NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: *Jackson's MFF RTC, LLC v. BP South of Market LLC d/b/a South of Market LLC et. al.,* Case No. CL 2017-4267

Dear Counsel:

This matter came before the Court upon the Plaintiff's motion for a preliminary injunction. The court started an evidentiary hearing on April 26, 2017. Due to unforeseen circumstances, the parties ended the hearing earlier than anticipated and continued the matter for a second day to June 1, 2017. At the conclusion of the second day, the Court took this matter under advisement to consider the evidence and legal arguments the parties had thoroughly presented in their opening briefs.

The question presented is whether a dispute over the installation of a paid parking system between a commercial landlord and a tenant, who had been promised free parking, supports the granting of a preliminary injunction. A preliminary injunction is an extraordinary remedy. It is a temporary determination of rights before the final judgment of the merits of a case. It commands

the enjoined party to either refrain from taking certain actions or to take specific actions. It is granted by a court in its sound discretion only after taking into consideration well-established equitable principles.

Under Virginia law, the decision of whether to grant an injunction is not susceptible to a formulaic exercise. It requires a balancing of the equities that include a consideration of the specific facts and circumstances then presented to the court. To obtain the extraordinary relief in the form of a preliminary injunction, the moving party has to show that absent such relief, it will suffer harm during the pendency of the litigation that cannot be adequately addressed by the award of monetary damages or capable of redress at the final trial.

I. BACKGROUND

On March 22, 2017, Plaintiff Jackson's Mighty Fine Food & Lucky Lounge ("Jackson's"), seeking to preserve free parking for its customers, commenced litigation against Defendants BP South of Market LLC and South of Market Garage LLC (collectively referred to as "Defendants" or "Boston Properties"). Jackson's is a subsidiary of Great American Restaurants, Inc. ("Great American"), and operates in the Reston Town Center.

Jackson's three count Complaint, includes, Count I (Breach of Contract), Count II (Declaratory Judgment), and Count III (Interference with Easement). For each of these counts, Jackson's seeks an injunction prohibiting Boston Properties from using a pay-to-park system in an adjoining garage that had previously provided free parking to the general public. Jackson's asserts that the pay-to-park system violates its contractual rights under several provisions of the Lease, interferes with easement rights, causes irreparable injury, and leaves it with no adequate remedy at law. The parties' dispute center on Boston Properties' installation of a pay-to-park system that prior to 2017 had not been in place at the Reston Town Center.

The trial is set for February 12, 2018. Jackson's motion for preliminary injunction was heard prior to the setting of the trial date and this decision shortly follows the setting of the trial date.

According to the Complaint and as is further evident from the exhibits attached to the Complaint, in 2006, Boston Properties developed two parcels of land at the Reston Town Center referred to as South of Market.

One parcel was developed as a three building office complex consisting of two (2) ten (10) story buildings and one (1) six (6) story building for a total of 557,051 square feet of rentable space. The first floor contains 61,563 square feet rentable space for retail businesses. The office complex has 469 parking spaces for passenger vehicles.

The second parcel was developed as a commercial garage and multi-story office building. The development of second parcel includes 23,000 rentable square feet for retail establishments on the first floor, approximately 1,950 parking spaces for passenger vehicles located on eight (8) levels of above grade parking and (2) levels of below grade parking and a multi-office buiding.

A recorded Declaration of Easements ("Declaration") provided that Boston Properties, in its capacity as Landlord, had the right to access and use, on a non-exclusive and unreserved basis, up to one thousand four hundred sixteen (1,416) of the garage's parking spaces. Declaration ¶3. The Declaration further granted the landlord, for the benefit of "tenants, employees, agents, guests, customers, licensees and invitees . . . , the perpetual, irrevocable and non-exclusive right . . . to use, on an unreserved basis, up to one thousand four hundred sixteen (1,416)" parking spaces. *Id.*

The Declaration mandated that the exercise of the parking rights by the beneficiaries "shall be free of charge." Declaration at ¶ 3(b).

In 2007, Boston Properties reached out to Great American to discuss opening a restaurant in Reston Town Center. Great American negotiated parking rights to assure that its customers would receive free parking. On November 19, 2007, the parties executed a lease for operation of Jackson's restaurant in the first-floor retail area of the garage structure.

