relief were sought in court.

For these reasons, a franchisor should seriously consider including a “carve out” in its arbitration clause, permitting it to litigate its right to injunctive relief under certain circumstances (e.g. preventing the franchisee’s unauthorized use of its trademark). Although the vast majority of courts will enforce such carve-outs, franchisors should be aware that in a few jurisdictions, such a clause may render the agreement to arbitrate unenforceable.

c. Federal vs. State Court

Once a franchisor decides to seek an injunction in court (as opposed to arbitration), it then must determine whether it would prefer to litigate the injunction motion in state or federal court. If the franchisor decides to pursue its claims in federal court, the franchisor must ensure that federal jurisdiction exists. Fortunately for franchisors, a Lanham Act claim (which is discussed in Section III (B) of this paper) usually provides an easy avenue for getting into federal court. Claims brought under the Lanham Act can be asserted in federal court as a federal question regardless of the amount in controversy or the citizenship of the parties. To the extent that a franchisor does not have a claim under the Lanham Act (e.g. a lawsuit limited to seeking enforcement of a non-compete), the action may be brought in federal court only if the parties are diverse and the amount in controversy exceeds $75,000. If a franchisee files a claim for injunctive relief against the franchisor in state court, the franchisor may remove the franchisee’s claims from state to federal court if the federal court is vested with diversity jurisdiction or otherwise has subject matter jurisdiction.

Generally, a franchisor is better off pursuing a claim for injunctive relief in federal court than state court for several reasons. First, there is an extremely well-developed body of federal case law recognizing the importance of the franchisor’s trademark rights and the need to
enforce system standards. Second, given the greater resources in the federal system (not the least of which are the clerks available to federal judges), a federal judge will typically be able to hear and resolve an injunction proceeding more quickly than his or her state court counterparts. Finally, while most state courts and state court judges are unquestionably fair and impartial, a franchisor faces less risk of being in a “magnet” courthouse sympathetic to a local business if it elects to pursue its claims in the federal system.

3. Other Strategies Franchisors Should Consider to Improve the Chance of Success

Other strategies franchisors should consider to improve the chance of success of prevailing on their request for injunctive relief include:

- anticipating counterclaims with termination or standards enforcement actions;
- preparing an exposure assessment;
- considering the most important franchisee defenses, such as wrongful termination, adequacy of monetary damages (failure to establish irreparable harm), failure of franchisor to establish goodwill, previous standards enforcement history, and discrimination, bad faith, or pretext; and
- exhibiting “good faith” in dealing with franchisees by complying with the applicable state franchise relationship statutes, the Uniform Commercial Code Section 1-203 and the Uniform Franchise and Business Opportunities Act Section 201.

In addition, franchisors should put franchisees on notice of any perceived deficiencies or contract violations early and often, and act consistently when dealing with franchisees in a uniform and predictable manner. If possible, franchisors should provide franchisees with a reasonable opportunity to cure, and document its efforts to work with franchisees to enforce system standards.

In cases where a franchisee believes that its franchise agreement was wrongfully terminated, the franchisor should be prepared to demonstrate that its termination was proper. For example, in McDonald’s Corp. v. Robertson, the Eleventh Circuit held that in order to demonstrate that the former franchisee is engaged in the unauthorized use of the trademark, the Lanham Act requires a franchisor to demonstrate that the franchisor properly terminated the franchise agreement. Exactly what showing must be made is determined by the courts’ various standards with respect to the issuance of the preliminary injunction.

Furthermore, franchisors should identify potential disputes and candidates for termination early on and document franchisees’ poor performances and any violations of the franchise agreement by personnel with actual knowledge of such occurrences. Similarly, when deficiencies arise in one area, franchisors should review and monitor performance in other areas of the system. All performance and contractual deficiencies should be communicated to franchisees in a prompt and uniform manner.

23 147 F.3d 1301, 1308 (11th Cir. 1998).
24 Compare McDonald’s, 147 F.3d at 1308 (four-part injunctive test in 11th Circuit) and Nightclubs, Inc. v. City of Paducah, 202 F.3d at 884, 888 (6th Cir. 2000) (nearly identical preliminary injunction standard as McDonald’s) with Dunkin’ Donuts, Inc. v. Albireh Donuts, Inc., 96 F. Supp. 2d 146, 149 (N.D.N.Y. 2000) (test under 2nd Circuit law stating that party seeking injunctive relief must demonstrate that : "(1) absent injunctive relief, it will suffer irreparable harm, and (2) either (a) that it is likely to succeed on the merits, or (b) that there are sufficiently serious questions going to the merits to make them a fair ground for litigation, and that the balance of hardships tips decidedly in favor of the moving party"), citing Statharos v. N.Y. City Taxi & Limousine Comm’n, 198 F.3d 317, 320 (2d Cir. 1999).
the franchisee clearly, promptly, and preferably in writing. The franchisor should advise the franchisee what steps to take in order to correct the problems or improve performance.

Finally, communications with franchisees must be consistent. Contact reports and other documents memorializing franchisee communications should be maintained in a single file pertaining to the franchisee, with copies made to all personnel who have ongoing contact with the franchisee. Mistakes often occur when one representative of the franchisor is unaware of deficiencies or other issues that are the subject of another representative’s discussions with the franchisee. Assurances may be given, privileges extended, or rights waived because the left hand did not know what the right hand was doing.  

C. Building the Evidence: Best Practices For Franchisors in Preparing And Litigating Claims for Injunctions

1. Substantiating the Elements for Preliminary Injunctive Relief

Although courts in various federal circuits apply somewhat different standards in evaluating a request for a preliminary injunction, most courts apply four factors: (a) a substantial likelihood of success on the merits; (b) irreparable injury that will result unless the injunction is issued; (c) threatened harm to the franchisor if the injunction is not issued, which outweighs the threatened harm to the franchisee if the injunction is issued; and (d) the public interest. Because the criteria for an injunction – irreparable harm, probability of success on the merits, and balancing of equities – need not be applied by the court with equal weight, a strong showing as to one element may compensate for a weak showing of another.

It is important to note that courts are more apt to grant requests for preliminary injunctive relief that prohibit conduct rather than requests that mandate certain conduct. To increase a franchisor's chances of success on a motion for preliminary injunction, franchisor's counsel should, to the extent possible, draft the accompanying order using prohibitory language rather than mandatory language.

State courts have varying (though similar) standards for the issuance of preliminary injunctions. Franchisor's counsel must review the state standard in their own jurisdiction to determine specifically how the court will balance these factors and whether any additional or different factors will be considered. Although irreparable harm should be the primary consideration, franchisors should not neglect to analyze the "probability of success" and "balancing of equities" factors in evaluating a case. In addition, counsel should be aware that under the Federal Rules, a party who obtains a preliminary injunction is generally required to post a bond (or security). The purpose of the bond is to provide protection to the party enjoined in the event the injunction is later found to have been improperly issued. The amount of the bond is subject to the court's discretion.

26 Courts that apply these factors include the Third, Fifth, Eighth, Tenth and Eleventh Circuits. The Second and Ninth Circuits apply an alternative test, under which the court evaluates the movant's likelihood of success and irreparable injury on a sliding scale; if serious questions are raised and the balance of hardships tips sharply in the movant's favor, an injunction will likely be issued.
27 See Levin v. Metro-Goldwyn-Mayer, Inc., 221 A.2d 499, 505 (Del. Ch. 1966); Frank's GMC Truck Center, Inc. v. G.M.C., 847 F.2d 100, 103 (3rd Cir. 1988).
28 See Gimbel v. Signal Cos., Inc., 316 A.2d 619 (Del. 1974); Frank's GMC Truck Center, 847 F.2d at 103.
a. **Element One: Likelihood of Success on the Merits**

The first element a court will consider in evaluating a motion for a preliminary injunction is whether the franchisor is likely to prevail on the merits of its claim. For example, in *Pizza Hut v. White*, Pizza Hut terminated its franchise agreement with Charles Randall White, but White continued to use the Pizza Hut trademarks after the agreement was terminated. Pizza Hut filed a motion for a preliminary injunction to enjoin White from using Pizza Hut’s trademarks, trade names, logos, designs and business and merchandising systems, based on alleged post-termination trademark infringement. Pizza Hut claimed that White’s continued use of the Pizza Hut marks and proprietary system after termination was likely to cause confusion between the products sold by White and those of authorized Pizza Hut franchisees.

The court first examined whether there was a substantial likelihood that Pizza Hut rightfully terminated the franchise agreement. The court determined that Pizza Hut met its burden on this issue, as White failed to pay monthly service fees, royalties and advertising contributions required under the agreement. The court also relied on evidence that White was using the Pizza Hut marks and system without the consent of Pizza Hut, and agreed with Pizza Hut that such unauthorized use would create a likelihood of confusion between its franchisees' products and White’s products. Pizza Hut had, therefore, shown a substantial likelihood of success on the merits of its trademark infringement claim.

The franchisor must show that it is likely to prevail on the merits. A mere allegation regarding a pre-termination dispute that the former franchisee claims that the franchisor “breached first” is generally insufficient to prevent a franchisor from receiving injunctive relief. For example, in *S&R Corp. v. Jiffy Lube Int'l, Inc.* Jiffy Lube sued a franchisee, seeking to enjoin the franchisee’s continued use of the Jiffy Lube trademark after Jiffy Lube terminated the contract for the franchisee’s failure to make required payments. The District Court for the District of New Jersey refused to grant a preliminary injunction against the franchisee, apparently concluding that the franchisee was “justified in halting payment because Jiffy Lube breached some of its contractual obligations under the franchise agreement.” The Third Circuit, however, reversed the trial court’s ruling, and remanded the case with instructions to grant the requested injunction. The court explained that “a franchisor’s right to terminate a franchisee exists independently of any claims the franchisee might have against the franchisor,” and that “[t]he franchisor has the power to terminate the relationship where the terms of the franchise agreement are violated.”

Once the franchisor establishes that it had a right to terminate a franchise agreement, or that an injunction is necessary to compel a franchisee to comply with system standards, franchisors will generally be able to establish a likelihood of success on the merits. For instance, in *Burger King Corp. v. Stephens*, the court held that if Burger King “is unable to control the nature and quality of the goods and services defendants provide at Burger King franchised restaurants, activities not meeting [Burger King’s] standards at those restaurants could irreparably harm the goodwill associated with [Burger King’s] marks and [Burger King’s] reputation.”

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31 Id. at 373.
32 Id. at 375.
b. Element Two: Threat of Irreparable Harm

The second element in evaluating a preliminary injunction motion is whether the franchisor will suffer irreparable harm without injunctive relief. Irreparable harm has been defined as an injury of a unique nature that cannot be compensated by money damages alone. Courts generally consider irreparable harm to be the most critical element in the preliminary injunction analysis, and they have little difficulty finding that destruction or major disruption of a business constitutes irreparable harm.

A franchisor may be able to easily establish irreparable harm based on a franchisee’s unauthorized use of the franchisor’s trademark. When a franchisor’s marks are used without authorization by a terminated franchisee, such usage damages the goodwill of the trademark owner when the public begins to associate the owner’s distinctive marks with non-identical goods or services. As a result of this association, the trademark owner loses control over its own goodwill and reputation, and has a powerful argument that the resulting harm will be impossible to calculate.

As the First Circuit observed, “[f]ew harms are more corrosive than the inability of a trademark holder to control the quality of bogus articles thought (erroneously) to derive from it.” A demonstration of likelihood of confusion may satisfy the requirement of irreparable injury. For instance, the Ninth Circuit has held that, “once the plaintiff establishes a likelihood of confusion, it is ordinarily presumed that the plaintiff will suffer irreparable harm.” There is irreparable harm because: (1) where the trademark infringement has occurred, the franchisor has suffered irreparable harm as a matter of law and (2) public confusion creates irreparable injury to the franchisor. Consumer confusion is exactly what the Lanham Act and its injunctive remedies were developed to prevent.

Moreover, equally important to the concept of irreparable harm is the timing of the threatened harm. It is not sufficient that the franchisor is merely threatened with irreparable injury; the injury must be “imminent.” Simply stated, the event or transaction that the franchisor is seeking to enjoin cannot be speculative or in the distant future. Otherwise, the

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34 Pappan Enters., Inc. v. Hardee’s Food Sys., Inc., 143 F.3d 800, 805 (3d Cir. 1998).
37 Hypertherm, Inc. v. Precision Prods., Inc., 832 F.2d 697, 700 (1st Cir. 1987).
38 General Mills, Inc. v. Kellogg Co., 824 F.2d 622, 625 (8th Cir. 1987) (“Since a trademark represents intangible assets such as reputation and goodwill, a showing of irreparable injury can be satisfied” by a demonstration of likelihood of confusion); see also Opticians Ass’n, 920 F.2d at 196 (citing cases).
39 Vision Sports, Inc. v. Melville Corp., 888 F.2d 609, 612 n.3 (9th Cir. 1989).
40 See S&R Corp., 968 F.2d at 378 (“trademark infringement amounts to irreparable injury as a matter of law”)
judge will usually find that a full-scale trial on the merits could be completed before any injury would occur and be inclined to deny the franchisor’s request for preliminary injunctive relief.

c. **Element Three: Balance Between Movant’s Harm and Harm that Relief Would Cause Non-Movant**

The third issue a court will consider before granting a preliminary injunction is whether the injury to the franchisor absent the injunction outweighs any injury the franchisee may suffer if the injunction is granted. The harm that a licensor/franchisor will suffer without preliminary injunctive relief, such as loss of customers, reputation and goodwill is, “by its nature, incapable of precise quantification.” Therefore, a claim for money damages is not likely to compensate the franchisor for the harm it will suffer from the continued infringement by the holdover franchisee. Thus, the balancing of equities in the case of trademark infringement should favor granting preliminary injunctive relief.

In standards disputes, franchisors generally have a strong argument that a franchisee cannot be harm by the requested injunction because it will only be required to fulfill its obligations under the franchise agreement. In *Dunkin' Donuts, Inc. v. Albireh Donuts, Inc.*, the court stated, “[a]ll that is being asked of [the franchisees] is that they comply with the terms of the franchise agreement and the operating manuals and operate a clean, safe, and healthy donut shop. Requiring them to do so should not cause them any unnecessary expense or loss and certainly not subject them to any costs beyond that which they seemingly should now be spending to safely operate their shop.”

Franchisors should also argue that if a preliminary injunction is entered, the public, other franchisees and even the defendant franchisee may benefit. In *Dunkin' Donuts, Inc. v. Kashi Enterprises, Inc.*, the court observed that “[t]he instant injunction would only require that the defendant comply with the Franchise Agreement, [into] which it freely entered. While no harm would befall the defendant by its compliance with the sanitation standards, the court notes that its business and public safety would at worst improve. Accordingly, the court finds that threatened injury to the plaintiff outweighs any conceivable injury to the defendant.”

A balancing of the harms does not always favor the franchisor, however. In *Dunkin' Donuts, Inc. v. Pleasant Hill Coffee & Donuts, Inc.*, the district court considered whether an allegedly improper transfer warranted injunctive relief. Although the court credited the franchisor’s largely uncontested assertions that the franchisees sold interests to unapproved transferees in violation of the franchise agreements, it still denied the motion for preliminary injunction that would have terminated the franchise agreements immediately. Focusing exclusively on the balance of harms to the parties, the court concluded that on the record presented, the likelihood of potential harm to the franchisees from a preliminary injunction—an ouster of the franchisees “that will have a tremendous impact on their financial resources”—outweighed the potential harm to the franchisor if the franchise agreements remained in place for a relatively short time. In essence, (although its opinion did not speak in these terms) the district court took the path that best preserved the status quo pending final resolution of the action, despite the fact that the franchisor was likely to prevail on the merits.

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43 McDonald’s Corp., 147 F.3d at 1314.
44 Id.
45 Id.
46 Albireh Donuts, 96 F. Supp. 2d at 151.
47 Kashi Enters., 106 F. Supp. 2d at 1327.
Finally, franchisors should emphasize (with testimony from other franchisees, if possible) that not only is the franchisor harmed by the franchisee’s continued unauthorized usage of the franchisor’s mark, but other franchisees are harmed as well. The reason is simple: because the public views the franchisor’s mark, and stores bearing it, as a unified business system, when one franchisee fails to uphold the franchisor’s standards, it threatens the brand and the reputation and goodwill of all franchisees.

d. **Element Four: Public Interest**

The last issue a court will typically consider before granting a preliminary injunction is whether issuance of the preliminary injunction “serves the public interest.” Although public interest can be defined in a variety of different ways, courts routinely define it as the right of the public not to be confused and deceived, and the right to make an informed purchase.

