

Appeal Nos. 2020-1996, 2020-2042

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United States Court of Appeals  
*for the*  
Federal Circuit

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F'REAL FOODS, LLC, and RICH PRODUCTS CORPORATION,  
*Plaintiffs-Cross-Appellants,*  
— v. —  
HAMILTON BEACH BRANDS, INC., and HERSHEY CREAMERY  
COMPANY  
*Defendants-Appellants.*

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Appeal from the United States District Court for the District of Delaware,  
Civil Action No. 16-41-CMC

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**DEFENDANTS-APPELLANTS' REPLY IN SUPPORT OF  
MOTION FOR STAY OF INJUNCTION PENDING APPEAL**

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Plaintiffs-Cross-Appellants' (hereinafter, "f'real") response raises no new relevant issues that are not already addressed in Defendants-Appellants' (hereinafter, "Appellants") Motion. f'real's only asserted harm is lost sales and competition, which Appellants addressed in their Motion as being compensable by money damages. By contrast, Appellant Hershey Creamery Company ("Hershey") has demonstrated a number of concrete harms posed by imposition of the injunction or recall that cannot be remedied if Appellants prevail on appeal in view Hershey's discontinuation of the Shake Shop Express ("SSE") program. Moreover, given the unrebutted evidence that Hershey is unable to fully recall all of its SSE MIC2000 machines within 30 days, due in part to the COVID-19 pandemic, Hershey also faces potential sanctions. Furthermore, the District Court declining to revisit its own decisions in assessing the likelihood of success on appeal should be given little weight as Appellants have shown clear errors of law that will necessitate a remand. Therefore, Appellants respectfully request that the Court stay, or alternatively modify, the District Court's order enjoining the MIC2000 and recalling machines in the SSE program.

Rather than focusing on the issues actually raised in Appellants' Motion, f'real unfairly and improperly focuses its efforts on framing the Motion as merely an effort to needlessly prolong litigation. There is no question that this litigation has a long complicated history, but Appellants have continued this litigation with a good

faith belief they do not infringe any valid patent, as evidenced by the jury's finding of no willfulness, which f'real does not contest, and the District Court's denial of exceptional case. Moreover, Appellants have already prevailed on a number of key issues regarding the SSE program offered by Hershey, including a jury verdict of non-infringement of U.S. Patent No. 5,803,377, judgement as a matter of law of non-infringement for the '662 patent, and remittitur of nearly \$900,000 in speculative lost profits damages. When focusing on the actual issues before this Court—Appellants' substantial case on the merits and the balance of harms weighing clearly in Hershey's favor as a stay or modification of recall will not affect f'real's dominant market position—Appellants respectfully submit a stay or modification of the injunction and/or recall is warranted.

### **I. The balance of the harms plainly favors Appellants.**

As anticipated by Appellants in their Motion, f'real merely argues that they are harmed by competition and lost sales. Doc. 15 at 22-23. However, that harm is outweighed by the harms faced by Hershey from the injunction and/or recall. While lost sales are a "factor" in deciding irreparable harm, this Court recognizes that such harm by itself is compensable by money damages. *Automated Merch. Sys., Inc. v. Crane Co.*, 357 F. App'x 297, 301 (Fed. Cir. 2009) (citing *Abbott Labs. v. Andrx Pharms., Inc.*, 452 F.3d 1331, 1348 (Fed. Cir. 2006)). f'real does not argue that lost profits are insufficient compensation, and f'real concedes that it was able to greatly

expand its locations and cup sales even with the competing SSE program in the market. *See Doc. 5 at 17-18.*

f'real claims that it is harmed because it cannot displace Hershey in current locations because Hershey does not charge retailers for equipment. Doc. 15 at 22 n.12. But when asserting its entitlement to lost profits, f'real indicated that it would have adopted Hershey's model of not charging for machines and instead using a cup upcharge. Ex. 23 at 606-07. As f'real now suggests that it will use its traditional business model of selling machines to Hershey's customers, it is unclear that f'real would capture any sales even if the stay is denied.<sup>1</sup> On the other hand, Hershey will definitely be unable to sell its remaining pre-filled cup inventory if the injunction remains in place.

Moreover, the public interest does not weigh in favor of f'real. While f'real is correct that there is a public interest in upholding patent rights, here f'real would be fully compensated with lost profits damages (should f'real ultimately prevail on appeal) for any lost sales as Hershey winds down the SSE program.

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<sup>1</sup> The District Court already held a large portion (almost 30%) of the alleged lost profits based on Hershey's rental model were speculative and granted remittitur of \$897,028. Ex. 24. Appellants are appealing the remaining lost profits based on Hershey's upcharge model award as equally speculative because they are based on unreliable evidence of market share, a speculative cup multiplier, and a cup upcharge exceeding what retailers would be willing to pay and f'real never offered.

With respect to the recall, f'real fails to identify any harm if the recall is dissolved and/or modified. Rather than identifying any harms or providing any actual evidence rebutting Mr. Waite's sworn testimony, f'real relies on uncited and unsupported attorney argument to assert that Hershey<sup>2</sup> has the resources to recall all of its machines within 30-days.<sup>3</sup> Doc. 15 at 20. f'real does not even address the effect COVID-19 pandemic has on Hershey's ability to perform a recall in such a short time frame. In view of the injunction, Hershey immediately stopped sales of pre-filled cups for use with the MIC2000 machines and has already taken affirmative steps to ensure the SSE machines are not being used and is attempting to recall machines. Ex. 25. Hershey has even continued with best efforts to recall machines despite the stay of the recall, and through those efforts has found a large proportion of machines inaccessible due to the pandemic. *Id.* If the recall is dissolved and the injunction remains in place, f'real is still free to try and sell its frozen blocks and machines into former Hershey's locations. With the injunction in place, f'real will not lose sales, regardless of whether there is a recall.

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<sup>2</sup>Appellants reiterate that Hamilton Beach has no custody or control of machines used in the SSE program.

<sup>3</sup> Contrary to f'real's suggestion, Hershey had no obligation to recall machines until the District Court issued its order. In fact, the District Court declined to enjoin most models of the accused products erroneously found to infringe in this action, including: the IMI2000, the BIC2000, and the BIC3000-DQ. Doc. 5 Ex. 1.

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