The Lease addresses the parking rights in Sections 24.1 through 24.8. The parking rights pertained to the "Parking Structure," which was described as containing approximately one thousand nine hundred and seventy-five (1,975) parking spaces designated for retail use. (The number of parking spaces was more than originally anticipated, although the difference is immaterial because the accessible number remained at one thousand four hundred sixteen (1,416) parking spaces under the Declaration of Easements). In addition, the Lease identified the "Parking Garage" which contains below grade parking.

The provisions at issue under § 24.5 of the Lease provided that:

1. All parking in the garage "shall be free" for Jackson's and its customers and employees;

2. Any access control system used in the parking garage would not "unduly impede [Jackson's] rights for free parking and access";

3. If the landlord instituted charges for customer or employee parking, it would "at its sole cost and expense" institute a system allowing Jackson's to validate tickets for all of its customers and employees; and

4. The validation system would operate "so that parking for such customers and employees shall be free and without charge at all times and in all instances."

In January 2017, Boston Properties implemented a pay-to-park system. Advanced notice of the system had been provided to tenants and the public. Under the system, customers are encouraged to pay primarily by using a software application known as Park RTC, which is downloaded on their smartphone. The software application is referred to as an "App." Customers can also pay at kiosks or though the website without downloading the App. The new pay-to-park system was met with public complaint and public protests.

Jackson's complains that Boston Property violated the Lease agreements by not providing free parking for its customers and employees. At the hearings, Jackson's introduced evidence that

the pay-to-park system has harmed its business and forced Jackson's to incur additional operating expenses to address the parking situation and manage growing customer dissatisfaction.

Boston Properties countered by introducing evidence that implementation of a pay-to-park system is necessary since a Metro station opened nearby in 2014. The Court takes judicial notice that the Reston-Wiehle Metro station is located less than two miles from the Reston Town Center. Boston Properties presented evidence that commuters started to park in the garages located at Reston Town Center in order to access the metro from a free parking facility. In addition, residents of the Reston Town Center were using the garages to store or park cars that they could not park at their residences and guests from a nearby Hyatt Regency Hotel regularly filled up the parking spaces during special events held at the hotel, which prevented Boston Properties from meeting its contractual obligations to provide its tenants with accessible parking.

Boston Properties expressed concerns that with the imminent Metro plans to add another Metro Station directly at the Reston Town Center, the parking situation will become direr given the expected invasion of commuters seeking to benefit from free parking while commuting on the metro line.

Boston Properties argues that the Lease clearly contemplates a future when paid parking would be necessary and complaints about paid parking simply reflect an unrealistic expectation by suburbanites that all parking should be free.

II. LEGAL ANALYSIS

A. STANDARD

In Virginia, "the granting of an injunction is an extraordinary remedy and rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case." *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60 (2008). The purpose of a preliminary injunction is to maintain the status quo until a final trial on the merits can be held. *See Capital Tool & Mfg. Co. v. Maschinenfabrik Herkules*, 837 F.2d 171, 172 (4th Cir. 1988).

The "status quo" is the position the parties were in before the alleged invasion of rights occurred. It is not limited to the position the parties find themselves at the time of the hearing. If a party unreasonably delays in asserting its rights, equitable principles may estop a party from obtaining injunctive relief. However, those principles of estoppel and laches do not define what constitutes the "status quo." Since 2007, Jackson's employees and customers have enjoyed unfettered access to parking. The implementation of a pay-to-park system changed that status quo and the question presented is whether the system should be enjoined pending the litigation.

Virginia Code § 8.01-628 provides: "No temporary injunction shall be awarded unless the court shall be satisfied of the plaintiff's equity." The Virginia Supreme Court has not defined additional elements or standards that the moving party must meet in every case before an injunction is granted. However, some principles reoccur in decisions addressing injunctions, such as the requirement that plaintiff lacks an adequate remedy at law, or suffers irreparable harm. *Wright v. Castles*, 232 Va. 218, 220 (1986).

Both parties, however, approached the question of whether a preliminary injunction should be granted under the four-prong test adopted by the federal courts and various judges of the 19th Judicial Circuit. The four-prong test includes:

(1) the likelihood that the plaintiff will succeed on the merits;
(2) the likelihood of irreparable harm if the injunction is denied;
(3) the balance of the equities tip in the Plaintiff's favor; and
(4) the injunction is in the public interest.