The Second Circuit’s *Church of Scientology* decision illustrates how the public interest usually supports entry of a preliminary injunction in cases involving holdover licensees:

Finally, the public interest is especially served by issuing a preliminary injunction against a former licensee as the licensee’s status increased the probability of consumer confusion. A licensee or franchisee who once possessed authorization to use the trademarks of the licensor or franchisor becomes associated in the public’s mind with the trademark holder. When such a party, as defendants here, loses its authorization yet continues to use the mark, the potential for consumer confusion is greater than the case of a random infringer. Consumers have already associated some significant source identification with the licensor. In this way the use of a mark by a former licensee confuses and defrauds the public.

Following a trial on the merits (which may or may not be consolidated with the preliminary injunction hearing), the court may make the injunction permanent if it determines that the franchisor is entitled to relief on its claims. Misuse of a trademark, through false designation of origin or dilution, satisfies the irreparable injury factor. In addition, many franchise agreements include an acknowledgment by the franchisee that noncompliance with system standards constitutes irreparable harm. Where the franchisor seeks only compliance with system standards (rather than cessation of operations), courts often have little difficulty finding that issuance of the injunction will serve the public interest.


One of the primary benefits of franchising as a business model is that it is an effective way to enable franchisors to establish goodwill associated with their names and commercial symbols. By using their names and commercial symbols to identify their goods or services in interstate commerce, franchisors establish “marks” that can be protected and registered under the Lanham Act. The licensing of the franchisor’s marks to its franchisees is an element found

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49 Pappan, 143 F.3d at 807.
50 Id. (the “[p]ublic interest can be defined a number of ways, but in a trademark case, it is most often a synonym for the right of the public not to be deceived or confused”) (internal citation omitted); Dunkin’ Donuts, Inc. v. Benita Corp., 1998 WL 67613, *19 (N.D. Ill. 1998).
51 *Church of Scientology Int’l. v. Elmira Mission of the Church of Scientology*, 794 F.2d 38, 44 (2d Cir. 1986).
in all statutory definitions of a “franchise,” and the unauthorized use of those marks by a former franchisee lies at the heart of a Lanham Act claim.

a. The Intent of the Lanham Act

The Lanham Act provides the federal statutory foundation of a franchisor’s substantive claims against a terminated franchisee continuing to use the franchisor’s marks. The trademark or service mark under which a product or service is sold or the trade name under which a business operates has been characterized as “the cornerstone of a franchise system.” The intent of the Lanham Act is to “regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; . . . to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks.”

Under the Lanham Act, a trademark exists only as a symbol of goodwill and has no independent significance without it. A franchisor, therefore, has a legal duty to take quality control measures or risk “abandonment” of its trademark. These measures typically include inspections to enforce system standards. The failure to enforce system standards may result in public deception and operate as a fraud on consumers, who expect a certain amount of uniformity when relying on a franchisee’s use of a recognized trademark. Accordingly, most franchisors retain the contractual right of inspection and quality control to enforce system wide standards.

The Lanham Act expressly provides for injunctive relief to trademark or trade name owners to prevent infringement. In a standards enforcement action, these claims are generally for infringement, false designation and misrepresentation of origin and dilution.

In the franchise context, if the franchisee continues to use the franchisor’s trademarks after the franchise agreement is terminated or expires, consumer confusion is inevitable. Thus, courts find: “Common sense compels the conclusion that a strong risk of consumer confusion arises when a terminated franchisee continues to use the former franchisor’s trademarks. . . [as] consumers automatically would associate with the trademark user with the registrant and assume that they are affiliated.” As such, it is “well-settled doctrine that a terminated franchisee’s continued usage of its former franchisor’s trademarks, by its very nature, constitutes trademark infringement.” For the foregoing reasons, courts often issue injunctions in trademark infringement cases.

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59 Id.
61 See, e.g., Burger King Corp. v. Mason, 710 F.2d 1480, 1492-93 (11th Cir. 1983).
b. Requirements for Granting Injunctive Relief Under the Lanham Act

The federal standard for a Lanham Act claim may vary slightly from circuit to circuit, but, generally speaking, a federal court will grant a preliminary injunction only if: (1) the plaintiff demonstrates a substantial likelihood that it will suffer irreparable injury if the injunction is not entered; (2) the harm to the plaintiff if the injunction is denied is greater than the harm to the defendant if the injunction is granted; and (3) the injunction will not adversely affect the public interest. Franchisor’s counsel must review this federal standard circuit by circuit to determine specifically how the court will balance these factors and whether any additional or different factors will be considered. The first step in meeting the burden of proof to demonstrate entitlement to a preliminary injunction is an identification of the legal claims on which the movant has a likelihood of success. The first and the third elements are presumed in favor of the plaintiff in trademark infringement actions, thus reducing the burden of the franchisor.  

However, a threshold requirement for a franchisor trying to prove a violation of the Lanham Act by a terminated franchisee is to demonstrate that the franchise agreements were legally terminated. Proper termination establishes that the franchisee used the franchisor’s marks without consent and that it was its unauthorized use that created the likelihood of consumer confusion or diluted value of the marks.

c. Claims Available to Franchisor Under the Lanham Act

There are three potential statutory claims available to a franchisor under the Lanham Act when there is continued, unauthorized use of a franchisor’s marks by a terminated franchisee. Section 32(1) proscribes the use in commerce of a registered trademark “which use is likely to cause confusion, or to cause mistake or to deceive” and is “without the consent of the registrant.” Section 32 of the Lanham Act provides, in pertinent part:

(1) any person who shall, without the consent of the registrant—(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distributions or advertising of any goods or services in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive. . . shall be liable in a civil action by the registrant.

Section 43(a) protects both registered and unregistered marks and makes unlawful “false designation of origin, false or misleading description of fact, or false or misleading representation of fact that is likely to cause confusion or mistake or to deceive regarding the source, sponsorship or approval of” goods or services. Section 43(a) of the Lanham Act provides, in relevant part, as follows:

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65 See, e.g., Pappan, 143 F.3d at 803.
66 See Eli Lilly & Co. v. Natural Answers, Inc., 233 F.3d 456, 469 (7th Cir. 2000).
67 See ServPro Indus., Inc. v. Schmidt, 1997 WL 158316, *11 (N.D. Ill. 1998); see also S&R Corp., 968 F.2d at 375 (“Jiffy Lube will merit preliminary injunctive relief if it can induce sufficient facts indicating that its termination of Durst’s franchises was proper”).
69 Id.
[A]ny person, who, on or in connection with any goods or services . . . uses in commerce any word, term, name, symbol or device. . . or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact which. . . is likely to deceive as to the affiliation, connection or association of such person with another person, or as to origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person. . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.\textsuperscript{72}

Finally, a party is prohibited from using and “diluting” the quality of another party’s famous and distinctive marks under section 43(c) of the Lanham Act.\textsuperscript{73} Section 43(c) of the Lanham Act provides, in part: Remedies for dilution of famous marks (1) The owner of a famous mark shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to an injunction against another person’s commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark, and to obtain such other relief as is provided in this subsection.\textsuperscript{74}

d. Remedies Under the Lanham Act

Under the Lanham Act, the owner of a federally registered trademark may recover: (1) injunctive relief; (2) damages; (3) lost profits; and (4) costs and attorneys’ fees upon a determination that the defendant infringed on its trademarks or service marks. These remedies are detailed in sections 32, 43 and 35 of the Act.

While a franchisor may be able to recover its attorneys’ fees and costs under the Lanham Act, the statute empowers a court to award the prevailing party reasonable attorneys’ fees only in “exceptional cases.”\textsuperscript{75} The prevailing party has the burden of demonstrating the exceptional nature of the case by “clear and convincing evidence.”\textsuperscript{76} While many courts have held that an exceptional case is one where the defendant’s acts can be characterized as malicious, fraudulent, deliberate, bad faith, or willful, some courts have simply characterized the misconduct as “very egregious.”\textsuperscript{77} As a practical matter, attorneys’ fees are difficult to recover unless the franchisor plaintiff can demonstrate that the franchisee defendant intended to deceive or refused to withdraw the advertising or promotion once it became aware of the deception.

e. Case law

In Dunkin’ Donuts, Inc. v. Albireh Donuts, Inc., the court noted that “[o]ne of the most valuable and important protections afforded by the Lanham Act is the right to control the quality of goods manufactured and sold under the holder’s trademark.”\textsuperscript{78} Consequently, “because [the franchisees] are selling products under [Dunkin’ Donuts’] trade name that do not conform to [Dunkin’ Donuts’] quality, safety, and health specifications, it is likely that there will be confusion

\textsuperscript{72} Id.
\textsuperscript{73} 15 U.S.C. § 1125(c).
\textsuperscript{74} Id.
\textsuperscript{75} 15 U.S.C. § 1117.
\textsuperscript{76} Balance Dynamics Corp. v. Schmitt Indus., Inc., 204 F.3d 683, 686 (6th Cir. 2000).
\textsuperscript{77} Id. at 691.
as to the source of [the franchisees’] products or that the value of [Dunkin’ Donuts’] trade name will be diminished, and [Dunkin’ Donuts] will succeed on one or all of its Lanham Act claims.”

Unauthorized use of a franchisor’s trademark or service mark unmistakably violates the Lanham Act and causes the franchisor irreparable injury by depriving it of the right to control the products and services offered under the mark. Yet even when presented with blatant infringement, courts are occasionally persuaded by the apparent inequity of shutting down a small-business owner. In Dunkin’ Donuts, Inc. v. Pleasant Hill Coffee & Donuts, Inc., for example, a terminated franchisee continued to operate as a Dunkin’ Donuts franchise. The franchisor sought a preliminary injunction prohibiting the franchisee from continuing to use the franchisor’s trademarks and enforcing the covenant not to compete. The court declined to issue the injunction on the ground that any injury to the franchisor was outweighed by injury to the terminated franchisee if it was forced to shut down the store.

D. Making a Compelling Case for Injunctive Relief

1. Proof of Irreparable Harm is Essential to Success on the Franchisor’s Motion for Preliminary Injunctive Relief

Franchisors are generally able to establish a likelihood of success on the merits with case law demonstrating their right to ensure the nature and quality of products and services associated with their trademarks. As discussed above/below, in order to succeed on its claim for injunctive relief, then, a franchisor must prove that an injunction is necessary to prevent immediate and irreparable harm.

If the franchisor seeks to sue, it should do so quickly. “Significant delay in applying for injunctive relief in a trademark case tends to neutralize any presumption that infringement alone will cause irreparable harm pending trial, and such delay alone may justify denial of a preliminary injunction for trademark infringement.” Courts have found a presumption of irreparable harm rebutted in face of periods shorter than four months. Franchisors, therefore, should seek to have their standards action brought within one to two weeks of the last inspection of the franchisee business.

In Watkins Inc. v. Lewis, the U.S. Court of Appeals for the Eighth Circuit affirmed the district court’s denial of a preliminary injunction motion to terminated dealers of household products. The Eighth Circuit held that money damages would adequately compensate the dealers for their alleged lost profits. Although the dealers asserted that they faced loss of goodwill and customer relations, they failed to introduce any evidence to substantiate those allegations. For franchisors, the court’s decision in Watkins serves as an important reminder that anyone seeking preliminary injunctive relief needs to be prepared to come forward with solid evidence of irreparable harm rather than relying upon conclusory allegations or statutory presumptions.

79 Albireh, 96 F. Supp. 2d at 149.
80 2006 WL 587616.
81 Citibank, N.A. v. Citytrust, 756 F.2d 273, 276 (2d Cir. 1985).
83 346 F.3d 841 (8th Cir. 2003).
a. **Case Law that Supports Injunctive Relief**

Courts have routinely granted franchisors’ request for injunctive relief where a franchisee has refused to adhere to system standards. For example, in *Dunkin’ Donuts, Inc. v. Kashi Enterprises, Inc.*, the court observed:

The possibility of irreparable injury arises because the record evidence indicates that the unsanitary conditions at the defendant’s store may result in illness to the plaintiff’s customers. To this end, the court notes that the plaintiff has an important interest in the uniformity of food specifications, preparation methods, quality and appearance, facilities and service of its franchisees. Not only does the defendant’s conduct place the plaintiff’s trademarks and trade name at risk, but more importantly, it puts the public in danger of food contamination. Further, the plaintiff has a strong legal interest in avoiding disputes stemming from the cleanliness and safety of its products. Accordingly, if customers become ill due to the defendant’s franchisees’ unsanitary conditions, the plaintiff’s national reputation, goodwill, and business will be harmed.84

Similarly, in *Dunkin’ Donuts, Inc. v. Albireh Donuts, Inc.*,85 the franchisor sued one of its franchisees, seeking an injunction and attorneys’ fees for breach of contract and violation of the Lanham Act after uncovering numerous health, safety and sanitation violations during its contractual inspections. Dunkin’ Donuts moved to enjoin the franchisees from continuing to violate the standards set forth in its franchise agreement and operations manual. The court granted the preliminary injunction on irreparable harm grounds, explaining:

In light of the significant quality control standards with which [Dunkin’ Donuts] requires its franchisees to comply and the evidence of non-compliance with these standards, the Court agrees . . . that the above factors demonstrate that [Dunkin’ Donuts] is likely to suffer irreparable harm. This is because . . . the serving of inferior, non-conforming products under [Dunkin’ Donuts] name could have a detrimental impact on [Dunkin Donuts’] name and goodwill, devalue [its] trademark, and subject it to a loss of business and exposure to substantial tort liability. The courts have repeatedly held that such damage is not readily quantifiable and, thus, constitutes irreparable harm.86

The court further concluded that the franchisor was likely to succeed on the merits because “[t]he plain terms of the franchise agreement require Defendants to comply with [Dunkin’ Donuts] quality, health, and safety standards and permit [it] to inspect Defendants’

84 *Kashi Enters., Inc.*, 106 F. Supp. 2d at 1327. See also *Albireh Donuts, Inc.*, 96 F. Supp. 2d at 149 (restaurant’s operation serving “inferior, non-conforming products under [Dunkin’ Donuts] name could have a detrimental impact on [Dunkin Donuts’] name and goodwill, devalue [Dunkin’ Donuts’] trademark, and subject [Dunkin’ Donuts] to a loss of business and exposure to substantial tort liability. . . . such damage is not readily quantifiable and, thus, constitutes irreparable harm.”); *Warner-Lambert Co. v. Northside Dev. Corp.*, 86 F.3d 3, 8 (2d Cir. 1996) (“The extent of loss of consumer goodwill that Warner-Lambert may suffer from the loss of some 300,000 bags of non-conforming cough drops will be unquantifiable at trial. It is thus not accurately compensable by monetary damages. This satisfies the irreparable injury requirement.”).
85 96 F. Supp. 2d 146 (N.D.N.Y. 2000).
86 Id. at 149. See also *McDonald’s Corp.*, 147 F.3d at 1301 (affirming injunction preventing franchisees from continuing to operate restaurant because of violation of franchisor’s operational standards); *Kashi Enters., Inc.*, 106 F. Supp. 2d at 1325 (granting preliminary injunction requiring franchisee to remedy violations of franchise agreement’s health, sanitation and safety requirements); *Baskin-Robbins, Inc. v. A. Ender, Ltd.*, 1999 WL 1318498 (D. Nev. 1999) (enjoining franchisees from violating franchisor’s health and sanitation standards in its manual of standards for operations); *Burger King Corp. v. Stephens*, 1989 WL 147557 (E.D. Pa. 1989) (enjoining franchisees from using franchisor’s trademarks and service marks and ordering restaurants closed pending compliance with operational standards).
store for compliance therewith. It also recognized that “one of the most valuable and important protections afforded by the Lanham Act is the right to control the quality of goods manufactured and sold under the holder’s trademark” and that “the dangers posed to the public and [Dunkin’ Donuts’] name and goodwill and the insubstantial burden that would be imposed” by requiring the franchisee to comply with the franchise agreement further justified the injunction.

Finally, the court refused to require Dunkin’ Donuts to post a bond “because there is no evidence, or likelihood, that [the franchisees] will suffer any costs or damages if it is later found they have been wrongfully enjoined or restrained” and that the franchisees were simply being asked to comply with the terms of the franchise agreement and operating manuals, which “should not cause them any unnecessary expense or loss and certainly not subject them to any costs beyond that which they seemingly should now be spending to safely operate their shop.”

The reason that injunctions are so often granted for operational violations is that no judge wants to be responsible, through inaction, for perpetuating a risk to the consuming public. As the court in Burger King Corp. v. Stephens, observed: a “failure to meet some of the safety and sanitary standards here involved could subject [Burger King] to substantial civil liability to members of the public personally injured thereby.”

2. Attorneys’ Fees and Costs

Typically, either by contract or statute, a franchisor is entitled to its attorneys’ fees and costs incurred in successfully obtaining injunctive relief. In Dunkin’ Donuts Incorporated v. Priya Enters., Inc., for example, the district court held that the franchisee’s failure to cure violations of Dunkin’ Donuts’ standards for health, sanitation, and safety after notice and an opportunity to cure was a breach of the franchise agreement thus entitling Dunkin’ Donuts to its attorneys’ fees and costs for bringing suit pursuant to the terms of the franchise agreement.

