2017 WL 6452028 (Ind.Super.) (Trial Order)
Superior Court of Indiana.
Marion County

SIMON PROPERTY GROUP, L.P., on behalf of itself and its affiliated Landlord entities, Plaintiff,
v.
STARBUCKS CORPORATION, Defendant.

No. 49D01-1708-PL-032170.
November 27, 2017.

Order Granting Plaintiff's Motion for Preliminary Injunction

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Heather A. Welch, Judge.

***1** On August 21, 2017, Plaintiff Simon Property Group, L.P. ("Simon") filed its Verified Complaint for Injunctive Relief ("Complaint") (Ex. 201) against Defendant Starbucks Corporation ("Starbucks"). The Complaint was verified by Bruce Tobin, Simon's Senior Executive Vice President-Leasing. (Ex. 201 at 17). Simon contemporaneously filed a Motion for Temporary Restraining Order and Preliminary Injunction seeking to compel Starbucks to operate its Teavana tea stores in 77[1] Simon malls in 26 states throughout the U.S. (the "Motion"). The parties subsequently submitted an Agreed Order, which the Court entered on August 25, 2017, in which the Court ordered that Starbucks was restrained and enjoined until the Court issues a ruling on Simon's Motion for Preliminary Injunction in any manner, from directly or indirectly:

[1] The Complaint and Motion refer to 78 stores; however, it is undisputed that the lease for one store has since expired by its own terms. (Ex. 346) (Teavana Lease Termination.)

i. Failing to occupy and conduct business as usual in the leased premises for any Teavana store at any Simon shopping center owned in whole or in part or managed by Simon (the stores subject to this Agreed Order are set forth on Exhibit 1), including any failure to be open and operating during normal business hours, as required by the leases for those stores ("Leases"); and

ii. Conducting, promoting, or advertising any fire, "going out of business," or similar sale, as prohibited by any of the Leases listed on Exhibit 1.

On October 12 and 13, 2017, the Court held a hearing on Simon's Motion for Preliminary Injunction. Both parties appeared by counsel. Simon presented live testimony from Simon's Executive Vice President of Leasing, Sharon Polonia, and Simon's President of Malls and Chief Administrative Officer, John Rulli. Simon also presented by video deposition Starbucks' Store Development Director of Emerging Brands, Lisa Kerns, who testified as a Rule 30(B)(6) representative of Starbucks. Starbucks presented live testimony from Robert Herring (Starbucks' Director of Finance of Teavana), Bernard Acoca (President of the Teavana business unit), and Todd Menenberg, CPA, accounting expert with Navigant Consulting.

In addition to the Complaint, the Court accepted affidavit testimony from the following Simon witnesses: Melissa Palencia (Ex. 206), Megan Magyery (Exs. 209 & 211), David Carson, Bruce Tobin (Ex. 207) and Simon expert witness John Talbott (Ex. 208). The Court accepted affidavit testimony from Starbucks witness Catherine McCabe (Ex. 344). [2] Simon submitted deposition designations from Bernard Acoca, Lisa Kerns and Robert Herring, all of whom testified as Indiana Trial Rule 30(B)(6) corporate representatives of Starbucks. Starbucks submitted deposition designations from John Rulli, Bruce Tobin, Sharon Polonia, John Talbott and Tom Mullaney. (Ex. 350). Simon submitted counter designations for Mr. Rulli, (Ex. 348), Mr. Tobin, (Ex. 349), Ms. Polonia and Mr. Talbott. Starbucks submitted counter designations for Mr. Acoca, (Ex. 217), Mr. Herring, (Ex. 218), and Ms. Kerns (*Ex.* 216). The Court also accepted documentary exhibits, including the Leases at issue, various Ind. R. Evid. 1006 summaries of the terms of those leases, and other exhibits. (Ex. 340) (unprofitable Teavana stores); (Ex. 345) (Teavana lease provisions); and (Ex. 346) (Teavana store area as a percentage of Simon gross leasable area (GLA) and other lease data).

