

QUICK-START GUIDE

CIVIL PROCEDURE I, SECTION 1 – FALL 2011 PROFESSOR NATHENSON

Introduction. This document contains everything you'll need for the first two days of class, including: 1) initial assignments; 2) syllabus; and 3) first-week readings.

Readings. All assignments should be read carefully and critically. As you'll quickly realize, one read-through is never enough. Future assignments will be posted on the Lexis Blackboard webcourse. Details on enrolling in the webcourse are in the syllabus. Assignments will be posted the week prior so that you don't read too far ahead.

Computer Use Policy. Computers are not permitted in the classroom. Make sure to bring your case briefs in hardcopy format.

Books. "Casebook" refers to the grey book by Marcus. "Statutes book" refers to the rule book by Baicker-McKee et al. The Federal Rules of Civil Procedure ("FRCP") are contained in the Statutes book. Bring your Casebook and Statutes book to every class, along with any other materials assigned for that day.

MONDAY, AUG. 15

- This syllabus (including questions on page 2)
- *Public Reprimand of Judge Terry* & questions (pages 6-9 of this document)

WEDNESDAY, AUG. 17

- *Two Men and a Truck Int'l, Inc. v. Clete, Inc.* & questions (pages 10-15 of this document)
- We'll be making a movie. Details to come.

FRIDAY, AUG. 19

- Casebook pp. 1-3, 13-19, 25-26
- FRCP 16 & commentary (Statutes book) (skim only)

SYLLABUS
CIVIL PROCEDURE I, SECTION 1 – FALL 2011

Professor Ira Nathenson
St. Thomas University School of Law
inathenson@stu.edu, 305/474-2454

Class meets: Mon., Wed., Fri., 9:15-10:05 a.m., Room 104
Office hours TBA

ABOUT CIVIL PROCEDURE

Civil Procedure is about the procedures that govern litigation in civil lawsuits. Suppose your client, Paula from Florida, gets into a car accident in Utah with a driver, David from Pennsylvania. Paula tells you that David drove recklessly, thus causing the accident. There are no witnesses besides Paula (your client), and David (who refuses to talk to you). The police report does not say whether David was reckless, but indicates that his tires may have been defective. David's tires were manufactured by Malay Treads, Inc., a company from Malaysia. Also, David works for Mall-Mart, Inc., a national retail chain incorporated in Delaware with its headquarters in Arkansas.

In addition to considering the *substantive* law of tort liability (which you'll cover in another class), you'll have to consider *procedural* issues, such as:

- How do you start a lawsuit? What do you file? What should it say?
- How do you get the information you need to file a lawsuit, and to later go to trial?
- Can Paula sue only David, only Malay Treads, Inc., or may she sue both?
- Where do you file the suit? Florida? Pennsylvania? Utah? Malaysia?
- Should you file in state or federal court? Do you get to pick and choose?
- What if after filing suit, you learn that David was "on the job" for Mall-Mart at the time of the accident. Can you amend your lawsuit to bring Mall-Mart into the suit? If the statute of limitations expired by then, would it be too late?
- Can David counter-sue Paula?
- If Paula loses at trial, can she sue David again in another court?

Can you answer these questions now? Of course not. But this year, we'll consider questions like these and many more. Our course will provide a comprehensive introduction to the process of modern civil litigation. In the fall and part of spring, we'll examine the major steps in the civil litigation process from initial filing until final disposition, including but not limited to: pre-filing issues, pleadings, motions, joinder of parties and claims, disclosure and discovery, summary judgment, the right to a jury trial, judgment as a matter of law, judgments, appeals, and post-judgment motions. In the spring, we'll also address personal jurisdiction, subject matter jurisdiction, service, venue, choice of law in federal courts, and preclusion doctrines.

BOOKS: REQUIRED AND RECOMMENDED

It is essential that you obtain the current editions of the books listed below. Civil Procedure is changing constantly, and older materials differ not just in content, but may also contain “bad” (i.e., no longer valid) law. Always bring both required books to class. Additional reference and study materials are listed in the RESOURCES section of the Lexis Blackboard Webcourse.