Similarly, a franchisor is typically entitled to its recover any attorneys’ fees and costs incurred in enforcing a previously issued court order. For instance, in Mail Boxes Etc., Inc. v. McEntire and McClaib, Inc., the District Court of Kansas issued an order to show cause why the defendant should not be held in contempt for violating the preliminary injunction that court had previously entered. The former franchisee had been enjoined from operating a competing business and using any mark similar to the franchisor’s trademark. The preliminary injunction required the former franchisee to transfer its telephone and fax numbers and e-mail addresses to MBE. Despite the court’s order, the former franchisee refused to transfer the telephone numbers to MBE, refused to return records, and continued to operate at its formerly franchised locations under the name “Mail Boxes & Copies.” The district court awarded MBE its attorneys’ fees incurred in preparation of the motion to rule to show cause and reserved ruling on MBE’s request for sanctions pending defendant’s response to the order to show cause.

Albireh Donuts, Inc., 96 F. Supp. 2d at 150.
Id. at 150-51.
Id. at 151.
Stephens, 1989 WL 147557 at 26-27, 32 (Underscoring the gravity of its concern, the court went so far as to notify local health agencies of the condition of the shops).
91 89 F. Supp. 2d 319 (E.D.N.Y. 2000).
Id. at 322.
E. How to Work With In-House Counsel/Executives to Ensure Your Injunction Claim Prevails

1. Termination
   
a. Comply with All Applicable State Relationship Laws

   Before commencing any termination action, franchise executives and their counsel should know whether a franchise relationship statute governs the relationship, and the procedural and substantive requirements of such statutes. (e.g. whether such a statute requires a notice of default, opportunities to cure, the standards for termination of a franchise agreement).

   Eighteen states\(^4\) have statutes relating to the termination of franchises, designed to protect franchisees from abuses by franchisors. These statutes specify some or all of the following (among other things): whether good cause is required for termination and what constitutes good cause; whether the franchisee must be given an opportunity to cure the deficiency and how long that cure period must be; and how far in advance of termination must notice be given. In some states, the statutes require the franchisor to compensate the franchisee for inventory, equipment and other items purchased from the franchisor or from approved suppliers.

   Franchise termination remains a hot topic in franchise litigation, because a franchisee facing the loss of its livelihood and substantial investment has little to lose by vigorously litigating its position. For the same reason, courts generally scrutinize the termination process for missteps by the franchisor. The majority of cases addressing termination uphold the franchisor’s decision to terminate if there is good cause to do so. Typically, “good cause” will be found where the franchisee fails to fulfill its financial obligations, fails to comply with system standards, or engages in some other form of misconduct (e.g., violating state or federal laws, engaging in fraud) that constitutes a breach of the franchise agreement.\(^5\)

   Even if no statute applies, a franchisor should also be sure to comply with any provisions in the franchise agreement concerning the appropriate notice and opportunity to cure. Failure to do so may subject the franchisor to liability for wrongful termination and inevitably makes things difficult for the franchisor down the road.

   b. Give Proper Notice to Cure/Notice of Termination

   Most state statutes that restrict a franchisor’s right to terminate require written notice of default and an opportunity to cure. Assuming that a franchisee fails to cure within the allotted period, the franchisor would then serve a termination notice. That notice should contain at least

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\(^4\) Arkansas, California, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, North Dakota, Virginia, Washington, and Wisconsin, the District of Columbia Puerto Rico and the Virgin Islands.

four components. First, it must indicate the precise date on which termination will be effective. Second, it should set forth all grounds for termination. Third, it should indicate any quantity or payment restrictions to be applied during the notice period. Fourth, the notice should include the post-termination obligations which the franchisee may have under the franchise agreement.

The minimum notice of termination that must be given to a franchisee is typically regulated by either generic or industry specific franchise statutes (if any apply). The amount of notice required may also depend on the circumstances giving rise to the termination. For example, shorter notice is typically required in certain extreme cases, such as when the franchisee abandons the franchise, files for bankruptcy or is convicted of a crime. The notice requirement will also be specified in the franchise agreement, usually according to the reason for termination. Absent statutory or contractual guidance, courts apply a standard of commercial reasonableness under the circumstances. The notice of termination also must set forth all reasons for termination along with previous warnings and opportunities to cure, if any.

2. Prepare a Chronology Once Litigation Has Commenced

Preliminary injunctions are often heard shortly after filing; therefore, counsel should create a complete exposure assessment and chronology of facts once litigation has commenced. One of the first tasks for franchisor’s counsel is to identify key facts and prepare affidavits.

Comprehensive and persuasive affidavits are essential. The affidavits submitted by the parties are sometimes the only evidence on which the court will rely when rendering a decision. Where time is of the essence, the judge may rely on affidavits and may even skip the briefs altogether, expecting counsel to summarize their arguments orally. Each affidavit should be organized logically and, unless it is very short, should contain topic headings denoting each of the facts to be presented. Facts should be set out in short, clear sentences without argument, speculation, or opinion. In addition, all referenced documents should be attached.

Deciding which company officer or franchisor employee will execute the affidavit involves important considerations for the long-term defense of the case and the preliminary injunction hearing. The affiant will likely become a company spokesperson in the litigation. He or she may be required to testify at the preliminary injunction hearing, in deposition, or at trial on the merits. It is common practice in preliminary injunction proceedings to use affidavits or deposition transcripts, as opposed to live testimony at the hearing. Ideally, the affiant will be the person or one of the persons responsible for making the decision to terminate the franchisee. Although the affiant need not be personally familiar with the franchisee or its operations, he or she should be able to describe in a clear, consistent, and authoritative manner the reasons for termination, the decision-making process, and the information relied on in that process.

A credible affidavit is prepared in close consultation with the franchisor’s attorney, bearing in mind the requirements of Rule 56(e). That rule requires that an affidavit: (i) “be made on personal knowledge;” (ii) state “facts as would be admissible in evidence;” and (iii) “show affirmatively that the affiant is competent to testify to the matters stated therein.” The affidavit should be limited to relevant and material facts that can withstand cross-examination in a deposition or a trial.

Third-party witnesses with no stake in the outcome of the matter can add substantial credibility to a franchisor’s case. These include health inspectors, fire marshals, other government officials, former employees of the franchisee, and mystery shoppers. In addition,
existing franchisees may also be effective in making the franchisor’s case that enforcing system standards is necessary to protect the integrity of their investment in the franchise system.

3. Identify the Relief Sought in the Complaint/Motion

A franchisor moving for an injunction should support the motion with the following submissions: (1) a verified complaint or a complaint with a supporting affidavit, (2) a written motion for a preliminary injunction with supporting memorandum of law, (3) a motion and proposed order for expedited proceedings that contemplates the entry of a date by which the defendant franchisee must respond to the complaint, (4) a date for the expedited production of documents and a hearing date, (5) a request for production of documents and (6) deposition notices.

In the event the franchisor seeks a TRO, the verified complaint or affidavit must set forth specific facts (1) demonstrating the immediate and irreparable harm or injury franchisor will suffer before the adverse party could be heard in opposition and (2) certifying the attempts, if any, by the franchisor’s lawyer to give notice and the reasons for not giving notice. For understandable reasons, courts are extremely reluctant to issue a TRO without notice to the opposing party or an opportunity to be heard. It is, therefore, imperative that the complaint or affidavit make a compelling case for not doing so. Similarly, any motion for expedited proceedings should also contain specific facts demonstrating the need for emergency relief.

Finally, the proposed order accompanying the motion should describe in detail the specific conduct or transaction to be enjoined or action to be taken. The requested relief should be narrowly tailored to address the specific harm threatened, because a court will not look favorably on a request for relief that is ill-defined and/or appears overreaching.

4. Standards Enforcement

a. Creating and Maintaining System Standards

The starting point for an effective systems standards compliance program is the franchise agreement itself, which should address, at minimum, these issues:

- the franchisor’s system and need for uniformity and consistency;
- the role of the operations manual;
- acts or omissions warranting termination;
- the franchisor’s right to conduct unannounced inspections of the franchised premises;
- notice and cure provisions;
- a non-waiver clause;
- the franchisor’s right to injunctive relief; and
- an attorney fee provision.\(^96\)

The franchise agreement should describe the franchisor’s system, the nature of the license being afforded to the franchisee, and the franchisee’s obligation to adhere to system standards for the preservation and enhancement of the franchisor’s trademark. Because it would not be practical to delineate every operational requirement in the franchise agreement

itself, the contract should require the franchisee to comply with the franchisor’s operations manual as it may be modified from time to time, and incorporate the terms of the manual by reference. The agreement should also describe in simple, straightforward language the acts or omissions that would permit the franchisor to terminate the agreement for standards violations. These items should be described as “material breaches of the agreement” and allow termination with no cure period, or a short cure period commensurate with the seriousness of the breach.

The purpose of anti-waiver provisions, which are found in most franchise agreements, is to enable a franchisor to rebut the claim that its failure to take action with respect to any franchisee defaults constituted a waiver of the right to future compliance and enforcement. A non-waiver clause is essential to enabling the franchisor to resolve problems without resorting to litigation; because a franchisor often does not (and should not) respond to every breach of the franchise agreement with a default notice or the threat of legal action.97

Finally, most franchise agreements include a provision under which the franchisee agrees to pay any attorneys’ fees incurred by the franchisor in seeking to enforce the terms of the agreement. Simply filing the lawsuit and demanding attorneys’ fees may encourage compliance and, as the matter continues, such a clause may help convince the franchisee to resolve the matter satisfactorily to the franchisor. If a franchisor demonstrates a willingness and ability to pursue a standards enforcement case and collect its attorneys’ fees when it prevails, that track record may convince similarly situated franchise owners that it is more sensible to cure operational problems voluntarily.

b. Consider the Franchisee’s Defenses to Enforcement Actions

A franchisor that chooses to take enforcement action against some, but not all, noncompliant franchisees should be prepared to rebut the argument that it is discriminating against certain franchisees. While there is no common law right to be free of disparate system standards enforcement, franchisees have argued that, by holding it to a harsher standard than others, the franchisor violated the covenant of good faith and fair dealing that may be implied in contracts by most (but not all) states’ laws. Increasingly, courts have rejected the contention that the covenant of good faith and fair dealing imposes an independent duty on franchisors above and beyond the obligations explicitly set forth in the franchise agreement. Rather, the covenant is often (but not always) used as a standard by which a franchisor’s exercise of discretion is judged, but cannot be used to override an express right conferred by the contract.99

Eight states100 have statutory provisions prohibiting various forms of discriminatory treatment of franchisees. Courts in three other states—California, Connecticut and Michigan—have interpreted their statutory prohibitions of “unfair” treatment to include disparate treatment. As a general rule, a franchisor will not be held to have acted discriminatorily with respect to a franchisee if it is not arbitrary or unfair. Thus, in selecting an enforcement target, a franchisor should be able to articulate a rational business justification for distinguishing it from other franchisees in similar circumstances. Is the franchisee a repeat offender? Are the franchisee’s standards deficiencies a risk to public health and safety? Has the franchisee broken previous

98 Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273 (7th Cir. 1992).
100 Arkansas, Hawaii, Illinois, Indiana, Iowa, Minnesota, Washington and Wisconsin.
promises to improve operations? Why has the franchisor treated arguably similar cases differently?

5. **Enforcing System Standards**

Usually, the best way to enforce standards is through random, unannounced inspections which enable the franchisor to view the condition of the franchise location at any given time period. The field inspectors should carefully document the conditions (good and bad) observed during an inspection on standardized forms prepared by the franchisor. Following the inspection, the franchisor or its agents should review the results with the franchisee and have the franchisee sign the review form, thereby eliminating any questions of notice down the road.

In addition, the standards violations should be documented. Pictures speak a thousand words and videos often tell a compelling story; therefore, where practicable, photographs and/or videotapes should be taken to record specific standards violations. The photographs or videos should be developed immediately and labeled with the date and description of the standard violation. Obviously, all photographs and videos of the location should be preserved—not just the ones depicting violations—since the disappearance of such evidence will likely cause a judge to conclude that the inspections were a result-oriented exercise.

Finally, “new day” letters are also helpful in enforcing system standards, particularly if a franchisor has been lax in standards enforcement system-wide but intends to make a push to encourage compliance. By sending these letters to its franchisees, the franchisor notifies them that, regardless of past practices, the franchisor intends to enforce its systems standards going forward and failing scores on operational reviews will subject them to standards enforcement actions. This type of communication helps rebut any argument that the franchisor waived its rights to demand compliance and such directives may cause franchisees to take their obligations more seriously.

6. **Preparing For Presenting Evidence and Oral Argument**

Obviously, the outcome of a preliminary injunction hearing is often driven by the specific facts of a dispute and, in those cases where a court elects to hold an evidentiary hearing, the credibility of the witnesses. In any case involving a request for injunctive relief, a franchisor increases its chances of success if, consistent with the facts, it is able to emphasize the following themes:

- allowing a franchisee to “slide” on operational issues will present a threat to the public health and safety;
- the franchisor operates in a highly competitive market where customers demand and expect uniformly excellent service. If customers’ expectations are not met, the franchisor’s business and goodwill are lost to competitors;
- the failure to enter a preliminary injunction requiring a former franchisee to de-identify will perpetrate a fraud on the consuming public;
- the failure to enter a preliminary injunction with respect to operational issues will injure existing franchisees because their business depends, in large part, on the value and reputation of the franchisor’s trademark;
- the failure to enter a preliminary injunction enforcing a non-compete provision will result in unfair competition to existing franchisees, cause public confusion, and undermine the value of the franchisees’ investment;
• the defendant franchisee was given multiple warnings and ample chances to cure, and failed to do so;
• the defendant franchisee clearly understood and accepted the obligation to run its outlets in accordance with the franchisor’s operations manual;
• the system standards at issue involve objective criteria, as opposed to subjective criteria; and
• the system standards at issue (e.g. remodeling requirements) were endorsed by a franchise association and/or franchisee council and/or published throughout the system (e.g. through newsletters and other forms of communication).

To the extent possible, the franchisor should try to elicit testimony supporting these themes from witnesses other than its own representatives. For example, the defendant franchisee will be hard pressed to deny the importance of following system standards – indeed, the value and reputation of the brand is probably the reason that the defendant purchased the franchise in the first place. Similarly, offering testimony of other franchisees in the system will typically be an effective way to demonstrate that the system as a whole will be harmed if the court does not take steps to prevent the rogue franchisee from undermining the reputation and quality of the brand.

III. FRANCHISEE’S PERSPECTIVE

A. Introduction

Injunctions have been referred to as a franchisee weapon against termination (not surprisingly by counsel for franchisors). However, franchisees’ use of injunctions—to defend against wrongful termination and other unlawful acts by franchisors—is more appropriately viewed as a shield. It is the use of injunctions by franchisors—in trying to require a change in the way the current or former franchisee does business—that more closely resembles a weapon. As discussed above, there are three common factual scenarios under which a franchisor may seek injunctive relief: (i) to compel an existing franchisee to comply with system standards; (ii) to prevent a former franchisee from using the franchisor’s trademarks or trade dress; (iii) to prevent a former franchisee from violating post-termination obligations, including a non-competition provision or prohibitions against use of the franchisor’s trade secrets or other proprietary material. While all of these scenarios directly arise out of or are implicated by rights granted in the franchise agreement, state and federal statutes and common law frequently play a large role in these cases.

This section will explore the strategies and defenses franchisees may employ in defending against franchisors seeking injunctive relief. It will also address the ability of franchisees to turn the tables and use injunctive relief to prevent termination or other unlawful acts by franchisors.

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102 Indeed, the Supreme Court of the United States of America has recognized that in “litigation between a franchisee and a franchisor the former may challenge the validity of various contract provisions under federal law, while the latter may rely heavily on state contract law as a basis for controlling the franchisee’s conduct.” Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977).
B. Building the Evidence and Defending Against Preliminary Injunctions Sought By Franchisor

1. Scenarios Giving Rise to Claims Seeking Injunctive Relief and Preventative Measures

Claims for injunctive relief may be filed by a franchisor against either a current or former franchisee. When a franchisor threatens to seek an injunction against a current franchisee, it is advisable for counsel to review the franchisee’s obligations under the franchise agreement, as well as documents detailing the history of the relationship, to determine whether the franchisee has a justifiable basis for any alleged non-compliance. To the extent the franchisee is blatantly violating a contractual obligation, such as safety standards, and wishes to remain in the system, it may be more beneficial for the franchisee to voluntarily comply rather than have the franchisor seek judicial intervention. This is so because voluntary compliance is usually less expensive than a lawsuit with heavy front-end costs. Additionally, voluntary compliance will likely be less harmful to the existing relationship between the franchisor and franchisee and may go a long way towards preventing termination by the franchisor. Although voluntary compliance may often be advisable, there are certainly times when injunctive relief is inappropriate or without merit, and counsel should not recommend voluntary compliance with unwarranted or unreasonable requests by the franchisor.