2 Starbucks also offered an affidavit from Kevin Kernan, but by Order dated October 24, 2017, the Court granted Simon's Motion to Strike that affidavit from evidence.

***2** The issue for the Court on the pending motion is whether to enter a preliminary injunction enjoining Starbucks from closing Teavana stores until the Court can have a full trial on the merits of this case. Starbucks' witnesses testified that Starbucks intends to cease operating those Teavana stores no later than January 31, 2018. Simon argues Starbucks should be ordered to continue operating those stores until this Court has an opportunity to rule on the merits in order to prevent irreparable harm to Simon and to preserve Simon's right to the specific performance agreed upon in the Leases.

Having considered the foregoing evidence and judging the credibility of the witnesses, the Court enters the following Findings of Fact, Conclusions of Law, and Order Granting Simon's Motion for Preliminary Injunction.

FINDINGS OF FACT

I. The Parties.

1. Simon is a Delaware limited partnership based in Indianapolis, Indiana that owns, develops and manages retail real estate properties, consisting mostly of shopping centers. (Ex. 201 [Complaint] ¶11), Simon's U.S. shopping centers primarily fall into three platforms: regional malls, the Mills, and Premium Outlets. (Rulli Dep. at 9:22-10:2). Simon's "malls" are enclosed regional and super-regional shopping centers selling full price, retail merchandise. The Mills shopping centers are hybrid products that have both full-priced and value and discount-priced merchandise and also have various forms of entertainment. Premium Outlets sell off-price or outlet products. (Hrg. Tr. at 80:13 to 81:3, 154:6 to 155:8, 196:4-17).

2. Simon has a direct or indirect ownership interest in and/or authority to manage the malls for each of the landlords on whose behalf Simon initiated this action. (Ex. 200 [Ratification of Action]). Those landlords have expressly verified their ratification of Simon's pursuit of this action. (*Id.*). Each of the landlord entities is a separate entity, many of which have mortgages on their shopping centers. (Ex. 53; Ex. 205 [Simon 2016 Form 10k] at 43-46 (listing mortgage and unsecured debt by mall)).

3. Starbucks is a publicly-traded, Seattle-based Washington corporation and purveyor of coffee and tea products that operates more than 26,000 stores across the globe, including 379 Teavana-branded retail locations. (Verified Complaint ¶12).

4. In 1997, an Atlanta-based entrepreneur, Andy Mack, opened a Teavana retail store. The store focused on the retail sale of premium loose-leaf tea, authentic artisanal teaware and other tea-related merchandise. Over the period of 2006 to 2012, Teavana Corporation expanded rapidly to 379 mall-based stores.

5. In 2012, Starbucks decided to enter the business of selling loose leaf and tea-related merchandise. Rather than build its own Tazo specialty retail stores, Starbucks acquired Teavana Corporation and its existing mall-based retail store network in North America. (Ex. 344 ¶ 5, Affidavit of Catherine G. McCabe).

6. On January 1, 2013, Starbucks acquired all of the controlling interests in Teavana Corporation for $620 million in cash. (Verified Complaint ¶15, Exhibit 3).

7. On March 25, 2016, Starbucks announced that it merged its Teavana subsidiary with Starbucks and "assume[d] and be[came] directly responsible for the obligations of Teavana under Teavana's leases." (Ex. 217 [Acoca Dep.] at 18:4 to 20:17; Ex. 218 [Herring Dep.] at 9:11-15, 26:19-21, 27:11-15, *see* Ex. 201 at Complaint Ex. 3). The Teavana-branded mall stores are, therefore, leased and operated by Starbucks, and Starbucks is the tenant under all of the leases at issue ("Leases").

8. Teavana is a brand within Starbucks Corporation, but not a separate legal entity. (Ex. 217 [Acoca Dep.] at 18:4 to 20:17; Ex. 218 [Herring Dep.] at 9:11-15, 26:19-21, 27:11-15).