Winter v. NRDC, Inc., 555 U.S. 7, 19 (2008); *Wings, LLC v. Capitol Leather, LLC*, 88 Va. Cir. 83, 89 (Va. Cir. Ct. 2014) (citing *Real Truth About Obama Inc. v. Federal Election Com'n*, 575 F. 3d 342, 345 (4th Cir. 2009), *vacated on other grounds,* 559 U.S. 1089 (2010), *aff'd* 607 F.3d 335).

Of the four factors, the two most important considerations are the irreparable harm to the plaintiff if the injunction is not granted and the irreparable harm to the defendant if the injunction is granted. *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991). The United States Supreme Court has explained irreparable harm as follows:

> 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.

Sampson v. Murray, 415 U.S. 61, 90 (1974) (quoting *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (emphasis added).

Boston Properties further argues that the Court has to consider that the relief sought by Jackson's may be a mandatory injunction as opposed to a prohibitive or preventive injunction. "A 'preventive' injunction commands a party to refrain from doing an act, while a 'mandatory' injunction commands the performance of some positive act." 10A M.J. *Injunctions* § 2.

Boston Properties contends that discontinuing a parking payment system that has been in place since January 2017 is a mandatory injunction and Jackson's evidence does not meet the heightened standard required for a mandatory injunction. In *Handsome Brook Farm*, a federal court noted the different standards:

> In cases where the request for preliminary relief encompasses both an injunction to maintain the status quo and to provide mandatory relief, the two requests must be reviewed separately, with the request for mandatory relief being subjected to a more exacting review. A mandatory preliminary injunction is disfavored, and warranted only in the most extraordinary circumstances. When mandatory relief is sought a strong showing of irreparable injury must be made, since relief changing the status quo is not favored unless the facts and law clearly support the moving party.

Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc., 193 F. Supp. 3d 556, 574–75 (E.D. Va. 2016) (citations omitted) (internal quotations omitted).

However, federal circuit courts are split over whether a heightened standard is necessary. *Compare O Centro Espirata Beneficiente Uniao Do Vegetal v. Ashcroft,* 389 F.3d 973, 975 (10th Cir. 2004) with *United Foods & Commercial Workers Union v. Southwest Ohio Reg'l Transit Auth.,* 163 F.3d 341, 348 (6th Cir. 1998).

While the Virginia Supreme Court has not expressly required a heightened standard of proof for injunctions, whether mandatory or preventive, the "strong and imperious necessity" language cited by Boston Properties and attributed to mandatory injunctions remains good law. *Virginian Ry. Co. v. Echols*, 117 Va. 182, 184 (1915) ("A mandatory injunction will not be granted upon a preliminary hearing except in cases of strong and imperious necessity, where the right to the injunction is clear."). As recently as 2011, the Circuit Court of Norfolk quoted that exact language. *See Dean v. Va. High Sch. League, Inc.*, 83 Va. Cir. 333, 334 (Va. Cir. Ct. 2011) (Norfolk). This Court interprets that language as meaning that there has to be extraordinary reasons to grant the extraordinary remedy of a preliminary injunction.

Both *Virginian Ry. Co* and *Dean* are otherwise distinguishable from the facts and circumstances here. In *Virginia Ry,* the Virginia Supreme Court reversed the granting of a preliminary injunction in the absence of all necessary parties and relying upon affidavits. Although the Court is mindful that Boston Properties complained of the lack of discovery, the hearing provided the Court an opportunity to consider evidence that the trial court in *Virginia Ry* did not consider.

In *Dean,* the trial court found that the plaintiff was unlikely to succeed on the merits when asking the Court to overturn the decision of a High School football league decision to not grant a waiver allowing a high school student to play football. In both cases, creating a higher standard of proof from the phrase of "strong and imperious necessity" was unnecessary and adds nothing further than the admonition that an injunction is an extraordinary remedy.

Regardless, the facts of this case do not support defining the relief sought as a mandatory injunction. Temporarily discontinuing the use of the parking system is more akin to a preventive injunction than a mandatory injunction. The preliminary injunction would not require removal of the parking system pending trial, or other positive steps, other than simply discontinuing enforcement of the present system. By June, the second day of the evidentiary hearing, Boston Properties had declared that the parking system would not be in effect Mondays through Fridays after 5:00 p.m. and on weekends.

