COMMONWEALTH OF MASSACHUSETTS

Worcester, ss **Superior Court Department of the Trial Court**

WHITE CITY SHOPPING CENTER, LP,	)	
Plaintiff,	)	C.A. No. 06-1963B
v.	)	
PR RESTAURANTS LLC,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PR RESTAURANTS, LLC'S APPLICATION FOR A PRELIMINARY INJUNCTION

Defendant and Plaintiff-in-Counterclaim, PR Restaurants, LLC ("PR") hereby submits this Memorandum in support of its application for a preliminary injunction. PR seeks to enjoin its landlord, White City Shopping Center, LP ("Landlord") from taking any action which would permit Qdoba to operate in the Shopping Center in violation of the Landlord's lease with PR.

BACKGROUND

PR currently operates 22 Panera Bread ("Panera") bakery/cafes in Maine, New Hampshire and Massachusetts. *See* Affidavit of Mitchell J. Roberts at ¶ 3 (hereinafter, "Roberts Aff. ¶ _"). PR entered into a ten year lease (the "Lease") with White City Shopping Center, L.P. ("Landlord") on or about March 14, 2001 for space in the White City Shopping Center in Shrewsbury, Massachusetts ("White City") where PR operates a Panera. *Id.* at ¶ 4.

The Lease provides that PR's use of the premises will be "only for the operation of a 120-seat bakery/café restaurant (but not for Chinese or Asian food) selling ... premium quality breads, bagels, pastries, salads, muffins, cookies, hot and cold nonalcoholic beverages, fresh and frozen yogurt, sandwiches, soups, potato chips and other incidentals . . . ." *Id.* at ¶ 5.

The Lease contained, at Section 4.07 an exclusive use provision that provided as follows:

> Except as permitted under existing leases of space in the Shopping Center renewals and extensions (but not a modification) thereof, provided no Event of Default has occurred and is continuing, Landlord agrees not to enter into a lease, occupancy agreement or license affecting space in the Shopping Center or consent to an amendment to an existing lease permitting use primarily for a bakery or a restaurant reasonably expected to have annual sales of sandwiches greater than ten percent (10%) of its total sales or primarily for the sale of high quality coffees or teas, such as, but not limited to, Starbucks, Tea-Luxe, Pete's Coffee and Tea and Finagle a Bagel. The foregoing restriction shall not apply to (i) the use of the existing, vacant free-standing building in the Shopping Center for a Dunkin Donuts – type business, or for a business serving near–Eastern food and related products, (ii) restaurants primarily for sit down table service or (iii) a Jewish style delicatessen or (iv) a KFC restaurant operating in a new building following the demolition of the existing free-standing building. No new building shall violate the no-build provisions of this Lease.

On December 30, 2005, PR and the Landlord entered into an amendment to the Lease that addressed a number of outstanding disputes between PR and Landlord concerning the application and interpretation of the Lease. *Id.* at ¶ 7.

During the renegotiation of the lease, one of the issues which was the subject of extensive discussion and negotiations with regard to the First Amendment to Lease were the exclusivity provisions of Section 4.07 of the Lease. *Id.* at ¶ 8. The amendment amended the second to last sentence of Section 4.07 to read as follows:

> The foregoing restriction shall also apply (without limitation) to a Dunkin Donuts location and to a Jewish-style delicatessen within the Shopping Center, but shall not apply to (i) the use of the existing, free standing building in the Shopping Center partially occupied by Strawberries and recently expanded for a business serving near–eastern food and related products, (ii) restaurants primarily for sit down table service or (iii) a Papa Gino's restaurant (provided the same continues to operate with substantially the same categories of menu items as now apply to its stores and franchisees generally).

Id. at ¶ 8.

Recently, PR learned that the Landlord has leased space in White City to a Qdoba Mexican Grill franchise ("Qdoba").[1] *Id.* at ¶ 14. Qdoba sells tacos, burritos, quesadillas and salads that — like Panera sandwiches — are made at the customers' direction. *Id.* at ¶ 16. These restaurants offer limited but well appointed seating for approximately 30 customers. Except for salads, nearly all products sold by Qdoba — tacos, burritos, quesadillas — are based on corn or flour tortillas and meet the definition of "sandwich.[2]" *Id.* at ¶ 17. Approximately 60-70% of the total sales in each Qdoba derive from the sale of tacos, burritos and quesadillas sales. *Id.*

Within the food service field, Panera and Qdoba are known to be direct competitors in what is known as the "fast-casual" market. These restaurants offer high quality, made to order products in environments that offer more atmosphere than traditional "fast food" settings. *Id.* at ¶ 19.