After a franchisor terminates a franchisee or a franchisee unilaterally leaves the system, there are certain steps a franchisee should take in order to avoid a franchisor’s threat to seek injunctive relief. Provided that the franchisee no longer wishes to remain in the system either by choice or upon obtaining a termination notice, the franchisee should make every effort to properly “de-identify” from the system. Indeed, proper de-identification may be the only sure way to avoid future disputes with the franchisor and is important for all former franchisees. While it may be more critical for the former franchisee who expects to remain in the formerly franchised location operating another business, even those former franchisees with no plans to continue operation should take steps to de-identify from the system.

In order to de-identify, the franchisee should carefully review the franchise agreement termination and post-termination provisions, which set forth post-termination obligations. The most important post-termination obligations usually require the franchisee to return proprietary material of the franchisor (including the operations manuals), cease using the franchisor’s marks, trade dress, and other franchise-associated items, assign (to the extent requested) telephone numbers or lease agreements, and not operate a competing business at the formerly franchised location or within a certain area of that location. In addition to the franchise agreement, any documentation regarding termination provided by the franchisor should be reviewed. Generally termination notices or other correspondence from the franchisor will highlight the de-identification issues most important to the franchisor. While it may not be initially apparent, the assistance of counsel is useful in the de-identification process, especially from a franchise attorney who has prosecuted or defended injunctions under similar circumstances. This individual will have a more heightened sense of the necessary or appropriate changes that should occur in order to comply with the franchise agreement and avoid the threat of injunctive relief. Prior to any de-identification efforts, the franchisee should take photographs of the franchise location with a digital camera. These photographs should be burned onto a disk and put in a safe location (perhaps in the franchisee’s counsel’s file). To the extent any litigation occurs in the future, these photographs will certainly become important evidence of the former franchisee’s operation of the franchised location.
To begin the de-identification process, the franchisee should first remove or destroy any items that reference the franchise system, including: interior and exterior signage, menus/catalogs, and advertisements or marketing materials. While destruction may be less expensive, the franchisor may question whether the items were actually destroyed and the reason for destruction over return, leaving lingering doubts of compliance in the mind of the franchisor (and perhaps a judge). Therefore, the return of such items (documented by a detailed cover letter) may have a greater likelihood of avoiding the threat of an injunction, especially if the franchisee intends to remain in business. Certainly, any items that contain the franchise name, marks, or logos should be destroyed or returned to the franchisor immediately. Some items that carry the name or marks are not so readily apparent. For instance, office items (notepads, employment applications, pens/pencils, facsimile transmittal sheets, business cards, etc.), bills sent to the location, business licenses or other required permits or health and safety charts, yellow/white page listings, credit card transaction slips, and other items commonly used, but not frequently noticed, should be reviewed for reference to the franchisor. This is another reason counsel for the franchisee should be involved—counsel will likely be less familiar with the franchised location and bring a fresh set of eyes to the process. The operations manual and other proprietary material should either be returned to the franchisor (which is likely what the franchise agreement requires) or turned over to counsel for the franchisee (in case future litigation is expected or possible).

Next, the franchisee should remove any items that it believes the franchisor, when describing the franchised location, would identify as trade dress. Trade dress has been characterized as: “a combination of any elements in which a product or service is presented to the buyer. Those elements combine to create a visual image presented to the buyer.” Trade dress is capable of acquiring exclusive legal rights as trade dress under the Lanham Act.

To the extent that the franchisee intends to operate a different business in the formerly franchised location, the franchisee should pay close attention to any non-competition provisions within the franchise agreement. In this vein, the franchisee should cautiously choose the type of the business, its new name, and any associated items (logo/trademark, marketing/promotional items, etc.) so as not to raise an argument from the franchisor that the new name or marks are confusingly similar to the franchisor’s.

The franchisee’s attorney should counsel the franchisee on the consequences of the franchisor determining that the franchisee failed to de-identify or is operating a competing business. Beyond the legal ramifications (such as a lawsuit seeking injunctive relief, which is discussed in great length below), the franchisee should analyze its ability to effectively operate a business in the formerly franchised location without the name or assistance of the franchisor. For instance, if a sandwich franchise in a particular location is failing, resulting in termination by either the franchisor or franchisee, simply changing the name (or making other changes—such as the food distributor, etc.) may make no difference in the success of the business. Accordingly, even if a franchisee can legally defeat an application for an injunction based upon

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a violation of a non-competition provision, its new business may fail for the same reasons that the franchised business failed. Rather than exerting time and money fighting an injunction, the franchisee should first determine whether the new (competing) business is sustainable over the long term. It would certainly be imprudent to fight and defeat an application for injunctive relief only to close the new business down in a matter of weeks or months. A franchisee who fails as a franchisee may well fail as an independent, thus winning the injunction battle but losing the war.

If a franchisor intends to seek an injunction despite a franchisee’s attempts at compliance or de-identification, a franchisor will usually send a current franchisee a default notice or a former franchisee a cease and desist letter. Such correspondence puts the franchisee on notice of the alleged breaches and provides an opportunity for dialogue between the parties. Remedial measures by the franchisee, if the franchisee believes any are necessary or worth making, at this juncture will either suspend the franchisor’s threat to obtain injunctive relief or focus the issues to be tried by a court.

2. Preparing for Temporary Restraining Order Hearings

Temporary restraining order (“TRO”) hearings are usually the first step in the injunction process. Because of the nature of a TRO, including minimal notice requirements, preparation time for the franchisee is usually minimal. In its ability to control both the time of filing and the location of filing, the franchisor may be able to take the franchisee by surprise. As a result, instead of being proactive in its defense of the TRO application, the franchisee is usually only able to be reactive. This underscores the importance of unilaterally taking as many remedial measures as possible prior to a TRO hearing. Such steps can serve the dual purpose of blunting some of the franchisor’s substantive claims while at the same time placing the franchisee in a more sympathetic position in front of the court.

While the pleadings associated with the application for a TRO and the hearing itself will provide the franchisee with insight into the claims, arguments, and strategy the franchisor will employ, they are usually not received until the eve of (if not minutes before) the TRO hearing. Thus, this knowledge will enable the franchisee to be more prepared at the time of the preliminary injunction hearing but may be of only limited assistance at the TRO hearing. If granted, the length of time a TRO is valid varies from state to state. If an application for TRO is filed in and granted by a federal court, a TRO may last ten days (with the potential of a 10-day extension), at which time an application for a preliminary injunction shall be heard. The Federal Rules require a successful movant to provide security “in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.” Federal courts have discretion in setting the bond amount and may condition the issuance of an injunction on the posting of the bond set at the hearing. In many state courts, the filing of a bond is jurisdictional and a prerequisite to the enforceability of a TRO. This being the case, the franchisee will want to have evidence available to convince a judge that the amount of the bond should be significant. A large bond may be cost prohibitive for a financially strapped franchisor and may prompt it to

105 For instance, a franchisee may be able to invalidate a non-competition provision based upon the lack of a protectable interest.
106 FED. R. CIV. P. 65(b).
107 FED. R. CIV. P. 65(c).
make a business decision against posting such a bond. At a minimum, a large bond will provide a vehicle for recovery by the franchisee in the event the TRO is later dissolved and found to be wrongful.

3. Preparing for Preliminary Injunction Hearings

a. Consideration of Pre-Hearing Motions

i. Expedited Discovery

The time between the TRO hearing or the filing of the application for preliminary injunction and the preliminary injunction hearing is usually rather short, but will be a critical time for the franchisee. As a result, both parties may make pre-hearing motions. One such common motion is for expedited discovery, including interrogatories, document requests, depositions, and site inspections. While a court has discretion in granting such a motion, motions for expedited discovery are routinely granted. Counsel for the franchisee should make a calculated decision regarding whether to file a motion for expedited discovery. Depending upon the circumstances of the case, expedited discovery may only aid the franchisor in furthering its claims. For instance, the franchisor may seek information regarding the continued use of its proprietary materials. While prior to discovery the franchisor may only be able to make vague allegations in this regard, discovery responses by the franchisee or an on-site inspection may provide the franchisor with additional ammunition to confirm its claim. Additionally, expedited discovery means additional expense for the franchisee. As the franchisor is often the party with deeper pockets, it may be able to put monetary pressure on the franchisee to the extent that the franchisee simply cannot afford to litigate the matter, even if it has valid defenses or its own claims against the franchisor. And, if the court has already issued a TRO against the franchisee, expedited discovery may delay the preliminary injunction hearing which is in the franchisor’s interests (since it already has a TRO).

While there may be some downside to expedited discovery for the franchisee, there are also some reasons to request it. Indeed, if no TRO was sought or granted, seeking expedited discovery could delay the preliminary injunction hearing. A franchisee may be able to delay the injunction hearing even longer by arguing that the issues are sufficiently complex that regular discovery deadlines should be followed. If the franchisor objects to regular discovery, the franchisee can argue that in light of the fact that a TRO was either not requested or not granted, the status quo is causing no irreparable harm to the franchisor and no harm can come from utilizing regular discovery. Even if a court does not grant a request for either expedited or regular discovery or neither of the parties makes such a request, the franchisee will need to conduct its own investigation of the facts in order to develop its strategy to defeat the motion for preliminary injunction.

ii. Motion to Increase Bond or Vacate/Modify TRO

If the franchisor has already obtained a TRO against the franchisee, the franchisee may wish to consider motions aimed directly at the merits of the TRO. Rule 65 specifically provides that on “2 days’ notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and

determine such motion as expeditiously as the ends of justice require.\textsuperscript{111} Thus, the franchisee can move to modify or dissolve the TRO.\textsuperscript{112} While such a motion puts the franchisee on the offensive, the standard applied to the motion to dissolve appears to mirror the standard to obtain an injunction.\textsuperscript{113} As such, courts routinely will take a motion for preliminary injunction and a motion to dissolve a TRO together, to the extent that the parties are prepared to present evidence on both.\textsuperscript{114}

Additionally, the franchisee can file a motion to increase the bond amount. By asking the court to increase the security, the franchisee indicates to the court the seriousness of the TRO and raises the stakes with the franchisor. In Federal Court and many states, the bond is the only source of a monetary recovery for the franchisee in the event the TRO is set aside.\textsuperscript{115} Accordingly, a motion to increase the bond, if properly supported, may be favorably received by a judge who has already entered a TRO at the request of the franchisor, often with little or no notice to the franchisee.

b. Examining the Franchisor’s Claims

When a franchisor files for injunctive relief, the place to begin for the franchisee is the franchisor’s papers for injunctive relief. The franchisee should analyze the complaint, the motion for injunctive relief, any verified statements or affidavits, and all supporting documents filed by the franchisor. These documents should contain the foundation upon which the franchisor will build its case. The franchisee should, therefore, examine the franchisor’s claims one by one. For each claim, the franchisee should identify the proof elements, the facts alleged to support each element, and the evidence it believes the franchisor will use at the hearing to substantiate the elements. By identifying the evidence it believes the franchisor will put on, the franchisee can better hone the evidence it intends to present in opposition.

In response to the motion for preliminary injunction and the memorandum supporting the application, the franchisee will usually draft a written memorandum in opposition. Drafting the memorandum will further clarify the issues for the franchisee in preparing for the hearing and will aid the court in understanding the facts and law prior to the hearing.

c. Defeating the Four Factors for Injunctive Relief

As discussed earlier in the franchisor section, a motion for preliminary injunction requires the district court to consider four factors: (1) the probability of success on the merits, (2) the

\textsuperscript{111} FED. R. CIV. P. 65(b).

\textsuperscript{112} See, e.g., Consumer Sales & Mktg., Inc. v. Digital Equip. Corp., 1995 WL 548765 (N.D. Ill. 1995) (Defendant, arguing it was not a franchisor, moved to dissolve TRO and obtain expedited discovery).


\textsuperscript{114} M.K. v. Roselle Park Bd. of Educ., 2006 WL 3193915, *8 (D.N.J. 2006) (“Rule 65(b) establishes a procedure whereby the party against whom a temporary restraining order has issued can move to dissolve or modify the injunction . . . ,” as the Supreme Court has found, “[s]ituations may arise where the parties, at the time of the hearing on the motion to dissolve the restraining order, find themselves in a position to present their evidence and legal arguments for or against a preliminary injunction.” Granny Goose Foods, Inc. v. Bhd. of Teamsters and Auto Truck Drivers Local No. 70 of Alameda County, 415 U.S. 423, 441 (1974). The Supreme Court found that “[i]n such circumstances, of course, the court can proceed with the hearing as if it were a hearing on an application for a preliminary injunction. At such hearing, as in any other hearing in which a preliminary injunction is sought, the party seeking the injunction would bear the burden of demonstrating the various factors justifying preliminary injunctive relief . . . .”).

\textsuperscript{115} See, e.g., Manpower Inc. v. Mason, 377 F.Supp.2d 672, 681 (E.D. Wis. 2005).
threat of irreparable harm to the movant, (3) the balance between that harm and the injury that granting the injunction will inflict on other interested parties, and (4) the public interest.\textsuperscript{116} The franchisor, as the party seeking injunctive relief, bears the burden of proving these factors.\textsuperscript{117} No single factor is dispositive,\textsuperscript{118} as a district court must balance all factors to determine whether the injunction should issue.\textsuperscript{119} Indeed, courts have specifically recognized that injunctive “relief is an extraordinary remedy which should only be granted if the movant has clearly carried its burden of persuasion on all of the four factors.”\textsuperscript{120} Therefore, in drafting a memorandum in opposition to a motion for preliminary injunction and preparing for the injunction hearing, the franchisee should analyze and be prepared to argue against the ability of the franchisor to meet these four essential factors. And while the four elements are interconnected and, thus, the facts and legal arguments to defeat each element may overlap, each element should be addressed separately. This is because the franchisee need only prevail on one of the factors to defeat the franchisor’s request. Moreover, to the extent the franchisor seeks injunctive relief on multiple claims, it is important for the franchisee to address the elements in relation to each claim separately. Although the “big picture” may initially indicate the appropriateness of injunctive relief, examination of the elements on a count-by-count basis may expose the weaknesses of the application for injunctive relief in that not every count can meet every injunctive factor.

In addition to the four factor analysis, courts routinely consider other facts attendant to the case to determine the merit of granting an injunction. Specifically, the Ninth Circuit noted:

> It is so well settled as not to require citation of authority that the usual function of a preliminary injunction is to preserve the status quo ante litem pending a determination of the action on the merits. The hearing is not to be transformed into a trial of the merits of the action upon affidavits, and it is not usually proper to grant the moving party the full relief to which he might be entitled if successful at the conclusion of a trial. This is particularly true where the relief afforded, rather than preserving the status quo, completely changes it.\textsuperscript{121}

Therefore, when a preliminary injunction mandates an affirmative act that changes the status quo, a court will scrutinize it even more closely.\textsuperscript{122}

i. **Element One: Likelihood of Success on the Merits**

The franchisor will initially have to make a showing that it has a likelihood of succeeding on the claims for which it seeks injunctive relief. In some jurisdictions, depending upon the type of injunction sought, the burden under this factor is heightened. The Second Circuit has stated that “the party seeking the injunction must show a ‘clear’ or ‘substantial’ likelihood of success

\begin{itemize}
  \item \textsuperscript{116} See Dataphase Sys. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir.1981) (en banc).
  \item \textsuperscript{117} See Watkins, Inc. v. Lewis, 346 F.3d 841, 844 (8th Cir. 2003).
  \item \textsuperscript{118} See West Pub. Co. v. Mead Data Cent., Inc., 799 F.2d 1219, 1222 (8th Cir. 1986).
  \item \textsuperscript{119} See Baker Elec. Cooper., Inc. v. Chaske, 28 F.3d 1466, 1472 (8th Cir. 1994), citing Modern Computer Sys., Inc. v. Modern Banking Sys., Inc., 871 F.2d 734, 737 (8th Cir. 1989) (en banc).
  \item \textsuperscript{120} Miss. Power & Light Co. v. United Gas Pipe Line Co., 760 F.2d 618, 621 (5th Cir. 1985).
  \item \textsuperscript{121} Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804, 808-809 (9th Cir. 1963).
  \item \textsuperscript{122} See, e.g., Alphagraphics, Inc. v. Shapiro, 966 WL 3969 (N.D.Ill. 1996) (Denying franchisor’s motion for TRO upon finding that “rather than preserve the status quo pending a preliminary injunction hearing, the TRO would grant the relief requested in the complaint’s first count to reclaim phone number.”); In-N-Out Burgers v. Chadders Restaurant, 2007 WL 1983813 (D. Utah 2007) (Recognizing heightened standard for mandatory injunction changing the status quo and only granting injunction on infringement count).
\end{itemize}
where the injunction sought is mandatory—i.e., it will alter, rather than maintain, the status quo.”