Notably, the parking system was initially planned to have been implemented in September 2016. Boston Properties delayed the implementation of the parking system for four months until January 2017 to avoid any negative impact upon the tenants during the busy holiday season and to allow the parties more time to resolve their differences. Consequently, under the facts and circumstances in this case, a preliminary injunction to discontinue the parking system would simply repeat a delay of the installation of the system.

Most importantly, the Virginia Supreme Court has not adopted any specific test or heightened standards, but instead reminds this Court that "[t]he granting of an injunction is an extraordinary remedy and rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case." *Levisa Coal Co.*, 276 Va. at 60.

Therefore, while federal courts' four-prong test and decisions discussing "heightened caution" are helpful guidelines, they do not constitute binding rules or controlling factors that govern the decision of a Virginia state court as to whether a preliminary injunction should be granted.

Consequently, although this Court will consider the arguments presented under the federal four-prong test, the ultimate decision will turn on whether the evidence, under the totality of the circumstances, is sufficient to satisfy the Court as to the equities of the moving party.

B. COMPARISON OF FACTORS AS ARGUED BY THE PARTIES

(1) Jackson's argues the pay-to-park system violates the lease as well as the Declaration of Easments' provisions mandating free parking.

A. Likelihood of Success on the Merits

Jackson's says that it will likely succeed on the merits because 1) the pay to park system fails to assure that its customers would receive parking that is "free and without charge at all times and in all instances," 2) the pay-to-park system does not allow for the validation of tickets because if a customer does not correctly use the system, the customer is charged and has to be reimbursed rather than having the ticket validated, 3) the system impedes Jackson's rights to free parking because of its complexity, 4) the pay-to-park system violates the Lease by imposing costs and expenses as Jackson's has had to bring on additional staff to help confused customers with using the parking system and 5) the system burdens and interferes with unfettered parking rights granted under the Declaration of Easement. The evidence, as a whole, favored Jackson's request for relief.

B. Irreparable Injury

Jackson's concludes that it will suffer irreparable injury if not granted an injunction pending the February 2018 trial because there will be a permanent loss of customers and goodwill. *See Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551–52 (4th Cir. 1994) (concluding that irreparable harm was satisfied due to the difficulties of calculating damages, as well as a threat of permanent loss of customers and potential loss of goodwill). Jackson's has reported a significant decline in sales and loss of goodwill from its customers who tell Plaintiff they will no longer dine there due to the pay-to-park system. This factor also favored Jackson's request for relief.

C. Balance of Equities

The evidence further supports an injunction when balancing the parties' interests. Jackson's argues that irreparable injury will result if the Court does not grant the injunction and Boston Properties cannot shown that it will suffer an injury as a result of the injunction.

D. Public Interest

Finally, Jackson's argues that the public interest will be served by a preliminary injunction because it is in the public interest to enforce contracts. *See HotJobs.com, Ltd.*, 53 Va. Cir. at 42. Boston Properties agreed with the standard expressed, but disagreed that the facts support Jackson's interpretation of its rights under the governing Lease.

(2) Boston Properties argues that the Lease contemplated a pay-to-park system and that advancement in technology enables the development of a parking system that complies with and is necessary to comply with its contractual obligations.

A. Likelihood of Success on the Merits

Boston Properties argues that the evidence fails to show a "strong and imperious necessity" and that its use of the parking system will likely succeed on the merits at trial. *See Virginian Ry. Co.*, 117 Va. at 184. Boston Properties contends that the Lease expressly contemplates that a pay-to-park system could be implemented and the Lease does not limit use of a gate and paper ticket system only. The only language agreed to in the Lease is that the parking system must not "unduly impede" Jackson's customers' rights to access and free parking.

While Jackson's argues that the system "unduly impedes" its rights because customers are charged up front to pay for parking, Boston Properties contends that the customer is not charged up front as the credit card is merely authorized. Boston Properties argue a pending credit card charge is not an actual charge. The Court agrees that using present-day technology to validate "tickets" in electronic form does not violate the Lease under any reasonable construction of the language used and asking the tenants to use an App to manage parking is not expressly prohibited. Jackson presented sufficient evidence that the manner in which the particular App is being deployed creates sufficient confusion and concerns by the customers that the current system is inappropriate.