REQUIRED CASEBOOK: Richard L. Marcus et al., *Civil Procedure: A Modern Approach* (5th ed. West 2009).

REQUIRED STATUTES BOOK: Steven Baicker-McKee et al., *A Student’s Guide to the Federal Rules of Civil Procedure* (14th ed. West 2011).

RECOMMENDED: Joseph W. Glannon, *Civil Procedure: Examples & Explanations* (6th ed. Wolters Kluwer 2008).

GRADING AND CLASS PARTICIPATION

PRACTICE MIDTERM: There will be a practice midterm, which will consist solely of multiple-choice questions. After the exam is administered, I will make available for your review your answer key along explanations. This will help you to determine the areas in which you are doing well and any areas which need improvement. Answer keys, examinations, and explanations can be obtained from the secretaries in the faculty suite area. These are highly confidential documents that must stay within the faculty suite area – you may not remove them from the faculty suite or copy them in any way.

ESSAY EXAM WORKSHOP: During the semester, I will provide a practice essay exam question and we will have a class dedicated towards writing essays. I will also provide you with a model answer to the question.

REVIEW SESSION: We will have a review session prior to the final examination.

FINAL EXAMINATION: There will be a single closed-book final examination (probably 3.5 hours) administered on an anonymous basis at the conclusion of the course. I will provide you with the Federal Rules of Civil Procedure and relevant statutes for use during the examination. Laptops will be permitted for answering essay questions, subject to law school policy as detailed in the Student Handbook. The final exam is worth 100% of your fall grade. It will consist of multiple-choice, essay, and short-answer questions. The topic of one of the essay questions will be announced in advance. After the holiday break, I will make available your exams, scoring keys, and multiple-choice explanations for your review. Such documents must be treated as noted above regarding midterms.

CLASS PARTICIPATION AND GRADING: Curving of final grades will be done in accordance with school policy as explained in the Student Handbook. In general, the final grade in this course for most students will consist entirely of the grade on the final examination. However, class participation may result in an adjustment of the examination grade of a half-letter (up or down). A limited number of “bump” adjustments will be provided to the Registrar concurrently with my submission of your final examination grades by anonymous grading number (AGN). Final examination grades

below a C- do not qualify for a bump-up, regardless of class participation. Class participation factors may include: class attendance; preparation & participation; performance on quizzes; use of the course website's bulletin board; and attendance at specified STU functions.

COMPREHENSIVE SPRING EXAMINATIONS: Be aware that St. Thomas University School of Law requires comprehensive final examinations for its Spring term first-year courses. This means that the final examination next Spring will include materials from both this term and next term.

ATTENDANCE AND CLASSROOM POLICIES

COMPUTER/TECHNOLOGY USE: Computers may not be used in class.

GENERAL COMMENTS: The atmosphere in most law school classes – including Civil Procedure – is more formal than what you likely experienced as an undergraduate; it's more like oral arguments in an appellate courtroom. All students are expected to have carefully read, analyzed, and thought about the day's assignment before coming to class. As would typically happen in an appellate court, we normally proceed via a "modified Socratic method." Generally, I ask the questions. Students provide the analysis and answers, not visa versa. You should expect to be called on to participate at any time.

ATTENDANCE POLICY: Class attendance at St. Thomas is mandatory. Attendance is measured solely by the sign-in sheet. It is each student's responsibility to sign the sheet at the beginning of class. Students deemed absent for more than 20% of scheduled classes may not sit for the final examination and cannot pass the course. I provide the Registrar with an attendance sheet for each class, and that is the exclusive measure of your attendance. If for any reason your attendance is not recorded there, you are considered absent. There are no "excused" absences – if for any reason you anticipate missing more than 20% of the classes, you are advised to withdraw before it is too late to do so. Please review the Student Handbook for further information regarding the attendance policy. Also be aware that it is a serious violation of the Academic Integrity policy to sign in other people or to have others sign you in.