The franchisee should examine each of the franchisor’s counts that may form the basis for an injunction to determine whether the franchisor can establish it has a likelihood of succeeding on the merits of each claim. While the franchisee’s defenses to each count may be helpful to defeat this factor, because the burden is initially on the franchisor, the franchisee should first determine if the franchisor will have evidence to substantiate each element of its own case in chief.

Many times the counts for which the franchisor can more easily prove it has a likelihood of success on the merits do not give rise to injunctive relief. For instance, perhaps the franchisor terminated the franchise agreement for breach of contract because the franchisee failed to make royalty payments. If, in fact, the franchisee did fail to make royalty payments, even ignoring any defenses the franchisee may have, such breach would not ordinarily entitle a franchisor to injunctive relief. This is because monetary damages would adequately compensate the franchisor, making injunctive relief inappropriate.

Franchisees should use any defenses, affirmative defenses, or counterclaims to defeat this factor for injunctive relief. In this regard, the franchisee does not bear the burden of establishing the likelihood of success of its defense, but only that its defense calls into question the franchisor’s likelihood of success on the merits. The following defenses, affirmative defenses, or counterclaims are frequently raised by franchisees:

- wrongful termination;
- fraud;
- waiver or condoning of alleged breach;
- unconscionability;

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123 Sunward Electronics, Inc. v. McDonald, 362 F.3d 17, 23 (2d Cir. 2004). See also Bad Ass Coffee Company of Hawaii v. Bad Ass Coffee Ltd. Partnership, 25 Fed.Appx. 738, 747 (10th Cir. 2001) (When the issuance of a preliminary injunction will alter the status quo between the two parties, the movant must show that “that on balance, the traditional four factors weigh heavily and compellingly in favor of granting the injunction.”).


125 See, e.g., Dunkin’ Donuts Inc. v. Nat’l Donut Rests. of N.Y., 291 F. Supp. 2d 149, 153 (E.D.N.Y. 2003) (Denying preliminary injunction because franchisee adduced evidence contrary to franchisor’s claims and “the two parties’ respective witnesses directly contradict each other. This conflicting testimony prevents the court from finding that [franchisor] has a ‘clear’ or ‘substantial’ likelihood of success at a trial”).

126 Depending upon the applicable law, the franchisor may bear the burden of proving as a threshold matter that it properly terminated the franchise agreement. See, e.g., Dunkin’ Donuts, Inc. v. All Madina Corp., 2006 WL 842403 (D.N.J. 2006) (“As an initial matter, the termination of the contract must be sufficient under the New Jersey Franchise Practices Act.”); See also Culligan Int’l Co. v. Culligan Water Conditioning of Carver County, Inc., 563 F. Supp. 1265 (DC Minn. 1983) (Denying preliminary injunction upon finding franchisor not likely to succeed on merits of case as franchise agreement was wrongfully terminated).

127 See, e.g., Sona Laser Centers, Inc. v. Capital Works, LLC, (E.D. Va. 2006) (Denying a preliminary injunction on the grounds that franchisor was unlikely to succeed on merits of claim because the relevant agreement containing the non-competition provision was procured by fraud, rendering the covenants unenforceable); Rodopoulos v. Sam Piki Enters., Inc., 570 So.2d 661, 665 (Ala. 1990) (Alabama Supreme Court held that evidence regarding violations of the FTC Rule were admissible in a fraud case with regard to the franchisor’s duty to disclose information pursuant to the FTC Rule. The court held that the “trial court correctly allowed the amendment to the complaint concerning the duty owed by the [franchisor] under the FTC regulations and correctly permitted the jury to consider the FTC regulations in determining the duty owed by the [franchisor].”).

128 See, e.g., Nat’l Donut Rests. of N.Y., 291 F. Supp. 2d at 153 (Holding “it would be unfair to grant a preliminary injunction pending trial because franchisor failed to overcome franchisee defense that it complied with franchise agreement or representative of franchisee waived alleged breach).
• lack of protectable goodwill, trade dress, or trade secrets, etc., associated with the franchise;  
• invalid or unreasonable non-competition provision;  
• discrimination between the franchisees;  
• breach of good faith and fair dealing;  
• prior material breach of the franchise agreement by the franchisor.  

Some of these defenses/counterclaims go to the heart of the franchisor’s claims and may be able to defeat this injunction factor altogether.

For instance, a franchisee has numerous avenues to challenge an alleged violation of a non-competition provision under the franchisor’s likelihood of success on the merits. Initially, the “burden is on the [franchisor] to prove the extent of its protectable interests, and if it cannot, the entire covenant will be deemed unenforceable.” Thus, to the extent the franchisee can prove that the franchisor does not have a protectable interest to form the basis for a non-competition provision, no injunction can issue on that claim. If the franchisee can demonstrate that the provision is simply too broad, even if it purports to protect a legitimate protectable interest, a court may decline to enforce the provision—at least at the preliminary injunction stage. In Gandolfo’s Deli Boys, LLC v. Holman, while the District Court recognized the need to protect the franchise system, it declined to enter an injunction against a franchisee, holding that “a covenant that restricts a former franchisee from employment in a competing business ‘in any capacity’ is overbroad and will not be enforced.” Additionally, the court found that the covenant was too broad “considering the business interest of [the franchisor]…

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129 See, e.g., Pirtek USA, LLC v. Wilcox, 2006 WL 1722346 (M.D.Fla. 2006) (Denying preliminary injunction on grounds that franchisor failed to establish any protectable interest as follows: franchisor had not developed any techniques or information entitled to protection; franchisor made no effort to refranchise area; no customer goodwill to protect as customer relationships developed by franchisee, not franchisor).

130 See, e.g., Gandolfo’s Deli Boys, LLC v. Holman, 2007 WL 1649085 (N.D.Ga. 2007) (Denying preliminary injunction against franchisee on the grounds that noncompetition provision was unenforceable as too broadly restricting franchisee from future involvement with competitive businesses and unreasonably broad considering the business interests of franchisor sought to be protected).

131 See, e.g., McDonald’s v. Underdown, 2005 WL 1745654 (M.D. Pa. 2005). There, the franchisee sought to use its counterclaims for breach of duty of good faith and fair dealing against the franchisor in defense of the franchisor’s injunction motion sought under, among other counts, the Lanham Act. However, the court held that pre-termination conduct was not admissible at injunction hearing.

132 See, e.g., Lippo v. Mobil Oil Corp., 776 F.2d 706 (7th Cir. 1985) (Cross-claims by both parties, including PMPA claim by franchisee for injunctive relief. Court held franchisor violated agreement by failing to acknowledge franchisee’s cure within cure period).


134 See, e.g., Pirtek, USA LLC v. Whitehead, 2006 WL 2038651 (S.D. Ala. 2006) (Refusing to enjoin franchisee from competing because franchisor no longer conducted business in protected area and finding the covenant against competition no longer reasonably necessary to protect the established interests of the franchisor); Bennigan’s Franchising Co. v. Swigonski, 2007 WL 603370 at *8-9 (N.D.Tex. 2007) (Denying injunctive relief under non-competition provision because franchisee was not using marks owned by the franchisor and the nearest franchised store to the formerly franchised location was 210 miles away, concluding “the covenant at issue in this case is more limiting than would be required to protect the [franchisor’s] legitimate business interests.”); Wilcox, 2006 WL 1722346 (Denying enforceability of non-competition provision as franchisor did not have protectable interest—in part because franchisor did not operate a franchise location in the New Orleans area or within at least 200 miles of the formerly franchised location).


136 This case also highlights the importance of understanding the applicable state law on non-competition provisions for the first injunction factor, as some states will blue pencil a provision while others will decline to enforce such an overly-broad provision. Georgia, for example, will not blue-pencil a non-competition provision in an employment or franchise agreement. Gandolfo’s Deli Boys, LLC, 2007 WL 1649085 at *3.
sought to be protected.” The covenant at issue there attempted to restrict franchisees from operating any competitive business at the formerly franchised location, within ten miles of the location, or within ten miles of any other franchise location. The agreement defined a “competitive business” as “any restaurant offering ‘casual dining and take-out of sandwiches, salads, or any type of deli foods and beverages.” The Court found such limitation unreasonable “because it purports to preclude Defendants from opening a broad array of restaurants, including those that do not target the same customers or directly compete with [franchisor] Gandolfo’s. For example, the plain language of the covenant would preclude Defendants from operating almost any casual restaurant, including a McDonald’s, Burger King, and Chick-fil-A, all of which offer ‘casual dining and take-out of sandwiches [and] salads . . ..’”

The District Court in Bennigan’s Franchising Co. v. Swigonski, similarly rejected a non-competition provision that prohibited franchisees from operating or having any involvement with “any casual dining or other restaurant business . . . that is in any way competitive with or similar to a Bennigan’s Restaurant.” The court determined that the “term ‘casual dining’ is not defined in the franchise agreement, but the agreement does include a list of restaurants that would qualify as ‘casual dining.’ Unfortunately, there does not seem to be a common thread binding all the examples together.” Finding such prohibition incapable of definiteness and, thus, overly broad, the court concluded that “the covenant is unreasonably restrictive, and Bennigan’s is not likely to succeed in enforcing the covenant on the merits.”

Additionally, the franchisor will need to prove that the non-competition provision is reasonable in time and scope. Finally, a former franchisee who has properly de-identified will have a stronger argument that it is not competing with the franchisor and, therefore, that an injunction is unnecessary to protect the franchisor.

If the franchisor is proceeding on trade dress infringement, the franchisor will need to meet all elements of that claim, including proffering a list of items or explanation of the character and scope of the claimed trade dress. Conclusory testimony that the listed items collectively acquired distinctiveness through secondary meaning may be insufficient to establish a likelihood of success on the merits, especially if a similar look is adopted by other franchisors or businesses. Accordingly, the franchisee should argue that the look and feel of the franchisor’s trade dress is generic and, therefore, cannot qualify for trade dress protection. In Planet Hollywood (Region IV), Inc. v. Hollywood Casino, the court denied a restaurant chain

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137 Id. at *10.
138 Id.
139 Id.
140 2007 WL 603370 (N.D.Tex. 2007).
141 Id. at *3.
142 Id. at *4.
143 See, e.g., Gandolfo’s Deli Boys, LLC, 2007 WL 1649085 (Finding non-competition provision invalid because the restrictions were capable of changing and expanding with the addition of new franchise locations).
144 See, e.g., Gandolfo’s Deli Boys, LLC, 2007 WL 1649085 (Denying injunctive relief, finding franchisees “shut down the store and changed the store’s name, signage, color of the menus, items on the menu, and recipes, and removed all Gandolfo’s logos and insignias.”).
145 To “establish a claim for trade dress infringement, [movant] must demonstrate that its trade dress is: (1) inherently distinctive or acquired distinctiveness through secondary meaning; (2) nonfunctional; and (3) its imitation would result in a likelihood of confusion in consumers’ minds as to the source of the product.” Gateway, Inc. v. Companion Prods, Inc., 384 F.3d 603, 607 (8th Cir. 2004).
146 See, e.g., Sports Traveler, Inc. v. Advance Magazine Publishers, Inc., 25 F.Supp.2d 154 (S.D.N.Y. 1998) (“a plaintiff must still articulate the specific elements of the trade dress that render the trade dress unique or novel, that is, capable of being an identifier of the product’s source”).
147 80 F.Supp.2d 815 (N.D. Ill. 1999).
trade dress protection for a generalized “Hollywood theme.” The franchisor’s use of popular decor, furnishings, and building style, the court reasoned, would likely result in an inability to evidence customer confusion as to the source of the product, defeating the franchisor’s ability to show likelihood of success on the merits of that count.

Additionally, in the time from the filing until the hearing, the franchisee may be able to rehabilitate some of the alleged wrong doing. For instance, the franchisor may allege trademark infringement through the continued use of its registered marks. The franchisee may be able to easily defeat the injunction application by thoroughly examining its formerly franchised location to remove any reference to the franchise, including its name, logo, or other identifying marks. A trade dress claim may be similarly defeated by properly de-identifying. While a court could award damages to the extent the franchisor can prove that the franchisee had, in fact, infringed for some period after termination, an injunction will not issue for past conduct.

However, franchisees must understand that not all defenses, even if likely to be successful at trial, defeat every claim raised by the franchisor. In Quizno’s Master v. Kadriu, the court found that neither the franchisor nor the franchisee sought to continue the franchise relationship. As such, the franchisee’s continued use of the franchisor’s trademarks violated the Lanham Act even if the franchisee won its counterclaims and secured rescission of the contract. Thus, the court ruled that the franchisee’s “potentially legitimate claims against Quizno’s notwithstanding, [franchisee] would not have permission to continue using Quizno’s trademarks,” entering a preliminary injunction in this regard. While entering an injunction prohibiting the use of the trademarks, the court declined to issue an injunction on the franchisor’s request for specific performance of the post-termination obligations because the “third claim is in doubt because it hinges on the validity of the contract, which remains in question given the assertions of fraudulent inducement.” Accordingly, the district court deferred this issue until the claims could be reached on the merits in arbitration.

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148 See, e.g., Whitehead, 2006 WL 2038651 (Denying preliminary injunction because franchisor failed to show likelihood of success on the merits related to trademark infringement claims because “plaintiff has failed to proffer any evidence in either the record or the preliminary injunction hearing to demonstrate any continued use of the ... marks by the defendants”). See also Bennigan’s Franchising Co., 2007 WL 603370 at *13 (Denying injunction in part because, based “on the evidence presented at the hearing, the court has found that the defendants have partially or completely decharacterized the restaurant, and the restaurant does not use marks owned by the plaintiffs in its operation.”).

149 See, e.g., In-N-Out Burgers v. Chadders Restaurant, 2007 WL 1983813 (D. Utah 2007) (Declining to issue injunctive relief related to trade dress claim where franchisee “already changed some of the elements that In-N-Out alleges infringes its trade dress” such that franchisor was not likely to succeed on merits of claim and failed to establish it will suffer irreparable harm in the future if the injunction is not issued); Gandolfo’s Deli Boys, LLC, 2007 WL 1649085 (Denying injunctive relief, finding it “is undisputed that [franchisees] have taken several measures to distance itself from any association with the [franchisor’s] franchise system, including: (1) changing the signage for the store and discontinuing the use of the [franchisor’s] name, font, and colors; (2) purchasing new uniforms for employees of [former franchisee’s new store] that are different from those worn by employee’s of [franchisor]; (3) printing new menus that differ from the [franchisor’s] menus in color, organization, and food names; (4) changing the recipes of all food items on the menu; (5) removing all of [franchisor’s] marketing books and manuals; (6) offering a number of different menu items, including pizza, pasta, specialty coffees, smoothies, grilled sandwiches, freshly baked bread, alternative meals such as fish dinners and chicken breasts, and breakfast items including omelets and hash browns; and (7) offering services such as catering that [franchisor] does not provide.”). See also Noodles Dev., LP v. Ninth Street Partners, LLP, 2007 WL 1115216 (E.D. Mo. 2007) (Ms. Zellweger represented defendant Ninth Street Partners, LLP in the proceedings).


151 Id. at *5.

152 Id.
ii. **Element Two: Threat of Irreparable Harm**

The franchisor will have the burden of establishing that the franchisee’s actions are irreparably harming the franchisor. As “[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies, to warrant a preliminary injunction, the moving party must demonstrate a sufficient threat of irreparable harm.” Franchisors will typically argue that their system will be irreparably harmed if an injunction does not issue based on the following grounds: harm to its customer base; harm to the goodwill associated with the location, the system generally, or the franchisor’s marks; harm to the system/other franchisees through the former franchisee’s unfair competition or competition in violation of a non-competition provision; harm to the system from the former franchisee’s use of trade secrets. Beyond arguing that the alleged harms raised by the franchisor do not rise to the level of irreparable harm, the franchisee may also defeat irreparable harm arguments indirectly, based on the type of harm alleged or timing of the application for the injunction.

Franchisees should first look to attack an argument of irreparable harm under the theory that the franchisor has an adequate remedy at law. In *Southland Corp. v. Godette*, the franchisor moved for interim injunctive relief to order the defendant franchisee to vacate the store entirely so that Southland could operate it, or, in the alternative, that the franchisee specifically perform under the franchise agreement as well as re-stock the store. The court held that the franchisor’s request for interim injunctive relief must be denied because it had not shown that it would be irreparably harmed and that the remedies available to it at law were inadequate. The court specifically found:

Southland’s injuries are at bottom economic: its contractual share of the gross profits from the operation of the 7-Eleven store, which it claims are being compromised by the continuing malfeasance of the Godettes. It is well-established “that economic loss does not, in and of itself, constitute irreparable harm.” As our court of appeals has reiterated: The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.