Boston Properties further argues that the Declaration of Easements does not govern Jackson's parking rights, which are expressly governed by the Lease. At the time the Declaration was signed, Jackson's was not a tenant and could not be a member of the class of beneficiaries of the parking easement. The Lease did not suggest that the Declaration somehow enhanced the rights that Jackson's negotiated under the Lease; rather, the Lease should be the controlling document as to this dispute.

Evidence regarding the applicability of the Lease and Declaration favors Boston Properties to the extent the evidence failed to show the second Defendant, South of Market Garage, LLC, has taken any action that would warrant that it be enjoined.

B. Irreparable Injury

Boston Properties parallels this case to that of *Wings, LLC v. Capitol Leather, LLC*, 88 Va. Cir. 83 (Va. Cir. Ct. 2014) (Fairfax). In *Wings*, the plaintiff argued that it had already lost customers to defendants and that without a preliminary injunction, it would continue to lose customers and might lose its entire business by the time of the trial. *Id.* at 87. While this Court acknowledged that the plaintiff would likely continue to lose customers if the preliminary injunction was not issued, the likelihood of lost business did not amount to irreparable harm. *Id.* at 91–92. This Court rejected the argument that it would be difficult to calculate damages, noting it "does not seem reasonable that Wings would not be able to determine how much income it received from certain customers prior to and after the breach of the Agreements, the difference presumably being the income lost due to the breaches." *Id.*

Boston Properties also points to the fact that Virginia courts routinely hold that if money damages could adequately compensate a plaintiff, then it fails to meet the irreparable harm standard. *See Preferred Sys. Solutions, Inc.*, 284 Va. at 402.

Furthermore, Boston Properties argues that Jackson's relies on a misplaced standard from the Fourth Circuit announced under *Multi-Channel TV Cable Co. v. Charlottesville Quality Operating Co.* that a possibility of loss of customers or goodwill can support the granting of the preliminary injunction. Under the United States Supreme Court's decision in *Winter v. Natural Res. Def. Council, Inc.*, the standard is stricter for irreparable harm: the plaintiff must make a "clear showing that it is likely to be irreparably harmed." 555 U.S. 7, 22 (2008). Boston Properties argues that no Virginia case decided since *Winter* has found irreparable harm based on possible "loss of goodwill" or "loss of customers," and the standard that Jackson's suggests is not applicable where a mandatory rather than permissive injunction is sought.

For reasons stated previously, the Court found that the injunction is permissive, that there is no additional heightened standard to be applied and for the moment, given that discovery has not been completed, the evidence favors Jackson's interpretation of whether sufficient injury has been shown.

C. Balance of Equities

Boston Properties concludes that the balance of equities does not tip in Plaintiff's favor. Defendants would be harmed if the preliminary injunction is issued because the injunction would cause the entire system to shut down. Shutting down the entire pay-to-park system would clearly result in harm to Defendants who have spent significant time, money, and resources implementing a system that was expressly contemplated by the parties in the Lease. This conclusion however is refuted by Boston Properties' recent decision to suspend charges at particular times and days and any investment spent in creating the system could still be realized in the future.

D. Public Interest

As noted above, Boston Properties agrees with Jackson's that it is in the public interest in Virginia to enforce contracts as written, but concludes that this factor does not weigh in Jackson's favor. Boston Properties argues that the pay-to-park system implemented does not breach the Lease and is consistent with the right to implement a controlled access system including charging for parking. The public interest factor does not strongly favor either party, as each is partially correct in their interpretation of the Lease. Technically, Boston Property may implement parking controls and impose charges upon other customers and tenants. The method chosen cannot, however, unduly interfere with Jackson's parking rights. The difficulty in applying this particular factor at this stage of the litigation is that changes or offered alternatives in the pay-to-park system affects the analysis of whether a specific system unduly interferes with Jackson's rights. For the moment, consideration of this factor weighed along with the other factors support Jackson's position, but it awaits the final trial to be weighed separately.