CLASS START TIME, SIGN-IN CERTIFICATION, and PROFESSIONALISM: Our time is our most precious commodity. Class will therefore start and end on time. Students arriving late must expressly note their arrival time on the class sign-in sheet. *Cf.* Fed. R. Civ. P. 11(b). What do I mean by the analogy to FRCP 11? Read FRCP 11(b) in the Statutes book. In other words, consider the sign-in sheet a certification of your honesty and integrity, akin to the certifications made by lawyers "presenting" a paper to the court under FRCP 11(b). Remember, the professional reputation you forge for yourself starts on the very first day of class, and your classmates and I are your future colleagues.

LEAVING THE CLASSROOM: As a general rule, you may not leave the classroom during class. Leaving is disruptive to your classmates and to me. However, I recognize that sometimes people have to leave for legitimate reasons. I trust that people will not abuse this privilege. Legitimate reasons do not include: getting coffee, taking a smoke break, getting food, or making a phone call.

ACCESSING THE COURSE WEBSITE

The most up-to-date resource for course information, class materials, and assignments is our Lexis Blackboard webcourse. Enrollment for the webcourse is separate from the official law enrollment process. You may obtain your Lexis ID from the law library and should do so as soon as possible. Once you have access to Blackboard, you should enroll online to obtain future assignments and additional course information. Note: the university and law school websites at STU.EDU may contain links to regular, non-Lexis Blackboard. You *cannot* use those links to gain access to the webcourse. Instead:

- 1) Go to <http://www.lexisnexis.com/lawschool> and log on using your custom LexisNexis ID and password.
- 2) Click on WEB COURSES (upper right).
- 3) Click on the red COURSES tab (upper left).
- 4) Click on ST. THOMAS UNIVERSITY (right-hand side).
- 5) Browse through the courses until you find CIVIL PROCEDURE I, FALL 2011 (Nathenson). Alternatively, use the search tool to search for INSTRUCTOR as NATHENSON. You'll find the course that way too.
- 6) Click on ENROLL.

You can go to <http://www.lexisnexis.com/lawschool> to revisit the webcourses. (Some users may also be able to use the link <http://webcourses.lexisnexis.com>). Assignments for the first week appear on the syllabus and on the webcourse. Subsequent assignments will appear on the webcourse on a weekly basis under "Assignments" as the semester proceeds.



**BEFORE THE
JUDICIAL STANDARDS COMMISSION**

INQUIRY NO. 08-234

**PUBLIC REPRIMAND
B. CARLTON TERRY, JR.
DISTRICT COURT JUDGE
JUDICIAL DISTRICT 22**

This matter came to the attention of the Judicial Standards Commission by a written complaint filed with the Commission. A formal investigation was ordered by the Commission and conducted by the Commission's investigator. During its meeting on February 13, 2009, the Commission completed its review of the investigative report prepared in this matter. The Commission caused a copy of this Public Reprimand to be personally served upon Judge B. Carlton Terry, Jr. In accordance with Rule 11(b) of the Rules of the Judicial Standards Commission, a judge has 20 days within which to accept the Public Reprimand or to reject it and demand, in writing, that disciplinary proceedings be instituted in accordance with Rule 12 of the Rules of the Judicial Standards Commission.

Findings of Fact

1. B. Carlton Terry, Jr., was at all times referred to herein a judge of the General Court of Justice, District Court Division, Judicial District Twenty-two and, as such was subject to the Canons of the North Carolina Code of Judicial Conduct, the laws of the State of North Carolina, and the provisions of the oath of office for a district court judge as set forth in the North Carolina General Statutes, Chapter 11.
2. Beginning Tuesday, September 9, 2008 and continuing through Friday September 12, 2008, Judge Terry presided over a child custody and child support hearing in the matter of Whitley vs. Whitley, Iredell County File No. 07CVD0008.
3. On or about September 9, 2008, while in the judge's chambers, Judge Terry and Charles A. Schieck, attorney for Mr. Sterling Whitley, the defendant in the proceeding, spoke about "Facebook", a [sic] internet social networking website. Jessie Conley, attorney for Mrs. Renee Whitley, the plaintiff in the proceeding, was present during the discussion but stated she did not know what "Facebook" was, and that she did not have time for it. Judge Terry and Mr. Schieck

designated themselves as “friends” on their “Facebook” accounts so that they could view each other’s account.