***3** 9. Starbucks is organized into Operating Segments[3] and reports its financial results on this basis, (Ex. 9 at note 11; Tr. 447:16-21; 450:5-20). The Teavana Business Unit is organized under the "All Others Segment," which does not include Starbucks cafes. (*Id*). Starbucks cafes in North America operate under the "Americas" Segment. (*Id*).

[3] Starbucks currently has five Operating Segments: (i) Americas - which includes the North American Starbucks cafes; (ii) China/Asia Pacific (CAP); (iii) Europe, Middle East, and Africa (EMEA); (iv) Channel Development; and (v) All Other Segments. (Ex. 9 at note 11; Tr. 447:16-21; 450:5-20.) The Operating Segments determine how Starbucks operates its business, evaluates financial results and makes key operating decisions. (*Id.*)

10. The Teavana Business Unit operates the Teavana mall-based stores, a stand-alone e-commerce platform, and a small number of Teavana franchise stores. (Tr. 449:7-11). The Teavana Business Unit has its own executive team, which includes:

• Bernard Acoca, President;

• Catherine McCabe, VP Sales and Operations;

• Robert Herring, Director of Finance;

• Lisa Kerns, Store Development; and

• Michelle Chin, Marketing

(*Id.* 447:8-15).

11. Teavana's supply chain relies on a dedicated 80,000-square foot distribution center, located in Stratford, Connecticut. The Teavana Business Unit acquired and continues to operate the distribution center acquired from Teavana Corporation. (Ex. 344 ¶ 5). This distribution center serves exclusively the Teavana retail stores, ecommerce and franchise sales; it does not provide any distribution for Starbucks cafes. (*Id.*; Tr. 481:24-482:20).

II. The Leases for The Starbucks Teavana Stores.

12. Starbucks' Teavana-branded stores are mall-based specialty retailers of high-end tea products. (Complaint ¶2, Exhibit 2 at page 5 of 38).

13. Simon or its affiliates and Starbucks are currently parties to 77 Leases for Teavana stores located throughout the United States, including three (3) stores in Simon Malls in Marion County, Indiana: Castleton Square, The Fashion Mall at Keystone, and Circle Centre Mall. (Complaint ¶ 2). [4]

[4] Simon's original complaint involved 78 Teavana stores, but the lease for one Teavana store — Burlington Mall – expired naturally according to its terms. (Verified Compl, Exhibit 5 (identifying 9/30/17 as the lease end date)).

14. Starbucks also operates more than 67 Starbucks branded stores in those same 77 Simon Malls in which it operates a Teavana store, and operates a total of 218 Starbucks branded stores in Simon malls and shopping centers. (Ex. 209 [Affidavit of Megan R. Magyery] ¶ 3]).

15. After Starbucks purchased Teavana Corporation in 2013, Starbucks continued to sign new Leases for Teavana stores in Simon's Malls. (Verified Complaint ¶18; Ex. 211A [Affidavit of Megan Magyery]). The most recent Lease was signed on March 30, 2016, wherein Starbucks agreed to open and continuously operate a Teavana store at King of Prussia Mall through January 31, 2027. (Complaint ¶18; Ex. 211A).

16. Only two (2) of the 77 Leases are scheduled to expire prior to the spring of 2018. (*Id*). The terms of the other 75 Leases extend as far out as January 31, 2027. (*Id*).