C. FINDINGS IN SUPPORT OF PRELIMINARY INJUNCTION

At the preliminary injunction stage, the evidence presented must raise a question "going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus more deliberate investigation." *Multi-Channel TV Cable Co*, 22 F.3d at 551–52 (quoting *Direx Israel Ltd. V. Breakthrough Medical Corp.*, 952 F.2d 802, 811 (4th Cir. 1991)).

i. The Current Pay-to-Park System Violates the Lease Provisions that Require Jackson's Customers Unfettered Access to Free Parking.

Here, the parties' disagreement rests on the interpretations of Lease provisions and such language as is repeated in the Declaration of Easements. In particular, the parties dispute the phrases such as "tickets," "unduly impede," and "free and without charge at all times and in all instances."

From the plain reading of the contractual provisions, the pay-to-park system that Jackson's and its customers are required to use violates the lease provisions by not providing parking that is "free and without charge at all times and in all instances." It is the inclusion of the phrase "at all times" and "in all instances" that grants the tenant broad rights and reasonable expectations that any parking system would not impose charges on the tenant's customers. Significantly, that phrase also envisions unlimited parking and precludes the adoption of any system that penalizes a guest who has overstay time limits imposed by the system.

The plain meaning of "without charge" is not merely that parking will be free, but that customers and employees will not be charged for parking before or after any type of validation is issued or parking enabled.

If the landlord does charge for parking for other customers and employees, the Lease requires Boston Properties to institute a system that allows Jackson's to "validate the parking tickets" of all its customers and employees. Under the Lease, customers should receive a parking

ticket with no initial charge, present the ticket for validation, and then receive free parking. However, the current pay-to-park system exposes Jackson's customers to potential parking charges, such as those who use the parking software but do not input the validation code in time or those customers who prefer not to use the software and choose instead to pay cash.

Boston Properties relies on § 24.5 of the Lease that provides, in pertinent parts:

> All parking in the Parking Structure and in the Parking Garage (if available) shall be free to the Tenant, its employees and customers; provided, however, Landlord may develop, construct and institute access control systems in the Parking Structure and the Parking Garage as long as such systems do not unduly impede Tenant's rights for free parking and access. In addition, Landlord may institute charges for such customer and employee parking in the South of Market Complex; provided, however, Landlord at its sole cost and expense and not as part of the Operating Expenses, shall provide a system that allows Tenant to validate the parking tickets of all of Tenant's customers and employees so that parking for such customers and employees shall be free and without charge at all times and in all instances.

Although Boston Properties may institute an access control system "as long as such systems do not unduly impede [on Jackson's] rights for free parking and access," the evidence presented persuades the Court that the system in place is contrary to the simplicity envisioned under the Lease and the Declaration of Easements. There are possible solutions to what is now in place and, in fact, Boston Properties has taken steps to mitigate the negative impact of the system, but the steps taken to date may not be enough.

ii. Loss of Business and Inability to Calculate Damages Will Cause Jackson's to Suffer Irreparable Harm if this Preliminary Injunction is Not Granted.

Presently, as a result of the implementation of the parking system, Jackson's credibly reports a decline in sales, loss of customers, less overall customer traffic in the shopping center, and that the loss of business will be difficult to quantify. Evidence of a drop of business, or comparing revenue before and after a claimed breach, without more, is insufficient to establish damages proximately caused by wrongful conduct. *See Saks Fifth Ave., Inc. v. James, Ltd.,* 272 Va. 177, 188-91 (2006).

When the circumstances support it, injunctive relief is merited when it would be difficult or impossible to quantify monetary damages with precision. *See Hotjobs*, 53 Va. Cir. at 45 ("There is substantial support in Virginia for the proposition that irreparable harm is sustained, and injunctive relief appropriate, when it would be very difficult or impossible to quantify monetary damages with precision."). It does not matter how large the damages may be, they just need to be incalculable. *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 197 (4th Cir. 1977) (noting that the harm to the Plaintiff was "incalculable -- not incalculably great or small, just incalculable"), *overruled on other grounds by, The Real Truth About Obama, Inc.*, 575 F.3d at 346–47.

The threat of a permanent loss of customers and potential loss of goodwill rises to the level of irreparable harm. *See Multi-Channel TV*, 22 F.3d at 551–52 ("[W]hen the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong is satisfied."); *Blackwelder*, 550 F.2d at 197; *Handsome Brook Farm*, 193 F. Supp. 3d at 574–75 (finding that the Plaintiff met the irreparable harm prong due to a loss of customers and goodwill).