4. During an in chambers meeting on or about Wednesday September 10, 2008, Judge Terry, Shieck and Conley were reviewing prior testimony that suggested one of the parties had been having an affair. Schieck asked Judge Terry if he thought Mr. Whitley was guilty of having an affair. Judge Terry stated he believed the allegations were true due to evidence introduced by Conley, but that it did not make any difference in the custody dispute. It was at this time Schieck stated “I will have to see if I can prove a negative”.
5. On or about the evening of September 10, 2008, Judge Terry checked Schieck’s “Facebook” account and saw where Schieck had posted “how do I prove a negative”. Judge Terry posted on his “Facebook” account, he had “two good parents to choose from” and “Terry feels that he will be back in court” referring to the case not being settled. Schieck then posted on his “Facebook” account, “I have a wise Judge”.
6. During a break in the proceedings on September 11, 2008, Judge Terry told Conley about the September 10, 2008 exchanges on “Facebook” between Schieck and himself.
7. On or about September 11, 2008, Judge Terry wrote on his “Facebook” account, “he was in his last day of trial”. Schieck then wrote “I hope I’m in my last day of trial.” Judge Terry responded stating “you are in your last day of trial”.
8. Sometime on or about September 9, 2008, Judge Terry used the internet site “Google” to find information about Mrs. Whitley’s photography business. Judge Terry stated he wanted to see examples of Mrs. Whitley’s photography work. Upon visiting Mrs. Whitley’s web site, Judge Terry stated he viewed samples of photographs taken by Mrs. Whitley and also found numerous poems that he enjoyed.
9. When court reconvened at approximately 2:00 p.m. on September 12, 2008, prior to the to [sic] announcing his findings in the case, Judge Terry recited a poem, to which he had made minor changes, that he found on Mrs. Whitley’s web site.
10. Judge Terry told the Commission’s investigator he quoted the poem because it gave him “hope for the kids and showed that Mrs. Whitley was not as bitter as he first thought”. Judge Terry stated that he felt the poem reflected favorably towards Mrs. Whitley.
11. Judge Terry acknowledge [sic] he accessed Mrs. Whitley’s photography web site on the first two days of trial and stated he may have accessed the site on the last day of trial to copy the poem. Judge Terry could not recall exactly how many times he visited the site but stated that four times was very possible.
12. Judge Terry never disclosed to counsel or the parties at any time during the four days of trial that he had conducted independent research on Mrs. Whitley or had visited any web site belonging to Mrs. Whitley.

13. Following the conclusion of the hearing and after having orally entered his order, Judge Terry requested a bailiff to summon Conley and Schieck to return to the courtroom, whereupon Judge Terry disclosed his actions of having viewed Mrs. Whitley's web site and quoting a poem he found thereon.
14. Conley filed a Motion in the Cause on October 2, 2008, whereby she requested a) Judge Terry's order be vacated, b) a new trial, and c) Judge Terry's disqualification.
15. Judge Terry disqualified himself by Order filed October 14, 2008.
16. Judge Terry's Child Custody and Child Support Order was vacated and an order for a new trial entered on October 22, 2008.
17. Judge Terry cooperated fully with the investigation.

Conclusions

Judge Terry had *ex parte* communications with counsel for a party in a matter being tried before him. Judge Terry was also influenced by information he independently gathered by viewing a party's web site while the party's hearing was ongoing, even though the contents of the web site were never offered as nor entered into evidence during the hearing. Judge Terry's actions described above evidence a disregard of the principles of conduct embodied in the North Carolina Code of Judicial Conduct, including failure to personally observe appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved (Canon 1), failure to respect and comply with the law (Canon 2A), failure to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Canon 2A), engaging in *ex parte* communication with counsel and conducting independent *ex parte* online research about a party presently before the Court (Canon 3A(4)). Judge Terry's actions constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute (N.C. Const. art IV, § 17 and N.C.G.S. § 7A-376(a)).