The timing of the application for injunctive relief may also weigh strongly against any alleged irreparable harm to the franchisor. Any extended period of time between the initiation of the harm and the application for injunctive relief should result in a finding that no interim relief is necessary before the case can be finally determined on the merits. This is because “[p]reliminary injunctions are generally granted under the theory that there is an urgent need for speedy action to protect the plaintiffs’ rights. Thus, a presumption of irreparable harm flowing from a reasonable probability of success in proving trademark infringement may be destroyed by delay in seeking relief.” However, to the extent a franchisor can evidence attempts to negotiate or resolve the matter without seeking judicial intervention, a court may not be

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153 *Bandag, Inc. v. Jack’s Tire & Oil, Inc.*, 190 F.3d 924, 926 (8th Cir. 1999).
155 *See also Indus. Elecs. Corp. v. Cline*, 330 F.2d 480 (3d Cir. 1964) (holding no abuse of discretion in denial of injunction based on breach of contract not to compete for one year after termination of franchise as record was clearly insufficient to show that plaintiff would suffer irreparable injury if relief were denied).
persuaded that an extended period of time between the initiation of the harm and the application for injunctive relief necessarily means there is no irreparable harm.  

In a similar vein, a franchisee who can prove that the alleged harm is no longer occurring will likely defeat a franchisor’s claim of irreparable harm and, thus, an injunction application. In Dunkin’ Donuts Inc. v. National Donut Restaurants of New York, Inc., the franchisor sought an injunction based on, among other things, standards violations related to health and safety which, according to the franchisor, irreparably harmed the reputation of the system around the country and the world. The court recognized, however, that such “an argument would have more force if [franchisor] DD had brought to the court’s attention any attempts it made after the initial round of inspections . . . to ascertain whether the [franchisees] continued to violate, in DD’s view, those health and safety standards.” Finding that the stores had not been the subject of health department violations recently, the court concluded “[w]ithout any timely evidence of such problems or of the [franchisees’s] failure, on an ongoing basis, to meet DD’s own health and cleanliness standards, or any evidence that [franchisee’s] continued operation of its Dunkin’ Donuts stores has somehow cast the brand as a whole in a negative light, I find the risk of irreparable harm to DD for this reason to be slight.”

With respect to arguments that the franchisor’s goodwill or customer base will be irreparably harmed in the absence of the injunction, the franchisee should examine the facts that would tend to defeat any alleged harm or any such protectable interest. In Snelling and Snelling, Inc. v. Ryvis, Inc., the court found that the franchisor had not met its burden of establishing irreparable harm where the franchisor sought a preliminary injunction to enforce the covenant not to compete against former franchisees located in Las Vegas and Reno, Nevada. Snelling argued that the former franchisees’ continued operation of personnel businesses at the same location was causing irreparable harm to its goodwill and business reputation and constituted unfair competition. The court disagreed, primarily because Snelling was not currently competing in the Las Vegas or Reno markets, and had not expressed any intent to enter those markets. The franchisor could not establish that it was currently losing customers it otherwise would have served, or employees it otherwise would have employed. The franchisor also could not establish that the franchisees were using confidential information to its detriment. The court concluded that the franchisor’s goodwill was not being damaged and denied the franchisor’s application for injunctive relief.

However, some courts have determined that a franchisor attempting to protect its local goodwill could warrant the entry of an injunction. For instance, in Snelling and Snelling, Inc. v. Martin, the franchisor sought a preliminary injunction to compel specific performance of

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158 Times Mirror Magazines, Inc. v. Las Vegas Sports News, L.L.C., 212 F.3d 157, 169 (3d Cir. 2000) (Defendant argued that the 15-month delay, beginning when plaintiff was on notice of the name of defendant’s publication and ending when plaintiff filed suit, necessarily shows that plaintiff’s injury, if any, was not immediate and irreparable. The Court was not persuaded by the argument because “the 15-month delay was attributable to negotiations between the parties.”).
159 291 F. Supp. 2d at 149.
160 Id. at 152.
161 Id.
163 See also Whitehead, 2006 WL 2038651 (Refusing to enjoin franchisee from competing because franchisor no longer conducted business in protected area and finding the covenant against competition no longer reasonably necessary to protect the established interests of the franchisor).
forced-sale and lease-assignment provisions. The Northern District of California granted a preliminary injunction, determining that there would be irreparable harm to the franchisor's goodwill in the absence of an injunction because:

   Snelling has presented evidence . . . that it will suffer irremediable loss of locational goodwill if the injunction were not entered. The loss of goodwill 'is often held to be irremediable.' . . . The lease assignment provision in this case is apparently intended to allow Snelling to retain clients who are familiar with the precise location of the business; if defendants [franchisees] remain in the premises and Snelling is forced to operate elsewhere, it loses the intangible benefit of that location.

Similarly in Gold v. Holiday Rent-A-Car Intern., Inc.,166 the District Court ordered a former franchisee, who had exclusive rights to all of Kansas City, to assign its lease, as required under its franchise agreement, after the franchisor demonstrated the need to protect its customer base in that area.

   These cases provide a lesson to the franchisee—the franchisee must carefully scrutinize the actions—and inactions—of the franchisor. There is a clear distinction between cases where a franchisor seeks to take over the lease and premises and cases where the franchisor merely seeks to shut down the franchisee’s business in the formerly franchised location. If the franchisor has the right in the franchise agreement to take over the lease and declines to do so, the franchisor has given the franchisee a possible line of defense against the franchisor’s claim of irreparable harm. Indeed, it is hard to imagine that the franchisor will be harmed by the franchisee remaining in the formerly franchised location when the franchisor has no interest in maintaining a store at that site or within the area. Taking this argument to the next logical level, the franchisee can argue that the franchisor’s disinterest in continuing to maintain its presence in the formerly franchised location is because it has no protectable customer base or goodwill associated with that location. Moreover, inaction by the franchisor in refusing to avail itself of “self-help” remedies under the franchise agreement (such as reclaiming the formerly franchised location) should make a court question why it should protect the franchisor’s rights when the franchisor fails to protect itself. Additionally, where a franchisee moves to another location, even if within the territory of the formerly franchised location, courts may be less inclined to find irreparable harm related to the franchisor’s goodwill.167

   Franchisees should also examine the status of the system for potential arguments against irreparable harm related to the system. Specifically, franchisees should determine whether the franchisor has begun to make changes to the system that indicate the concept was lacking in some regard or flawed. Such evidence may take the form of extensive changes to the menu, a name change, the introduction of a “spin-off” concept, or the phasing out of one concept completely and replacement with another. While a change or future plan for change in the system may explain some of the franchisor’s actions,168 it aids the franchisee in several respects under the irreparable harm factor.169 If the franchisor has no intention of opening another store with the same concept in the formerly franchised location, the franchisor will have

167 See, e.g., O.V. Marketing Assoc., Inc. v. Carter, 766 F. Supp. 960 (D. Kan. 1991) (Franchisor unable to prove franchisee’s competing business at different location within franchise territory drew goodwill from formerly franchised location).
168 For instance, it may explain why the franchisor has waited to seek injunctive relief, hoping not to spend additional sums on a concept it is phasing out, or it may explain why the franchisor does not want to take over the lease.
169 See, e.g., Noodles Dev., LP, 2007 WL 1115216 (Finding no irreparable harm in part because “Plaintiff has shifted its focus onto the new “Oodles” concept. Defendant no longer exclusively serves noodle dishes.”).
a difficult argument that it will be irreparably harmed by the former franchisee’s conduct in operating even a competing store in that location. This is because the franchisor will likely lose any alleged protectable interest in goodwill or any alleged customer base, the basis for a non-competition provision in many states.

Both the franchisor and the franchisee may argue that provisions contained vel non within the franchise agreement assist in evidencing or defeating a claim of irreparable harm. For instance, the franchisor may argue that the franchisee has already conceded within the franchise agreement that the franchisor will be irreparably harmed in the absence of injunctive relief. The franchisee should argue that such provisions cannot properly address the factual scenarios that actually developed between the parties to bring them into court and, therefore, should not be deemed sufficient to fulfill any injunctive factors. In addressing such arguments, some courts have determined that the court must make its own findings on the facts at issue to determine the appropriateness of invoking its equitable powers and not rely on conclusory contractual provisions. Additionally, at least one court found insufficient a franchisor’s argument that the intent behind contractual provisions provided evidence for entry of an injunction. In Snelling and Snelling, Inc. v. Martin, the court found that the franchisor had failed to establish irreparable harm in light of the fact that Snelling “entered into two earlier contracts that did not provide for a forced sale of the franchises, suggesting that [the franchisor] believed that transferring the lease, the files, and the client relationships was sufficient to protect its goodwill by providing uninterrupted service to its clients.” Accordingly, the court denied the injunction because with the existing contractual provisions, the franchisor did not need, nor could it explain what additional protections a preliminary injunction requiring a forced sale would provide.

In the non-competition context, courts have found persuasive franchisees’ arguments that the failure to include such provisions within all franchise agreements undermines a franchisor’s irreparable harm argument. For instance, in Bandag, Inc. v. Jack’s Tire & Oil, Inc. the court determined that the franchisor’s “contention that failure to enjoin [the franchisee’s] defection will irreparably injure its entire franchise system is belied by the fact that [the franchisor] has not included such covenants in many of its franchise agreements, including its agreements with two [franchisee] affiliates.”

iii. Element Three: Balance Between Movant’s Harm and Harm that Relief Would Cause Non-Movant

The balance of equities factor requires the court to balance the harm to the movant in the absence of an injunction with the harm to the non-movant if the injunction is granted. This issue has been considered in the franchisor/franchisee context by numerous courts. Some courts have refused to grant franchisors’ requests for preliminary injunctions enforcing restrictive covenants on the basis that the balance of equities weighed in favor of the franchisee. For

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170 Laidlaw, Inc. v. Student Transp. of Am., Inc., 20 F.Supp 2d 727, 766 (D.N.J. 1998), citing Firemen’s Ins. Co. of Newark, N.J. v. Keating, 753 F.Supp. 1146, 1154 (S.D.N.Y. 1990) (“The [clause in the contract declaring money damages inadequate] ... does not, by its mere presence in the [contract], satisfy the requirement that plaintiff make a showing of likely irreparable harm before the Court will grant its motion for a preliminary injunction. To the contrary, the Court must fully apply the same test for irreparable harm that it would were the [clause] not to exist.”)(citation omitted).


172 Id. at *3.

173 190 F.3d at 926.
example, in *Kronn v. Candleman Corp.*, 174 after the franchise agreement expired, the franchisee continued to operate its candle shop under a different name but at the same location as the former franchise. The court denied preliminary injunctive relief to the franchisor because it failed to show irreparable harm and because the court was concerned about the injunction's severe impact on the former franchisee—the injunction would effectively put the former franchisee out of business.

Similarly, in *Candleman Corp. v. Farrow*, 175 the court refused to grant the franchisor's motion for preliminary injunction, which sought to enforce a ten-mile, two-year post-term covenant, despite holding as a matter of law that the franchisor's noncompete provision was reasonable in both scope and duration. The court found that the potential harm to the franchisee was substantial, in essence putting him out of business and greatly hindering his ability to earn a living and to pursue his claim against the franchisor. Such harm to the franchisee, the court concluded, outweighed the injury to the franchisor in the absence of injunctive relief. 176

Courts have also balanced the harm to interested third parties when analyzing this factor. Specifically, courts have considered harm to employees of the franchisee if issuing an injunction would close the business. 177 And while the franchisor will, no doubt, argue that the franchisee's actions harm the entire system, evidence that other franchisees are not harmed by the party franchisee’s actions, especially if there are no franchisees geographically close to the party franchisee, may be able to defeat the franchisor's argument.

Additionally, to the extent possible, franchisees should evidence all remedial measures taken, specifically all efforts at de-identification. Indeed, a “consideration in the balance of harms calculus is whether the defendant has already voluntarily taken remedial action. Where the non-movant has taken such action, the balance of harms is readjusted, because the potential for economic or other harm to the movant has been eliminated.” 178 This is true because an injunction cannot remedy past harm—only existing and continuing harm.

### iv. Element Four: Public Interest

The franchisor will also need to evidence that it is in the public interest that the court issue an injunction. While this element is sometimes viewed as a “throw away”—that is, the least important element—it may be an element that the franchisee can use to its benefit. The franchisor will likely argue that public interest is served by enforcing contractual obligations (the non-competition provision) 179 and statutory rights (trademark infringement). However, as with the balance of the equities element, courts may find it is not in the public interest to punish a party for prior wrong conduct if remedial measures have been taken. Indeed, to the extent that remedial measures have cured any alleged breach of contract or trademark infringement, monetary damages are adequate, making the case inappropriate for injunctive relief.

176 This factor is discussed in greater detail below in the section on franchisee-filed injunctions.
177 See, e.g., *Bennigan's Franchising Co., L.P.*, 2007 WL 603370 at *5 (Denying injunction and recognizing that “if the court were to grant an injunction enforcing the covenant not to compete, the restaurant would be forced to close and a number of employees would lose their jobs.”).
179 See, e.g., *Novus Franchising, Inc. v. Oksendahl*, 2007 WL 2084143, *5 (D. Minn. 2007) (Granting franchisor injunction and finding that “courts have found that the public interest is served by upholding valid restrictive covenants”).

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Additionally, if the injunction is sought pursuant to a non-competition provision, the franchisee can argue that it is against public policy to close down a business and hinder competition.¹⁸⁰

d. Collecting Evidence for and Presenting Evidence at the Hearing

Collection of evidence is of vital importance for the injunction hearing. As previously discussed, photographs taken prior to de-identification will play an important role in confirming to the court that the franchisee is not infringing the franchisor’s trademarks or trade dress. Additionally, the photographs may aid against the claim that the franchisee is operating a competing business in the formerly franchised location or within a prohibited distance from that location.

To argue against the trademark or trade dress claims, the franchisee should first confirm the marks that the franchisor seeks to protect are federally registered with the United States Patent and Trademark Office.¹⁸¹ The website for that office has search capabilities that allow the user to view and print submissions of the mark. After confirming that the franchisee is no longer using the franchisor’s actual marks in connection with its business, counsel for the franchisee should do a side-by-side comparison of the marks to confirm that the franchisee’s new marks are not confusingly similar to the franchisor’s registered marks. Similarly, to the extent the franchisor uses a particular logo, counsel should also perform a side-by-side comparison. To create helpful exhibits, counsel should place both marks (or other logos) on the same page, allowing the court to make immediate observation of the differences.¹⁸²

With respect to trade dress, if the franchisor has yet to identify the components of its trade dress, counsel for the franchisee should identify the elements the franchisor is likely to identify at the hearing. This can be done either by utilizing the photographs taken prior to de-identification or by visiting another franchise location, if there is one in the area. To the extent that the look and feel of the business is generic, the franchisee should seek out other businesses that have the same or similar look and feel. For instance, if the franchise is a restaurant with a “Hollywood” motif, the franchisee should determine whether there is another restaurant with the same theme. The franchisee should photograph the other restaurant to evidence the fact that the trade dress is not unique and, therefore, is not protectable. These photographs may be used, again side-by-side, with the photographs taken of the formerly franchised location prior to de-identification (or of another franchise location) during the hearing.

The franchisee, however, needs to carefully approach this sort of an argument. This is so because while demonstrating that the trade dress is not unique, the evidence may assist the franchisor in its non-competition argument. For instance, the franchisee may maintain that it is not operating a competing business because the prohibition in the franchise agreement is vague (i.e., a “sports bar”) and the franchisee does not know exactly what to change to take the business out of the realm of the prohibited business. However, if the franchisee uses photographs of other sports bars in the area to show that the trade dress is not unique, it cannot

¹⁸⁰ See, e.g., Bennigan’s Franchising Co., L.P., 2007 WL 603370 at *5 (Denying injunction and finding public interest factor in favor of franchisee as “New York has a strong public policy that disfavors ‘sanctioning the loss of a man’s livelihood’ and favors ‘competition engendered by the uninhibited flow of services, talent and ideas.’”)
¹⁸² If the parties are in federal court and utilizing the electronic evidence presentation system (usually a document camera—sometimes referred to as “ELMO”), counsel can place both the franchisor’s mark and the franchisee’s new mark or logo on the screen at the same time to broadcast to the judge.
avoid acknowledging that it can identify a “sports bar” and the elements that comprise a typical “sports bar.”

Other evidence that may be useful to the franchisee during the hearing includes documentation provided by or communication from the franchisor. Indeed, correspondence setting forth the franchisee’s defaults under the franchise agreement may be helpful to the extent that it highlights those defaults the franchisor found important enough to call to the franchisee’s attention. Even more important is what is not said in a default notice or a complete lack of such correspondence or other records indicating problems. If no correspondence exists, the franchisee may be able to argue the harm, if any, cannot be irreparable, otherwise the franchisor already would have attempted to address the matter. Additionally, evidence that a representative of the franchisor allowed some transgressions from the franchise agreement—either by the party franchisee or another franchisee—is helpful to defeat injunction elements such as irreparable harm. Indeed, if the franchisee has evidence that the franchisor chose not to enforce its rights against other franchisees, such evidence may bolster the franchisee’s arguments related to lack of protectable interest and discrimination between franchisees. The franchisor, however, may be able to combat such an argument by focusing the court’s attention on the case at hand and arguing that each case has different facts that require separate evaluation and action.