Upon learning of the Landlord's discussions with Qdoba, PR directed PR's attorney to express PR's concern and seek an assurance that Landlord would not be entering into a Lease with Qdoba. *Id.* at ¶20. The Landlord has refused to provide the requested assurance. In fact, the Landlord was deliberately evasive concerning the

[1] According to the Landlord's Complaint, the Lease was executed "in or around" August, 2006.

[2] This issue is discussed at length below.

Qdoba issue. Landlord's counsel responded that the landlord did not intend to violate the lease. *See* September 14, 2006 letter, Roberts Aff., Ex. 4. When further asked to confirm that this could be interpreted as an agreement by the landlord not to enter into a lease with Qdoba, the Landlord's counsel responded with the cryptic comment that he "was not in a position to confirm one way or another what you may or may not interpret." *See* September 20, 2006, Roberts Aff., Ex. 4. On, September 28, 2006, PR was served with the Landlord's Complaint.

There is no doubt that the availability of sandwich offerings at Qdoba in the White City shopping center will adversely affect the business of and profitability of our Panera at that location. Roberts Aff. ¶ 21. It will be impossible to quantify the degree to which PR will be harmed as calculations of lost sales will inevitably be incomplete and will not capture the loss of good will that will result from the Landlord's planned breach of the amended Lease. *Id.*

ARGUMENT

The standards for injunctive relief are familiar:

> Those factors require the party seeking the preliminary injunction to show "(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the [moving party's] likelihood of success on the merits, the risk of irreparable harm to the [moving party] outweighs the potential harm to the [nonmoving party] in granting the injunction." *Tri-Nel Mgt., Inc. v. Board of Health of Barnstable*, [433 Mass. 217, 219 (2001)]. When a party seeks to enjoin governmental action, a judge is also "required to determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public." *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 89 (1984).

Loyal Order of Moose, Inc v. Yarmouth Board of Health, 439 Mass. 597, 601 (2003)*; see also Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980).*The facts as

set forth in the Roberts affidavit establish (1) that there is a substantial likelihood that PR will succeed on the merits of its claims; (2) that in the absence of an injunction PR will suffer irreparable harm; (3) that the balance of harm favors PR; and (4) that the public interest will not be harmed by an injunction.

I. PR HAS ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS.

In this case, PR is likely to succeed in this action because Qdoba derives greater than 10% of its total sale from the sale of sandwiches. It is well settled in Massachusetts that, "restrictive covenants in leases prohibiting the landlord from using or permitting to be used other property controlled by him in competition with the tenant are enforceable." 49 Am.Jur. 2d. Landlord and Tenant §70 (2006); *Sedmore v. Mazmanian*, 326 Mass. 578 (1950); *Kobayashi v. Orion Ventures, Inc.*, 42 Mass. App. Ct. 492 (1997) (affirming an award of damages against a landlord where "[t]he tenant described to the landlord the sort of fast-food breakfast and lunch establishment that it proposed to operate, the importance of employees of office tenants in the same building as customers, and the need, therefore, for some protection from competitors from dishing out similar food."); *The Paper Store of Shrewsbury v. White City Shopping Center,*[3] 17 Mass.L.Rptr. 217, 2003WL 23197898 (Mass. Super. Ct. Dec. 10, 2003) (granting a preliminary injunction against the defendant who leased to a competing store) (attached as *Exhibit A*); *Jepson v. Village Plaza L.P.*, C.A. No. 922593B, 1994 WL 902927 (Mass. Super. Nov. 3, 1994) (enforcing a covenant not to compete in a commercial lease)(attached as *Exhibit B*).

[3] In this case, the Court found that the same landlord as this case, White City, had violated a similar covenant in a lease and the Court quoted Barrie Shore, the principal of White City as saying that he "would do what's best for the shopping center," and he "didn't believe a little competition would hurt anybody." *The Paper Store,* 2003 WL 23197898 at *1.