Corrective Action and Acceptance of Terms

Judge Terry agrees that he will not repeat such conduct in the future, mindful of the potential threat any repetition of his conduct poses to public confidence in the integrity and impartiality of the judiciary and to the administration of justice.

Judge Terry agrees he will promptly read and familiarize himself with the Code of Judicial Conduct.

Judge Terry further agrees that he will not retaliate against any person known or suspected to have cooperated with the Commission, or otherwise associated with this matter.

Judge Terry affirms he has consulted with, or had the opportunity to consult with counsel prior to acceptance of this Public Reprimand.

I, B. Carlton Terry, Jr., hereby accept the terms contained in this Public Reprimand this the 25 day of March, 2009.

ORIGINAL SIGNED BY

B. Carlton Terry, Jr.

ORDER OF PUBLIC REPRIMAND

Now therefore, pursuant to the Constitution of North Carolina, Article IV, Section 17, the procedures prescribed by the North Carolina General Assembly in the North Carolina General Statutes, Chapter 7A, Article 30, and Rule 11(b) of the Rules of the Judicial Standards Commission, the North Carolina Judicial Standards Commission, hereby orders that B. Carlton Terry, Jr., be and is hereby PUBLICLY REPRIMANDED for the above set forth violations of the Code of Judicial Conduct. Judge Terry shall not engage in such conduct in the future and shall fulfill all of the terms of this Public Reprimand as set forth herein.

Dated this the __1st__ day of _____April_____, 2009.

ORIGINAL SIGNED BY

John C. Martin, Chairman

Judicial Standards Commission

QUESTIONS ON PUBLIC REPRIMAND:

1. What was Judge Terry accused of doing? Is there any indication that Judge Terry was biased against one of the parties?
2. Didn't Conley get all the relief she wanted for her client in her Oct. 2 motion? If so, why did the dispute regarding Judge Terry continue?
3. What kind of proceeding is this? Is this a lawsuit or something different?
4. What "law" was Judge Terry accused of breaking?
5. Who were the decision-makers in this matter? Judges? Lawyers? See <http://www.nccourts.org/Courts/CRS/Councils/JudicialStandards/Default.asp>.
6. Did Judge Terry lose his job as a result of this matter? Should he?
7. In a system of procedural justice, what roles do judges and lawyers play?
8. Should courts have rules that tell lawyers and judges how to conduct civil litigation? What topics might such rules cover? How detailed should they be?

TWO MEN AND A TRUCK INTERNATIONAL, INC., a Michigan corporation, Plaintiff,

v.

CLETE, INC., a North Carolina corporation, d/b/a Truck and Two Guys Moving;
and Bruce Hensley, an individual, jointly and severally, Defendants.

Civil No. 1:07CV394.

United States District Court, W.D. North Carolina, Asheville Division.

June 19, 2008*

James M. Harrington, The Harrington Practice PLLC, Charlotte, NC, for Plaintiff.

MEMORANDUM AND ORDER

THIS MATTER is before the Court on Plaintiff's motion for a preliminary injunction. For the reasons stated herein, the Court will grant the requested preliminary injunction, however, rulings on Plaintiff's motions for default judgment and permanent injunction and for attorney fees and costs will be deferred.