As for witnesses, counsel should identify those individuals with the most knowledge of the relationship with the franchisor and the facts involved in the franchisor’s claims. In addition to a corporate representative, it may be helpful to have an employee of the franchisee testify. The employee could speak directly to the daily operation of the franchised location and to any remedial measures undertaken. As with all cases, counsel should determine whether the most knowledgeable individual will also make the best witness. Because of the standard of review on appeal of an injunction (see below), credibility of the witness as gauged by the district or trial court will be of extreme importance. Additionally, both the franchisor and the franchisee may find expert witnesses relevant to injunction hearings on trademark or trade dress claims, especially related to survey evidence on customer confusion. Finally, current or other former franchisees may be able to assist the party franchisee in evidence-collection related to the franchisees’ defenses generally or by substantiating testimony as to the franchisor’s actions.

C.  Actions to Take If an Injunction Is Granted Against Franchisee

1.  The Importance of an Injunction Bond

Because the damages caused by an erroneous preliminary injunction cannot exceed the amount of the bond posted as security in many states, and because an error in setting the bond too high is not serious, the franchisee should argue that the court should err on the high side when setting the bond.183 This is especially true when an injunction requires the franchisee to close its business. To aid the court in setting an appropriate bond, counsel for the franchisee should put on evidence of the loss of income expected if the court enters an injunction requiring the franchisee to close its business.

2. **Immediate appeal**

An interlocutory appeal may be taken of a district court’s “granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions.”¹⁸⁴ A Court of Appeals will review a decision to grant or deny a preliminary injunction for abuse of discretion.¹⁸⁵ “A district court’s order regarding preliminary injunctive relief is subject to limited review. [The Court of Appeals] will reverse a grant of a preliminary injunction ‘only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact.’”¹⁸⁶ The Sixth Circuit has also found that the “district court’s ‘weighing and balancing of the equities’ is rarely overruled, and the court’s factual findings are binding on us unless clearly erroneous. We must be cautious about setting aside the credibility determinations of a judge who has had the opportunity to view the witnesses on the stand and assess their demeanor while testifying.”¹⁸⁷

The standard of review makes it clear that appealing the grant of a preliminary injunction in favor of the franchisor is, substantively, an uphill battle. External factors, including cost and time involved, must also be taken into account when evaluating whether it makes sense to file an appeal. Accordingly, unless an injunction requires the franchisee to close its business or sell its franchise back to the franchisor or has other extremely harmful effects on the franchisee, an immediate appeal of injunctive relief may not be in the best interest of the franchisee.

3. **Injunction Must Be Narrowly Tailored**

The Second Circuit has explained that a “preliminary injunction is a specific equitable remedy and thus, must be framed in such a way as to strike a delicate balance between competing interests. By necessity, the scope of the injunction must be drawn by reference to the facts of the individual case, reflecting a careful balancing of the equities.”¹⁸⁸ Appellate courts have remanded cases back to the district/trial courts where injunctions were overly and/or unnecessarily restrictive. For instance, in *Sunward Electronics, Inc. v. McDonald*,¹⁸⁹ the district court entered a preliminary injunction “enjoining Defendants’ use of Plaintiff’s trademark and specifically, requiring Defendants to assign to Plaintiff any of its telephone numbers that feature Plaintiff’s trade name or trademark in its phone book listing.”¹⁹⁰ After discussing the failure of the franchise agreements to require the former franchisee to assign its phone number to the franchisor, the Second Circuit determined that there were less restrictive alternatives to assignment that would still be able to address the franchisor’s concerns, remanding the case to the district court to amend its preliminary injunction order.

Similarly, an “injunction against trade dress infringement must be specific and list in detail the elements which make up the protected trade dress and which the defendant cannot use in combination.”¹⁹¹ Because of this level of description necessary for a proper injunction prohibiting the use of a franchisor’s trade dress, an injunction order generally prohibiting use of

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¹⁸⁶ *El Polio Loco, Inc. v. Hashim*, 316 F.3d 1032, 1038 (9th Cir. 2003).
¹⁸⁸ *Sunward Electronics, Inc. v. McDonald*, 362 F.3d 17, 26 (2d Cir. 2004).
¹⁸⁹ Id. at 21.
¹⁹⁰ Id. at 21.
the franchisor’s trade dress may be defective and unenforceable. Moreover, such an injunction would not likely comply with Rule 65(d) of the Federal Rules of Civil Procedure’s requirement of specificity.

Thus, to the extent that an injunction is too broad or over-reaching in light of the relief actually necessary to protect the franchisor, the franchisee should ask the district court to reconsider its mandate. Additionally, if the franchisee gets the impression that the court will grant the injunctive relief sought by the franchisor, it may wish to provide the court with compromise alternatives that are less restrictive on the franchisee than those proffered by the franchisor, but that still provide protection for the franchisor.

D. Building the Evidence and Winning Preliminary Injunctions Against the Franchisor

1. Using Injunctive Relief to Prevent the Franchisor from Terminating the Franchise Agreement

While franchisors seek injunctions predominantly as post-termination remedies, franchisees commonly utilize injunctive relief to prevent termination. Indeed, injunctive relief is often a shield used by franchisees either in response to a termination notice or in response to a lawsuit filed by the franchisor. In the latter situation, franchisors may have brought suit for declaratory judgment in an attempt to insulate themselves from future claims of wrongful termination or simply to preempt a claim by a franchisee for a preliminary or permanent injunction requiring the franchisor to maintain its relationship with the franchisee. In response, the franchisee may file an application for an injunction to prevent termination of the franchise agreement. The franchisee may base its claim for injunctive relief either on the Federal Rules and case law or under specific state or federal statutory sections created to protect franchisees, including, for instance, the Petroleum Marketing Practices Act. Regardless of the vehicle used to obtain an injunction, the importance of injunctive relief to a franchisee facing termination is undeniable, even to courts:

Irreparable harm can generally be assumed where a franchisor is attempting to terminate an exclusive franchise arrangement on short notice. By the nature of the exclusive arrangement, the franchisee’s business operation depends upon the economic relationship established by the franchise agreement. The franchise relationship is the lifeline of the franchisee’s business; the franchisee’s investment of capital, time, and effort in promoting the franchisor’s goods or services—to the general exclusion of competing goods and services—would be irreparably lost upon termination. Money damages cannot make the franchisee in such situations whole.

a. Initial Considerations Upon Receiving a Termination Notice

Upon receiving a termination notice or complaint seeking a declaratory judgment that the franchisor can terminate the franchise agreement, the franchisee must first determine the validity and materiality of the alleged breaches identified by the franchisor to justify termination. While under a scenario where the franchisee has received a termination notice it may be

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192 See, e.g., Tumblebus Inc. v. Cranmer, 399 F.3d 754 (6th Cir. 2005) (Vacating preliminary injunction because district court did not identify what particular aspects of plaintiff’s product were deemed protectable trade dress).
193 See, e.g., Manpower Inc., 377 F.Supp.2d at 672.
possible to reach a resolution of the issues without seeking injunctive relief, where a franchisor seeks the court’s “approval” to terminate a franchisee, it is usually not possible for the two parties to reach a resolution between themselves. Accordingly, to the extent the parties cannot reach an agreement that allows the franchisee to cure defaults or perform some other action to remain in the system, the franchisee should evaluate whether to simply comply with the termination or fight to maintain its franchised business. This analysis will depend on numerous factors, including the actions of the franchisor surrounding the termination, the alleged defaults of the franchise agreement by the franchisee, the viability of the franchisee’s business, the financial soundness of the franchisee, and whether the franchise agreement contains a non-competition provision.\(^{196}\) If the franchisee determines it is in its best interest to remain within the system—and it has the wherewithal to fight and post a bond for the injunction—the franchisee may be left with no choice but to seek injunctive relief to continue operating within the franchise system. However, while a court may be inclined to grant injunctive relief (to maintain the status quo, for instance), such relief is only temporary pending a trial on the merits. To the extent the franchisor has evidence to substantiate the alleged material breaches that give rise to termination, the franchisee may only have delayed the inevitable. Nevertheless, delaying the inevitable may give the franchisee a sufficient period of time in which to prove to the franchisor that it should remain in the system or otherwise reach an agreeable settlement.

b. Establishing the Right to Injunctive Relief For Wrongful Termination

To the extent the franchisee seeks an injunction under Rule 65 of the Federal Rules of Civil Procedure, it will have to meet the same four injunction factors discussed above. Other additional factors are of particular significance when the franchisee is the movant. For instance, courts have recognized that the “main purpose of a preliminary injunction is simply to preserve the status quo pending the outcome of the case.”\(^{197}\) Because the franchisee is already operating a business under an agreement with the franchisor, the franchisee initially has an easy argument that maintaining the status quo will not harm the franchisor. In addressing such an argument, a New York Court of Appeals found:

In the case at bar, the plaintiffs have demonstrated the necessity of injunctive relief in order to preserve the status quo pending trial. The defendants are clearly attempting to terminate the plaintiffs’ exclusive licensing agreement and, absent a preliminary injunction, there is no assurance that the plaintiffs will be able to stay in business pending trial. Such interference with an ongoing business, particularly one involving a unique product and an exclusive licensing and distribution arrangement, risks irreparable injury and is enjoinable. In the absence of any proof that Carvel will be harmed by the granting of injunctive relief in order to maintain the status quo, the existence of disputed factual issues should not preclude the remedy.\(^{198}\)

It is essential, though, for the franchisee to move for injunctive relief prior to the date identified for termination of the franchise agreement.

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\(^{196}\) A franchisee under a non-competition provision, in most circumstances, will be prohibited from participating in the same business in the same area. The inability of the franchisee to continue to run a certain type of business in the area it has operated in for some period of time may result in the former franchisee’s inability to make a living. Being in such a position may provide sufficient reason for the franchisee to seek judicial intervention to prevent termination.\(^{197}\) Tri-State Generation and Transmission Ass’n, Inc. v. Shoshone River Power, Inc., 805 F.2d 351, 355 (10th Cir. 1986).\(^{198}\) U.S. Ice Cream Corp. v. Carvel Corp., 136 A.D.2d 626, 628 (N.Y. App. Div. 1988).
c. Proving the Four Factors for Injunctive Relief

i. Element One: Likelihood of Success on the Merits

While when fighting an application for an injunction filed by a franchisor the franchisee should concentrate on whether the franchisor can actually meet all elements of its causes of action that give rise to injunctive relief, this may not be the most important factor for a franchisee to concentrate on when it is the movant. This is so because while courts will balance the four factors, some giving more weight to certain factors, franchisees can likely make a very persuasive case of irreparable harm under the threat of termination.

Nevertheless, to begin building a case for wrongful termination, the franchisee should examine the conduct of the franchisor in relation to the duties owed to the franchisee under applicable state and federal law as well as the franchise agreement itself. Some states have laws to protect franchisees from termination on short-notice or without cause. Specifically, the franchisee should determine whether the franchisor was required to and did actually provide notice and/or a period of time to cure prior to termination. The franchisee should also examine the franchisor’s actions during the pendency of the relationship. Coercive, retaliatory, or discriminatory behavior—or other unlawful acts by the franchisor—may provide a basis for the franchisee to argue that termination is not available. For instance, in NACCO Materials Handling Group, Inc. v. Toyota Materials Handling USA, Inc., after the supplier moved for declaratory judgment to terminate its dealer, the dealer presented an application for a preliminary injunction asking the court to enjoin the supplier from terminating the dealership contracts. In reviewing the dealer’s likelihood of success on the merits, the court found that the supplier’s “conduct in threatening to sue [the dealer’s] officers and to terminate the Memphis and Nashville agreements is coercive conduct because [the supplier] is seeking to restrain [the dealer’s] unwaivable right to purchase equipment from another supplier by such threats.

A franchisee may also fight termination on the grounds that a representative of the franchisor condoned or waived conduct by the franchisee that is now being identified as a breach. In U.S. Ice Cream Corp. v. Carvel Corp., the franchisee successfully obtained an injunction preventing termination, arguing that breaches alleged by the franchisor—“modifications of ingredients as well as the construction of a separate factory for the manufacture of take-home products”—were necessary in order to comply with laws and regulations and that “all such modifications were approved by employees in Carvel’s International Division which was disbanded in 1985.” Evidence in this regard indicated that the franchisee had a likelihood of success on the merits of its claim.

Provided that the franchisee cannot identify any failing by the franchisor to meet all threshold prerequisites to issuing the termination notice or any other unlawful conduct, the

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199 See, e.g., Bray v. QFA Royalties LLC, 486 F.Supp.2d 1237, 1253 (D.Colo. 2007) (Granting preliminary injunction and finding that franchisees “provided evidence, essentially conceded by Quiznos, demonstrating that the decision to terminate their franchises was made without any investigation or consideration, to punish that swath of franchisees . . . [and, as such] it is substantially likely that Plaintiffs will prevail on their claim that their terminations under the circumstances presented fall outside the authority given Quiznos under . . . the Franchise Agreement.”).
201 The relevant statute stated: “[n]o supplier, directly or through an officer, agent or employee, may terminate, cancel, fail to renew or substantially change the competitive circumstances of a retail agreement without good cause.” Tenn. Code Ann. § 47-25-1302(a).
204 U.S. Ice Cream Corp., 136 A.D.2d at 627.
franchisee must be able to prove it has not breached the franchise agreement or that any alleged breaches identified by the franchisor are not material, limiting the franchisor’s ability to terminate the franchise agreement. In *DMF Leasing, Inc. v. Budget Rent-A-Car Of Maryland, Inc.*[^205^] the franchisee sought a preliminary injunction to prohibit the franchisor from taking action to terminate three of its franchises in Maryland. The franchisee argued that language within the franchisor’s settlement agreement with the master franchisee altered the relevant franchise agreements, allowing for the continuation of the franchise relationship. Citing W. Michael Garner’s *Franchise & Distribution Law & Practice*,[^206^] the court found that “it suffices that [the franchisee] has presented a substantial question going to the merits of its case” and, therefore, holding that the franchisee “carried its burden of showing the potential likelihood of succeeding on the merits.”[^207^]

However, the franchisee must recognize that if the franchisor can prove the alleged franchise agreement defaults and that these defaults provide a basis for termination, the franchisee could be prevented from proving a likelihood of success on the merits. In *Manufacturer Direct LLC v. DirectBuy, Inc.*,[^208^] a buying club franchisee sued to enjoin termination by the franchisor. The franchisor issued a termination notice on the grounds that the franchisee had charged markups on cabinetry in violation of the franchise agreement and relevant Florida law. The District Court for the Northern District of Indiana held that the franchisee “likely violated” Florida law and, therefore, regardless of whether the franchisee also breached the franchise agreement, the franchisee did not have a substantial likelihood of success on its claim for wrongful termination, denying injunctive relief.[^209^]

### ii. **Element Two: Threat of Irreparable Harm**

Because “[n]umerous cases support the conclusion that loss of customers, loss of goodwill, and threats to a business' viability can constitute irreparable harm,”[^210^] and termination will result in these three consequences, franchisees should be able to make a case for irreparable harm in the absence of an injunction preventing termination. For instance, the franchisee in *NACCO Materials Handling Group, Inc.*, argued that if the franchisor was allowed to terminate its franchise agreements, it would suffer irreparable harm for the following reasons: it would have to discharge 40% of its employees (harming the employees as well as resulting in a loss of highly trained technicians that would not likely be able to be hired back if it later succeeded on the merits); even if it could obtain the franchisor's parts after the contract was terminated, it would be unable to service the contracts because the discounted price was unavailable (resulting in a large part of the customer base being lost and destroying the goodwill that had taken years to establish); it had taken nine years to increase the revenues of the company from seven to twenty-two million dollars and if the agreement was terminated, the franchisee could not calculate a specific amount of how much revenue would be lost.[^211^] Despite the franchisor’s arguments to the contrary, the court found these facts sufficient to find that the franchisee would be irreparably harmed in the absence of injunctive relief.