Having established the covenant to be enforceable, the next issue is whether the Landlord violates the covenant by leasing to with Qdoba. The central issue in this determination is the interpretation of the word "sandwich" as it is used in § 4.07 of the Lease. Under Massachusetts law, the meaning of a term used in a contract is usually determined by reference to its common meaning, as reflected in dictionary definitions, unless the parties have expressed an intent that a different point of reference should be used. *Town of Boylston v. Comm'r of Revenue*, 434 Mass. 398, 405 (2001).

Sandwich is defined in the dictionary as, "food consisting of a filling placed upon one slice or between two or more slices of a variety of bread or something that takes the place of bread (as a cracker, cookie, or cake)." Webster's Third New International Dictionary 2326 (2002). The word "sandwich" is generally thought to be named after John Montegu, the Fourth Earl of Sandwich, who is "said to have eaten food in this form so as to avoid leaving the gaming table." Alan Davidson, *The Oxford Companion to Food* 692 (Oxford University Press, 2000).[4]

In the last 350 years, sandwiches have evolved with the result that today, "sandwiches take so many forms in the modern world, including double- and triple-deckers, the open sandwich typical of Scandinavia (and their miniature versions known as canapés), and legions of toasted sandwiches, that a catalog would be a book." *Id.* The term sandwich now includes items such as wraps, gyros, and in this case, burritos, tacos, and quesadillas.

Qdoba's offerings -- tacos, burritos, and quesadillas - are all sandwiches because they are all food that consists of bread folded around fillings (in Qdoba's case, meats,

[4] Lord Sandwich is said to be fond of this form of food because it allowed him to continue playing cribbage while eating as he did not want to get his cards sticky from eating meat with his bare hands. Alan Davidson, *The Oxford Companion to Food* 692 (Oxford University Press, 2000).

cheeses, vegetables, and sauces). For Qdoba's tacos, burritos, and quesadillas, the bread is the tortilla. *See* Qdoba Menu, Roberts Aff., Ex. 3. All authorities recognize tortillas as a form of bread. *See Sabritas v. United States*, 22 C.I.T. 89, 988 F.Supp. 1123, 1128 (Ct. Int'l Trade 2002) ("tortillas are unquestionably commonly and commercially accepted as bread in the United States")(Attached as Exhibit C). *Also see Webster's Third New International Dictionary* 3413 (2002) (defining tortilla as "a round thin cake of unleavened cornmeal bread usu. eaten hot with a topping or filling that may include ground meat, cheese, or various sauces.") *Webster's New Word Dictionary of Culinary Arts*, 2d. Ed. 466 (2001) ("A thin, round, unleavened Mexican bread made from masa or wheat flour and lard and baked on a griddle (depending on its use, it could be then deep fried). Indeed, tortillas are customarily and predominantly used just like bread for sandwiches. *Sabritas*, 988 F.Supp. at 1129 ("taco shells are predominantly used as other conventional American bread: to hold meats, vegetables, cheeses and condiments and be consumed in a final sandwich.").

The *Sabritas* case is particularly helpful here. In *Sabritas,* an importer challenged the United States' classification of taco shells (which are fried tortillas). The United States classified them as "other bakers' wares" for tariff purposes. The Court, in a painstaking analysis of tortillas and their history disagreed with the United States' classification, and concluded that the taco shells were correctly classified as "bread." *Sabritas*, 988 F.Supp. at 1130.

If a tortilla is bread, burritos, tacos, and quesadillas which involve a tortilla with fillings such as meats, cheeses, vegetables, and sauces are unquestionably sandwiches. In fact, Webster's Third New International Dictionary defines taco as a ***sandwich*** made of a

tortilla rolled up with or folded over a filling and usu. fried." (emphasis supplied) *See Sabritas, S.A. v. United States*, 22 C.I.T. 59, 998 F.Supp. 1123 (Ct. Int'l Trade 1998) *citing* Webster's Third New International Dictionary 2326 (1993). *Also see* Robert A. Palmatier, *Food: A Dictionary of Literal and Nonliteral Terms* 371 (Greenwood Press, 2000) ("A taco is a folded tortilla that functions as a Mexican 'sandwich.'").