I. PROCEDURAL HISTORY

Plaintiff, who is in the moving business, filed a complaint on December 18, 2007, against Defendants Clete, Inc., d/b/a Truck and 2 Guys Moving, and Bruce Hensley, the owner of Clete. According to the complaint, Defendants, who are also in the moving business, are actively advertising and operating a company whose business name bears a confusing similarity to Plaintiff's nationally recognized trademark. The complaint alleges trademark infringement and unfair competition in violation of the federal Lanham Act and Chapter 75 of the North Carolina General Statutes, as well as unjust enrichment. Based on these causes of action, the complaint seeks an injunction that would prevent Defendants from advertising or operating their business as "Truck and 2 Guys Moving" or any other confusingly similar name. It also requests monetary damages, attorney's fees, and statutory interest.

On January 7, 2008, Plaintiff moved for a preliminary injunction, seeking to enjoin Defendants from using the designation "Truck and 2 Guys Moving." Plaintiff also requested that the Court require Defendants to assign their business telephone numbers to Plaintiff; provide accounts of sales and profits to Plaintiff; and destroy or surrender all labels, signs, vehicles, and other advertising bearing the confusingly similar business name. The Court denied this motion without prejudice, finding that the record, at that time, contained no indication that either the complaint or the motion for preliminary injunction had been successfully served on any of the Defendants.

Plaintiff then made a number of attempts to serve Defendants with the summons and complaint. Ex Parte Motion for Alternative Service, filed March 6, 2008, at 2. Defendants, however, consistently acted to evade service of process, using deception and – it

* Ed. note: the case has been edited, including omissions of some citations and footnotes.

appears – threatening tactics.¹ *Id.* After considerable difficulties, Plaintiff requested the Court to detail the United States Marshals Service to effect service of process. The Court did so, and the Marshals Service, after several attempts, finally managed to serve the summons and complaint. Order, filed March 17, 2008, at 1-2 (finding that Plaintiff had used its best efforts to effectuate service and that adequate cause existed to involve the Marshals Service); Process Receipt and Return, filed March 31, 2008, at 1, 3 (indicating that Defendant Hensley again attempted to evade service and that multiple endeavors and surveillance were required in order to successfully serve him).

Plaintiff then renewed its motion for preliminary injunction. Plaintiff served its renewed motion on Defendants by mailing it to their last known address Additionally, at Plaintiff’s behest, the Clerk made an entry of default against Defendants on May 15, 2008. Plaintiff then requested a default judgment and a permanent injunction against Defendants.

II. DISCUSSION

A. Motion for Preliminary Injunction

Federal Rule of Civil Procedure 65 governs the entry of injunctive relief and provides in pertinent part that, “[e]very order granting an injunction ... must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail ... the act or acts restrained or required.” Fed. R. Civ. P. 65(d)(1). In analyzing the propriety of a preliminary injunction, the Fourth Circuit has observed:

[P]reliminary injunctions are extraordinary interlocutory remedies that are granted in limited circumstances and then only sparingly. The limited circumstances amount to the demonstration of a need to protect the status quo and to prevent irreparable harm during the pendency of the litigation to preserve the court’s ability in the end to render a meaningful judgment on the merits. If that need is not presented, then a preliminary injunction should not be considered. But if the need is demonstrated, then the entry of a preliminary injunction rests in the discretion of the district court, which is informed by balancing factors under an analysis conducted pursuant to the familiar four-part test described in *Blackwelder [Furniture Co. of Statesville v. Seilig Manuf. Co.]*, 550 F.2d 189, 194-96 (4th Cir.1977)]. Under this test

a court should consider (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; (2) the likelihood of harm to the defendant if the injunction is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest.

Further, the plaintiff bears the burden of establishing that each of these factors supports granting the injunction.

¹ Plaintiff represented to the Court that it had hired a private investigation firm to serve Defendants with the complaint and summons. According to Plaintiff, after two unsuccessful attempts to serve Defendants, the firm refused to send its employees back again, believing Defendant Hensley to be dangerous.

In re Microsoft Corp. Antitrust Litig., 333 F.3d 517, 526 (4th Cir.2003) (internal citation and quotation marks omitted). “In applying this four-factor test, ‘[t]he irreparable harm to the plaintiff and the harm to the defendant are the two most important factors.’...Emphasis on the balance of these first two factors results in a sliding scale that demands less of a showing of likelihood of success on the merits when the balance of hardships weighs strongly in favor of the plaintiff, and vice versa.” *Id.* (alteration in original) (quoting *Rum Creek Coals Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir.1991)).