Jackson's claim of lost business is more persuasive than its claim of loss of goodwill. The animus to the paid parking system appears directed mostly to Boston Properties and the Reston Town Center as a whole. If anything, Jackson's customer oriented responsiveness has garnered it positive reviews. Nonetheless, the loss of business is palpable and a restaurant cannot long ignore the impact of an unpleasant dining experience. It is not the one or two customers who decides not to return that is at issue, it is the impact of the consumer's decision not to view Jackson's as being a convenient destination spot and sharing that belief with countless others. It is improbable that Jackson's could ever quantify the loss of such businesses.

iii. The Pay-to-Park System Also Causes Jackson's Irreparable Harm.

Parking rights are, as Boston Properties acknowledged, believed by many as an inherent right necessary to life, liberty and the pursuit of happiness. The recognition of Jackson's rights to enforce the Lease is about more than promoting an outdated belief and suburban angst. A business's inability to meet the parking needs of its customers can cause irreparable harm. *See Burka v. Aetna Life Ins. Co.,* 917 F. Supp. 8, 15 (D.D.C. 1996) (finding the "University's commitment to faculty, students, and staff that they will be provided safe and convenient parking will be seriously jeopardized," as will the viability of the school, absent an injunction to prohibit the enforcement of parking rules contrary to an easement providing for such parking); *Hamden Realty Assocs., L.P. v. 2319 Hamden Ctr. I., LLC*, No. CV156054261, 2015 Conn. Super. LEXIS 1912 at *17-18 (Super. Ct. July 23, 2015) (finding removal of available parking spaces constitutes irreparable harm to businesses whose customers may be discouraged from patronizing those businesses). *But see Safeway Inc. v. CESC Plaza Ltd. P'ship*, 261 F. Supp. 2d 439, 471-472 (E.D. Va. 2003) (finding that a change from above ground parking to underground parking as part of an urban revitalization project does not warrant the granting of a permanent injunction).

In addition to the impact on its customer, Jackson's complains that responding to the pay-to-park system has imposed a financial burden on the restaurant. The additional financial burdens arguably violate the Lease because the Lease requires that if the landlord does charge for customer and employee parking, the landlord will provide a validation system at the landlord's "sole cost and expense." Jackson's contends that it has instead incurred various costs and expenses due to the current pay-to-park system.

First, Jackson's must train employees on the complicated parking payment methods and process of the system. Second, additional staff has been hired to address customer complaints and problems with the parking system. Third, Jackson's has had to include new signage at its entrance and hand-outs at every table explaining and apologizing for the new system. Fourth, if customers are paying in cash or over the phone for parking and cannot receive a validation code, it is Jackson's that has to pay the customer and then recover compensation afterwards.

In essence, Boston Properties has effectively shifted the daily burdens and expenses of administering the parking system to Jackson's. At the same time, those additional burdens and expenses are not recoverable under ¶ 15.1 of the Lease. ¶ 15.1 is a limitation of liability clause and limits claims against the Landlord for the interruption of business or loss of business from any cause except the Landlord's negligence. The limitation of liability provision supports the granting of a preliminary injunction as it removes the ability of Jackson's to seek full redress even if its interpretation of the Lease later proves correct.

Lastly, Jackson's contends that Boston Properties not only violated the lease, but they also violated the Declaration of Easements. ¶ 3(b) of the Declaration provides:

> Parking Rights. In addition to the Parking Garage Access Rights, the Garage Owner hereby grants to the Building Owner [Boston Properties], for the benefit of the Building Owner and the Building Owner Parties [tenants, employees, agents, guests, customers, licensees and invitees] the perpetual, irrevocable and non-exclusive right and easement (the "Parking Rights"), appurtenant to the Building Parcel and burdening the Garage Parcel, and to be exercised upon the completion of the construction of the Garage Parcel Building by the Building Owner, to use, on an unreserved basis, up to one thousand four hundred sixteen (1,416) of the parking of the Garage Parcel Parking Spaces (collectively, the "Building Owner Parking Spaces") for the parking of passenger vehicles. **The exercise of the Parking Rights by the Building Owner and the Building Owner Parties shall be free of charge, and the Building Owner shall have no obligation to pay any fees or other charges to the Garage Owner in connection therewith.**

(Emphasis added).