This analysis is supported by the behavior of the parties when they renegotiated the lease. The Landlord and PR agreed to amend the language of Section 4.07 so that excludes near-Eastern restaurants. While near-Eastern restaurants do not utilize sliced bread products they do serve products like gyros, which are a type of sandwich using pita bread. *Id.* at ¶¶ 11-13. The fact that the parties' included this language suggests that the parties recognized that any bread, be it pita or tortilla filled with meats, cheese, vegetables, and/or sauces, is a sandwich. This is the only interpretation of the Lease that makes sense, and White City violates the Lease by negotiating with Qdoba.

II. PR WILL BE IRREPARABLY HARMED ABSENT AN INJUNCTION

The second criteria a Court looks to in deciding whether to grant a preliminary injunction is "irreparable harm." Here, PR will be irreparably harmed absent an injunction. Under Massachusetts Law, courts find irreparable harm in case involving non-competition agreements because damages are extremely difficult to quantify. As the Court pointed out in *In re Ward*, 194 B.R. 703 (Bankr. Mass. 1996):

> Loss of future profits is typically a principal element of damages for breach of a covenant not to compete. The evidentiary problems here for [the movant] and other covenant beneficiaries are obvious. The proof involved futuristic projections which are especially subject to contest. Courts therefore readily grant an injunction for breach of a covenant not to compete. Indeed, the injured party invariably requests injunctive relief because an injunction gives strong evidence he will receive precisely what

> he bargained for. This avoids the trauma of future injury, the need to prove damages, and problems in collecting a money judgment.

In re Ward, 194 B.R. at 711-12. *Also see The Paper Store of Shrewsbury v. White City Shopping Center*, 17 Mass.L.Rptr. 217, 2003WL 23197898 (Mass. Super. Ct. Dec. 10, 2003).

Landlord will likely argue that irreparable harm is not present because the PR could be compensated by money damages. The problem with this argument, as recognized by the *Ward* Court, is that, in these situations, the money damages may be difficult, if not impossible to quantify. Mitchell Roberts states in his affidavit that "calculations of lost sales will inevitably be incomplete and will not capture the loss of good will that will result from the Landlord's planned breach of the amended Lease." Roberts Aff. ¶ 21. When damages are not quantifiable, courts have found irreparable harm because the plaintiff is denied a complete remedy. *Cabot Corp. v. Ashland Oil, Inc.*, 597 F.Supp. 436 (D. Mass. 1984); *also see Loyal Order of Moose, Inc. v. Board of Health of Yarmouth*,439 Mass. 597, 603 (2003) ("[t]he preservation of legitimate economic expectations pending the opportunity for trial is a basis for granting a preliminary injunction."). In similar cases, Massachusetts Courts have favored, "preservation of legitimate economic expectations pending the opportunity for trial [as a] basis for granting preliminary injunctive relief." *Edwin R. Sage Co. v. Foley*, 12 Mass.App.Ct. 20, 29 (1981) (reversing the decision of the trial court to refuse to grant a preliminary injunction in a case involving similar restrictive covenants in a lease). Under the law of *Edwin R. Sage Co.*, PR's legitimate economic expectations should be preserved until there is an opportunity for trial in this matter.

III. THE PUBLIC INTEREST IS BEST SERVED BY GRANTING THE INJUNCTION.

Most of the public will not affected one way or the other if the requested injunction is granted. Patrons of the shopping center will still be able to eat at Panera, Papa Ginos, Chum Lee (Chinese food), Usaka (Japanese food), or the Outback Steak House. There is a wide offering of other food options in the neighborhood. The part of the public most affected would be the owners and operators of the proposed Qdoba, who would be best served if the injunction was granted. This is because Qdoba would be spared the costs of a build-out, the costs of starting the company, hiring and training employees until the outcome of this dispute is decided.

WHEREFORE, for the forgoing reasons, PR respectfully requests that this Court enter a preliminary injunction prohibiting White City, and its partners, employees or agents, from taking any action that violates the terms of the Lease including, without limitation, taking any action that would permit a Qdoba franchise to operate at the Shopping Center during the term of the Lease.

Respectfully submitted,

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I HEREBY CERTIFY THAT A TRUE COPY
OF THE ABOVE DOCUMENT WAS SERVED
UPON THE ATTORNEY OF RECORD FOR
EACH OTHER PARTY BY ~~MAIL ON~~ Hand on 10.6.06

Dated: October 6, 2006