In this case, therefore, the Court must first examine whether the “limited circumstances” described in *Microsoft* exist here: namely, whether Plaintiff has demonstrated “a need to protect the status quo and to prevent irreparable harm during the pendency of the litigation to preserve the court’s ability in the end to render a meaningful judgment on the merits.” *Id.*

Plaintiff’s complaint includes an affidavit describing numerous specific instances in which customers have confused “Two Men and a Truck” and “Truck and 2 Guys Moving,” including several occasions in which unhappy customers of Defendants expressed dissatisfaction to or about Plaintiff, thinking the two were the same. Based on these occurrences, Plaintiff maintains that “Defendants’ actions are depriving and/or damaging Plaintiff’s market goodwill and confusing Plaintiff’s prospective customers.” Motion for Preliminary Injunction, *supra*, at 15, 19-20 (citing instances of actual confusion by customers and potential customers). The Court finds that there is at least a temporary need to prevent future injuries of this type while this litigation is resolved and that a preliminary injunction would aid in preserving the Court’s ability to render a judgment in the future. The first step of the *Microsoft* test is, therefore, satisfied.

Having determined that the “limited circumstances” are present in which a preliminary injunction may be issued in the Court’s discretion, the Court must now decide whether to exercise that discretion. The Court’s decision is informed by the four-prong analysis described in *Blackwelder*. The first *Blackwelder* factor is the likelihood of irreparable harm to Plaintiff absent the requested relief. Particularly in light of the documented instances of misplaced hostility by Defendants’ customers, the Court finds that enabling Defendants to continue with the alleged infringement is very likely to cause irreparable harm to Plaintiff in the form of lost business, decreased revenue, and loss of reputation and goodwill.

The second *Blackwelder* factor is the likelihood of harm to Defendants from a preliminary injunction. Defendants could indeed incur harm from even a temporary prohibition on the use of their “Truck and 2 Guys Moving” business name; however, the likely harm to Plaintiff from a lack of injunction is potentially greater, given that Defendant’s business is only about a year and a half old and Plaintiff has been in business since 1985.

The third factor is the likelihood that Plaintiff will succeed on the merits. Given Defendants’ history of total passivity and non-responsiveness in this lawsuit, coupled with the striking similarity between Plaintiff’s and Defendants’ business names, the Court finds that this factor weighs very heavily in Plaintiff’s favor.

Finally, as to the fourth factor-public interest considerations – as noted above,

Plaintiff has carefully documented instances of customers' mistaking Plaintiff for Defendants and vice versa. It appears likely that a preliminary injunction would at least temporarily eliminate the potential for such confusion, which would indeed be good for the public.

On the basis of these considerations, the Court concludes that entry of a preliminary injunction is proper in this case. Although Defendants will likely incur harm from such an injunction, the other three *Blackwelder* factors are heavily in Plaintiff's favor and outweigh any potential harm that Defendants may suffer.

B. Motion for Default Judgment and Permanent Injunction

After receiving an entry of default by the Clerk, Plaintiff has moved for entry of a default judgment and permanent injunction. In addition to the injunction, Plaintiff requests the following monetary relief: (1) treble damages "in consequence of [Defendants'] ... willful acts of service mark infringement and unfair competition"; (2) treble damages "in consequence of [Defendants'] ... willful acts, which have caused injury to Plaintiff's goodwill and reputation, and caused Plaintiff to suffer damages in lost revenue due to Plaintiff's franchisees' lost sales"; (3) statutory interest; and (4) attorneys' fees and expenses totaling \$22,210.18. Accompanying affidavits detail the attorneys' fees and expenses incurred thus far in the prosecution of this litigation. Plaintiff has not, however, attached any documentation pertaining to the two different types of treble damages it requests.