[^205^]: 871 A.2d 639 (Md. 2005).
[^206^]: *Id.* at 644, *citing* W. Michael Garner, *Franchise & Distrib. Law & Practice* § 17:41 (2004) ("The party seeking an injunction must also show a likelihood of success on the merits or at least sufficiently serious questions going to the merits to make a fair ground for litigation. Some courts look to this alternative requirement on a kind of sliding scale working in tandem with the balance of hardships: the greater the hardship on the party seeking the injunction, the less of a showing of success on the merits need be made.").
[^207^]: *Id.*
[^208^]: 2006 WL 319254 (N.D. Ind. 2006).
[^209^]: *Id.* at *5.
[^211^]: 366 F.Supp.2d at 609-610.
The court in *DMF Leasing, Inc.* summarized the status of the law in this regard: “most courts agree that total destruction of a franchised business which flows from termination, constitutes irreparable injury.” Identifying *Semmes Motors, Inc. v. Ford Motor Co.* as the “leading case cited for that proposition,” the court quoted Judge Friendly:

> Of course, Semmes' past profits would afford a basis for calculating damages for wrongful termination, and no one doubts Ford’s ability to respond. But the right to continue a business in which William Semmes had engaged for twenty years and into which his son had recently entered is not measurable entirely in monetary terms; the Semmes want to sell automobiles, not to live on the income from a damages award. Moreover, they want to continue living. . . . A judgment for damages acquired years after his franchise has been taken away and his business obliterated is small consolation to one who, as here, has had a Ford franchise for many years. As against this, the hardship to Ford in continuing the Semmes dealership pendente lite was relatively small.

Going one step further, the court in *Manpower Inc. v. Mason* found persuasive the fact that in the absence of an injunction, the post-termination covenants in the franchise agreements would not only prevent the franchisees from remaining a part of the franchised system, but would prevent them from participating in the same industry anywhere in the United States. Thus, the franchisee would be put out of business completely. Even if the franchisee prevailed at trial, the court observed, it would be unlikely that they will be able to simply pick up where they left off when they were terminated.

A franchisor will likely counter an irreparable harm argument with its own argument that monetary damages can appropriately compensate a franchisee for loss of business sustained as a result of wrongful termination and, therefore, there is no irreparable harm. However, this counter-argument has not always proven successful and franchisees may be able to defeat such an argument in several ways. Indeed, one appellate court reversed the trial court and issued an injunction in favor of the franchisee, specifically finding: “Even assuming, as the trial

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212 871 A.2d at 646.
213 429 F.2d 1197, 1205 (2d Cir. 1970).
214 *DMF Leasing, Inc.*, 871 A.2d at 646.
215 Id.
216 377 F.Supp.2d 672 (E.D.Wis. 2005).
217 Id. at 676.
218 Id. at 677.
219 Monetary damages may take the form of the recoupment doctrine. The purpose behind the recoupment doctrine is “to protect franchisees.” *Armstrong Business Services, Inc. v. H & R Block*, 96 S.W.3d 867, 878 (Mo. Ct. App. 2002). In *H & R Block*, the court of appeals explained that the “doctrine is a limitation on the general rule that where a franchise, exclusive agency, or distributorship agreement says nothing about duration and does not specifically deal with termination, the contract is terminable at the will of either party. The doctrine imputes to a terminable-at-will agreement a duration equal to the length of time reasonably necessary for a dealer to recoup its investment, plus a reasonable notice period before termination.” Id.
220 See, e.g., *Manpower Inc.*, 377 F.Supp.2d at 672.
221 This same argument may be made to defeat an injunction under the theory that the franchisee has an adequate remedy at law.
222 The Seventh Circuit has identified four reasons why a damages remedy can be inadequate: (1) “[t]he damage award may come too late to save the plaintiff's business”; (2) “[t]he plaintiff may not be able to finance his lawsuit against the defendant without the revenues from his business that the defendant is threatening to destroy”; (3) “[d]amages may be unobtainable from the defendant because he may become insolvent before a final judgment can be entered and collected”; and (4) “[t]he nature of the plaintiff's loss may make damages very difficult to calculate.” *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984) (citations omitted).

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judge concluded here, that damages were readily ascertainable, we hold that the loss of the movant’s business constitutes irreparable injury under our injunctive relief analysis.\textsuperscript{223}

iii. **Element Three: Balance Between Movant’s Harm and Harm that Relief Would Cause Non-Movant**

Similar to the irreparable harm argument, depending upon the circumstances of the case, the franchisee may have a compelling argument that termination of its business outweighs any harm to the franchisor. This is true because an injunction would simply maintain the status quo under the agreement previously negotiated between the parties and the franchisor would continue to reap the benefit of a portion of the franchisee’s continued business via royalties.\textsuperscript{224}

In *DMF Leasing, Inc.*\textsuperscript{225} the appellate court found the trial court’s analysis of the balance of the harms appropriate as “it would be more burdensome for [franchisee] to lose its subfranchises (with the possibility of monetary compensation later) than it would be for [franchisor] to tolerate [franchisee’s] continued operation of its subfranchises, until a final determination on the merits.” The court specifically found that with “respect to the balance of the equities, in termination cases, courts usually find that the equities tip in favor of a long-term franchisee facing termination, reasoning that maintenance of the status quo will not injure the franchisor while failure to grant an injunction and permit termination might result in destruction of the franchisee’s business.”\textsuperscript{226}

While loss of the franchisee’s livelihood may make a compelling argument, courts are not always persuaded by it, especially when balancing the harm to the franchisor. In *Manufacturer Direct LLC*\textsuperscript{227} the court held that the franchisee did not establish irreparable harm requiring injunctive relief. In so finding, the court recognized that the cases cited by the franchisee to establish irreparable harm “when the business’ viability is endangered”\textsuperscript{228} were not comparable to the present facts. The court found important the following distinguishing facts: the franchisee had only been in the franchise system approximately four years (and, thus, was not an established dealer) and it was “uncontroverted that [the present franchisee] wishes to sell the franchise.”\textsuperscript{229} In contrast, the court found that the franchisor faced serious harm to its system if the termination was enjoined, including harm to its public perception as an honest buyers’ club. Accordingly, although business devastation may tip the balances in favor of the franchisee in most termination cases, facts specific to the relationship may go against the franchisee, including the number of years with the system or the future plans of the franchisee related to the system.

Evidence of discrimination by the franchisor—that is, allowing other franchisees to do the things cited by the franchisor as the basis for termination—may sway the balance in favor of the franchisee by indicating to the court that no real harm will come to the franchisor if an injunction is issued allowing the franchisee to continue in the system.

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\textsuperscript{223} *DMF Leasing, Inc.*, 871 A.2d at 646.


\textsuperscript{225} 871 A.2d at 645.

\textsuperscript{226} Id.

\textsuperscript{227} 2006 WL 319254.

\textsuperscript{228} Id. at *6.

\textsuperscript{229} Id. at *6.
iv. **Element Four: Public Interest**

To the extent that the franchisee can evidence the other factors for injunctive relief, this factor should be a slam-dunk: public interest favors issuing an injunction against unlawful termination of an agreement.230

d. **Franchisee’s Arguments Against Having to Post a High Bond**

Courts have interpreted the language of Rule 65(c) to provide “[w]ide discretion to set the amount of a bond, and even to dispense with the bond requirement ‘where there has been no proof of likelihood of harm.’”231 The franchisee should argue that “the franchisor has only benefited financially from the . . . operation of their franchises.”232 Accordingly, the franchisor will continue to profit from the franchisee’s ability to continue operating. Under these circumstances and the financial hardship that posting a large bond would have on the franchisee, the franchisee should argue for a small bond amount or no bond at all.

In *Manpower Inc.*,233 the court issued an injunction allowing the franchisee to continue operating the franchise, finding that the franchisor’s concern that the franchisee would lose customers pending trial was highly speculative. The court concluded that “the present injunction does no more than prevent plaintiffs from exercising their power to terminate under the franchise agreements; it does not authorize defendants to breach the agreements. If defendants commit a future breach which causes plaintiffs to lose a customer, plaintiffs may commence a new action and possibly obtain damages for the loss of such customer.”234 Because the court reasoned that the damages available in such a future action would not be limited to the amount of the present bond (since “the amount of the bond limits damages only for harm caused by this injunction”), the court declined to issue a high bond. Rather, the court determined that the “real measure of the pecuniary harm attributable to the injunction is the difference between what plaintiffs’ profits would be if they terminated the agreements, took over defendants’ business and enforced the noncompete clauses, and what their profits will be now that they cannot do these things.”236 Because the franchisor presented no evidence on this issue, the court required the franchisee to post only a $1,000 bond.

e. **Establishing the Right to Injunctive Relief Under the PMPA**

To the extent that the franchise agreement deals with the “sale, consignment, or distribution of motor fuel,” the Petroleum Marketing Practices Act (“PMPA”)237 would apply to the franchise relationship. “The PMPA affords protection to franchisees because ‘Congress found that [franchisors] had been using their power over franchisees to further their own self-interest.’”238 In remedying the disparity in bargaining power of the parties, “Congress protected the franchisee’s interests by curbing those of the [franchisor].”239

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230 See, e.g., *NACCO Materials Handling Group, Inc.*, 366 F.Supp.2d at 609-610.
231 *Doctor’s Assocs. v. Distajo*, 107 F.3d 126, 136 (2d Cir. 1997).
233 377 F.Supp.2d at 681.
234 Id.
235 Id.
236 Id.
238 Rhodes v. Amoco Oil Co., 143 F.3d 1369, 1371 (10th Cir. 1998), citing *Slatky v. Amoco Oil Co.*, 830 F.2d 476, 482 (3d Cir. 1987).
Injunctive relief is specifically provided for within the PMPA \textsuperscript{240} and may require a franchisor to continue its relationship with a franchisee until a trial on the merits finally resolves the matter. Indeed, because “[d]istrict courts . . . enjoy broad discretion in fashioning temporary equitable remedies, especially under the PMPA’s lenient standard, a district court has the power to preserve the status quo between the parties during the pendency of the litigation (i.e., the existing terms of the franchise relationship). In this respect, the PMPA protects franchisees not only from arbitrary and discriminatory termination or nonrenewal, but also from the harmful effects of threatened termination or nonrenewal.”\textsuperscript{241}

A franchisee as defined in this Act\textsuperscript{242} is entitled to a preliminary injunction under the PMPA based upon a lesser showing\textsuperscript{243} than would be required in a case under Rule 65 of the Federal Rules of Civil Procedure.\textsuperscript{244} The PMPA states:

\ldots the court shall grant a preliminary injunction if--

(A) the franchisee shows--
\begin{itemize}
  \item[(i)] the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and
  \item[(ii)] there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and
\end{itemize}

(B) the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.\textsuperscript{245}

The “franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under \ldots [the PMPA] and, if applicable, that such franchisor complied with the requirements of \ldots this title.”\textsuperscript{246} Importantly, a franchisee’s application for injunctive relief under the PMPA must be made within specified time periods\textsuperscript{247} and the franchisee should be prepared to post a bond.\textsuperscript{248}

If a franchisor fails to comply with an injunction under the PMPA (or any injunction, for that matter), the franchisor may be held in contempt of court and receive a fine or other

\begin{itemize}
  \item[241] Dersch Energies, Inc. v. Shell Oil Co., 314 F.3d 846, 863 (7th Cir. 2002).
  \item[243] The lessor burden may be explained by courts recognition that the “PMPA was enacted by Congress in 1978 to protect gasoline franchisees from arbitrary or discriminatory termination or nonrenewal of their franchises.” Esso Standard Oil Co. Puerto Rico v. Monroig-Zayas, 445 F.3d 13, 15 (1st Cir. 2006) (internal quotations omitted).
  \item[244] “The PMPA offers a preliminary injunction standard to franchisees that is more forgiving than the common law standard . . . .” Esso Standard Oil Co., 445 F.3d at 16, citing § 2805(b)(2). See also Dersch Energies, Inc., 314 F.3d at 846.
  \item[247] 15 U.S.C.A. § 2805(b)(4). In the absence of a timely application, the First Circuit in Esso Standard Oil Co., 445 F.3d at 17, found that “courts have taken three different approaches when the franchisee is tardy in seeking equitable relief: (1) ‘outright dismissal of the franchisee's claim for equitable relief’; (2) reliance ‘in part upon the franchisee's failure to timely commence an action in denying equitable relief’; and (3) ‘adjudge the request under the common law standard.’”
appropriate sanctions. In Joy & Middlebelt Sunoco, Inc. v. Fusion Oil, Inc., plaintiff franchisee alleged that Sunoco violated the PMPA by assigning its franchise agreement to Fusion Oil. The complaint further alleged that “Fusion Oil violated the Petroleum Marketing Practices Act by failing to negotiate and renew the franchise agreement in good faith and by unilaterally raising rent.” The District Court entered a preliminary injunction, “requiring Defendant Fusion Oil to continue daily fuel deliveries to Plaintiffs. The preliminary injunction set the price of fuel at 3 cents above the rack price.” However, despite the preliminary injunction, Fusion Oil refused to deliver fuel to the plaintiffs, who moved for sanctions. Finding Fusion Oil in contempt of the preliminary injunction, the court ordered “Fusion Oil to pay Plaintiffs $7,000 in compensatory damages for the period between January 21 and 28, 2005, as well as $1,000 per day until arrangements were made for fuel delivery.”

To the extent the PMPA is applicable, franchisees should seek relief under its protective mechanisms.

2. Using Injunctive Relief to Prevent Other Conduct by the Franchisor

While the most common reason a franchisee seeks injunctive relief is to prevent termination of the franchise agreement, a franchisee may find an injunction is necessary to prevent or prohibit other conduct by the franchisor or to require the franchisor to do something required, for example, under the franchise agreement or at law.

For instance, in response to a franchisor’s demand for arbitration, it may be possible for a franchisee to seek injunctive relief to prevent a dispute from being resolved by arbitration proceedings—rather than a federal or state court. Guided by section 4 of the Federal Arbitration Act (“FAA”), the Supreme Court held in Prima Paint Corp. v. Flood & Conklin Mfg., Co., that “if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the making of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.” Therefore, if a franchisee seeks to specifically challenge the validity of an arbitration provision, the franchisee may be able to obtain injunctive relief from a court to stay arbitration proceedings pending a decision from the court on that limited issue.

In Ticknor v. Choice Hotels Intern., Inc., franchisor Choice Hotels suspended its franchise agreement with the franchisee and filed a demand for arbitration. In response, the franchisee sought and received a state court temporary restraining order prohibiting the
franchisor from proceeding with arbitration. The franchisor then removed the state court action to federal court and filed a motion to dismiss or, alternatively, to compel arbitration. In response, the franchisee raised the defense of unconscionability. After an evidentiary hearing, the District Court, applying Montana state law, concluded that the arbitration provision in the franchise agreement was unconscionable and denied Choice’s motion to dismiss and alternative motion to compel arbitration. The Ninth Circuit affirmed the finding that the franchise agreement was a contract of adhesion under Montana law. Moreover, the Circuit found no error in the determination that the arbitration provision was unconscionable and, therefore, unenforceable.

However, as with all litigation decisions, numerous factors should be considered when deciding whether to seek an injunction to prohibit arbitration based on a challenge the validity of an arbitration provision. Indeed, the cost of such an action may prove prohibitive to most franchisees, especially in light of the fact that while a court may invalidate an arbitration provision, the larger battle remains to be fought and all that has been accomplished is the determination of the location of that battle. And, since courts appear inclined to enforce arbitration provisions under the FAA and relevant Supreme Court decisions, such an injunction application may serve only to delay arbitration proceedings.

IV. CONCLUSION

Legal proceedings seeking injunctive relief, with or without damage claims, are common in franchise disputes. As discussed, the outcome of these proceedings often foreshadow or even determine the outcome of the entire matter. Counsel for both parties and their respective clients must, therefore, understand the substantial body of case law that has developed in this area. Understanding the law in the relevant jurisdiction will enable counsel to effectively gather and present key evidence and fashion the most persuasive argument, whether moving for or defending against injunctive relief claims.

257 Id. at 936.
258 While the validity of an arbitration provision is the most common challenge to enforcement of it, the franchisee in Quizno’s Master v. Kadiri argued that its counterclaims should not be stayed because arbitration would be prohibitively expensive. 2005 WL 948825 at *4 (N.D. Ill. 2005).
259 265 F.3d at 940 (Finding the provision unconscionable, in part, because the “arbitration clause in this case allowed Choice to bring its claims against Ticknor into state or federal court, yet forced Ticknor to submit all claims to binding arbitration at Choice’s headquarters in Maryland.”).
260 Id. at 940 (Finding the provision unconscionable, in part, because the “arbitration clause in this case allowed Choice to bring its claims against Ticknor into state or federal court, yet forced Ticknor to submit all claims to binding arbitration at Choice’s headquarters in Maryland.”).
261 See, e.g., Great Earth Companies, Inc. v. Simons, 288 F.3d 878 (6th Cir. 2002). There, a franchisee challenged the validity of an arbitration provision. The district court requested briefing and heard oral argument as to the validity of the arbitration agreement. The court found that the franchisee had not demonstrated a genuine issue as to the validity of the arbitration clause, even though other provisions of the agreement were fraudulently induced, and granted the franchisor’s petition to compel arbitration without a trial.
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