Plaintiff, as a tenant, was granted parking rights under the easement with the specific provisions that the parking rights shall be "free of charge." Any pay-to-park system arguably violates this right. This particular system, even recently modified, does.

Vested property rights do trigger a greater measure of protection. In balancing equities between a property owner and the needs to address changing needs of the community, the Court have sided on preserving those property rights. *See Blue Ridge Poultry & Egg Co. v. Clark,* 211 Va. 139, 144 (1970) (citing *Townsend v. Norfolk Ry. & Light Co.,* 105 Va. 22, 49 (1906)); *Shoffner v. Sutherland,* 11 Va. 298, 301 (1910); *Smith v. Pittson Co.,* 203 Va. 711, 717 (1962).

At the same time, the rights as expressed under the Lease are not as broad as that provided for under the Declaration of Easements. For purposes of granting a preliminary injunction, the Court reads both documents consistently to warrant the imposition of a preliminary injunction as to the pay-to-park system in place. The Court reserves for a future determination whether there are provisions of the Lease that overrides rights under the Declaration.

CONCLUSION

Having concluded that the Court should issue a preliminary injunction, the inquiry has to turn to how to issue an appropriate narrow and specific injunction and to the question of an appropriate bond.

As mentioned above, any injunction would be directed to the Landlord, South of Market, LLC and not South of Market Garage, LLC. In addition, there is less of a necessity to apply the injunction to Jackson's employees. Boston Properties, Inc.'s Tenant Parking Reference Guide describe a reliable system of providing electronic permits to the employees. The license plate scanning system can help manage the number of employee parking to ensure that other tenants are not unnecessarily using up parking spaces. The software system is more intrusive upon the occasional visitor and not an employee who regularly makes use of the parking facilities.

With respect to the issue of bond, Va. Code § 8.01-631 provides that ". . . [N]o temporary injunction shall take effect until the movant gives bond with security in an amount that the trial court considers proper to pay the costs and damages sustained by any party found to have been incorrectly enjoined . . . ."

Boston Properties argues that if the system is enjoined, then the entire pay-to-park system will have to shut down, thus resulting in an amount likely to be many millions of dollars. That argument, however, is inconsistent with Boston Properties' initial argument that the pay-to-park system was necessary to ensure parking spaces would be available for the tenants and their employees and customers. Boston Properties has not yet admitted that the primary motivation to install the pay-to-park system was to monetize an asset that has become more valuable as the area has become more densely populated. Thus, the Court does not consider Boston Properties' lost revenues argument to be persuasive in determining the amount for bond.

The Court accepts the argument that the pay-to-park system is for the benefit of the tenants and, given that the Landlord had previously delayed implementing the system from September 2016 to January 2017, an additional delay of nine months until the final trial would not give rise to any compensable damages.

Rather, Article XIX ¶ 19.8 of the Lease provides that a non-prevailing party in any court action to enforce the covenants and obligations under the Lease shall be liable for attorneys' fees and expenses. There are two instances when Boston Properties could show that it was a prevailing party for purposes of determining an appropriate bond. The first is if there is a successful appeal of the preliminary injunction. The second is if at the final hearing, it is determined that Boston Properties is the prevailing party as to the entirety of the case. In both instances, the damages under Va. Code § 8.01-631 would be the attorney's fees and costs related to the arguments over the issuance of a preliminary injunction.

The Court will therefore require Jackson's to post a bond in the sum of $25,000.00, which would be payable upon a successful appeal of the Order granting a preliminary injunction or after

the final determination at trial if at that time the preliminary injunction is held to have been improperly issued and Boston Properties incorrectly enjoined.

The parties will kindly note that any express or implicit factual findings from the evidence do not have a preclusive effect and are not binding on the final trier of fact. A preliminary injunction is an interlocutory order. Although it is appealable, it is an order that is subject to vacation, modification, and suspension under Virginia Supreme Court Rule 1:1.

The interpretation of the Lease and Declaration of Easements is reviewed *de novo* on appeal and does not bind any other judge of this Court. Nonetheless, in assessing the equities presented, the Court finds that Jackson's has met its burden.

An Order reflecting the Court's decision shall be issued separately.

Sincerely,

John M. Tran

John M. Tran
Judge, Fairfax Circuit Court