The undersigned recognizes that Defendants' past conduct and recalcitrance make it difficult for Plaintiff to ascertain the exact amount of damages. Therefore, as part of the accompanying preliminary injunction, the Defendants will be required to provide the Court and Plaintiff financial information regarding sales and profits while operating under the infringing name. . . . This action will, of necessity, defer any ruling on the Plaintiff's motion for default judgment and permanent injunction until such time as the Defendants comply with the Court's preliminary injunction or the deadline for doing so expires.

As to Plaintiff's request for attorneys' fees and expenses, Plaintiff has already named a sum certain and submitted the necessary supporting documentation. . . . However, because attorney fees and expenses will no doubt continue to be incurred until this litigation is concluded, the Court will also hold in abeyance Plaintiff's request for attorney fees and costs to allow Plaintiff to amend such request and for a single order to encompass the entire fee request.

III. ORDER

IT IS, THEREFORE, ORDERED that Plaintiff's motion for a preliminary injunction is hereby GRANTED, and such is filed contemporaneously herewith.

IT IS FURTHER ORDERED that Plaintiff's motions for a default judgment, permanent injunction, and for attorney fees and costs are hereby held in abeyance pending further developments in this litigation.

QUESTIONS ON TWO MEN CASE:

1. Who is the plaintiff? Who are the defendants?
2. Is the case being heard in a state court or a federal court? If you were the plaintiff, which court would you prefer? Which court might defendants prefer? Whose choice should prevail?
3. Go to the plaintiff's site at <http://www.twomen.com>. Where is it based? Where does it do business? Did the plaintiff file suit in its home state? Why or why not?
4. What are the plaintiff's "causes of action?" Why is the plaintiff pleading multiple causes of action? Wouldn't one be enough to win?
5. What relief, or "remedies," did the plaintiff seek? What remedies did it get? Is the case over?
6. Why is no attorney listed for the defendants? Why was there a motion for "Ex Parte Motion for Alternative Service?" What does "*ex parte*" mean? As with any term you don't understand, look it up in a legal dictionary such as *Black's Law Dictionary*. Is there any reason to be concerned about *ex parte* litigation?
7. Did the defendants defend against the lawsuit? What arguments might you make for the defendants? For example, are the trademarks different enough to prevent consumer confusion? In one case, the court listed a test for similarity:

We test the degree of similarity between [trade]marks on three levels: sight, sound, and meaning. We do not consider these factors in isolation. Instead, we must examine them "in the context of the marks as a whole as they are encountered by consumers in the marketplace." . . . We give the similarities of the marks more weight than the differences.

King of the Mountain Sports, Inc. v. Chrysler Corp., 185 F.3d 1084, 1090 (10th Cir. 1999) (citations omitted). Based on this test, do the defendants have any arguments that the competing trademarks are distinguishable?

8. What other arguments might you make for defendants? One court held:

The greatest protection extends to marks that are purely arbitrary or fanciful and bear no relation to the products or services sold under the mark. The marks "Kodak" and "Xerox" are such marks. A suggestive mark, as the term implies, suggests characteristics of the product or service offered but does not actually describe the product or service. A suggestive mark is entitled to a narrower range of protection than an arbitrary mark.

Minturn Advertising, Inc. v. Hermsen Design Assoc., Inc., 728 F. Supp. 430, 432 (N.D. Tex. 1990) (citations omitted). Does the plaintiff's mark bear a relation to its services? If so, is the plaintiff's trademark arbitrary, fanciful, or suggestive? If you were defendant's lawyer, what arguments might you make that the plaintiff's mark deserves narrow legal protection?

9. Can you distinguish the reprimand against Judge Terry with the *Two Men* case? Based on the rationale of the *Terry* decision, did the Judge in *Two Men* behave improperly?
10. Suppose the *Two Men* Judge became a Facebook friend of the plaintiff's lawyer after the case was filed, but didn't discuss the case online. If you think that is improper, what if they were "friended" before the trademark lawsuit was filed? What if the judge and lawyer had gone to law school together?