17. All the Leases contain a "Continuous Operations Covenant." (Ex. 202 [1006 Lease Summary]). That covenant, as it appears in § 8.2 of the Lease for Starbucks' Teavana store at Castleton Square, provides:

> ***4** Tenant will *occupy* the Premises upon the Commencement Date and *thereafter continuously operate and conduct in one hundred percent (100%) of the Premises during each hour of the entire Lease Term* when Tenant is required under this Lease to be open for business the business permitted in Section 8.1 hereof, with a full staff and full stock of merchandise, using only such minor portions of the Premises for storage and office purposes as are reasonably required. The parties agree that: *Landlord has relied upon Tenant's occupancy and operation in accordance with the foregoing provisions; because of the difficulty or impossibility of determining Landlord's damages which would result from Tenants violation of such provisions,* including but not limited to damages from loss of Percentage Rent from Tenant and other tenants, and diminished saleability, mortgageability and economic value, Landlord shall be entitled to liquidated damages if it elects to pursue such remedy; therefore for any day that Tenant does not fully comply with the provisions of this Section 8.2 the Minimum Annual Rent, prorated on a daily basis, shall be increased by ten percent (10%), such increased sum representing the damages which the parties agree Landlord will suffer by Tenant's noncompliance. *In addition to all other remedies, Landlord shall have the right to obtain specific performance by Tenant upon Tenant's failure to comply with the provision of this Section 8.2.*

(Complaint, Ex. 5, at § 8.2 (*emphasis* added)). The other Leases contain the same or substantially similar language. (Ex. 202).

18. In 72 of the Leases, Starbucks expressly agreed to the remedy of specific performance for any breach of the Continuous Operations Covenant:

> In addition to all other remedies, Landlord shall have the right to obtain specific performance by Tenant upon Tenant's failure to comply with the provisions of this Section 8.2.

(Ex. 202).

19. All the Leases – including the five (5) Leases that do not expressly contain the language regarding specific performance – contain at least two additional provisions authorizing Simon to obtain injunctive relief in addition to all other available remedies. (Ex. 202). For example, Starbucks' lease regarding its Teavana store at Castleton Square provides:

> In the event of any breach *or threatened breach* by Tenant of the terms and provisions of this Lease, Landlord shall have the right to injunctive relief as if no other remedies were provided for herein for such breach.

(Complaint, Exhibit 5, § 18.2 (emphasis added); Ex, 202).

20. The Leases also generally state that none of the remedies granted to Simon are exclusive. The Castleton Square Lease, for example, states:

> Any rights and remedies reserved by, or granted to, Landlord under this Lease, at law or in equity, are distinct, separate, and cumulative, and the exercise of any one of them shall not be deemed to preclude, waive or prejudice Landlord's right to exercise any or all others.

(Complaint, Exhibit 5 at § 18.2). All 77 Leases contain the same or substantially similar language. (Ex. 202).

21. Starbucks testified through its Rule 30(B)(6) corporate representative that Starbucks assumed the Leases for Teavana-branded stores when it acquired Teavana. (Herring Dep. at 97:12-19).

22. Starbucks also testified that, at the time it acquired Teavana and assumed Teavana's obligations under the Leases, it intended to honor those Leases. (Kerns Dep. at 59:14-24).

23. Starbucks performed due diligence regarding the Leases it assumed before it acquired Teavana and made the decision to assume the Leases for the Teavana stores. (Kerns Dep. at 57:5-9).

24. Starbucks understood there were numerous provisions that had been negotiated in those Leases, such as lease term, whether there would be exclusivity for the tea category in the Mall, whether there could be another Teavana-branded store within a certain distance from the Mall, the actual location of the store within a Mall, and co-tenancy requirements. (Kerns Dep. at 50:18 to 52:25, 53:14-22).).

***5** 25. Starbucks understood the Leases it assumed and the Leases it signed after it acquired Teavana contained a Continuous Operations Covenant, and specified that specific performance as an agreed remedy for violation of the Continuous Operations Covenant. (Kerns Dep. at 44:22-25; 46:18-47:1; 47:17-22; Herring Dep. at 103:17-25). Starbucks understood when it assumed the Leases and when it signed new Leases that the Teavana-branded stores had a risk of not

performing well financially, that the stores may or may not be profitable, and that the stores may or may not produce a positive cash flow. (Kerns Dep. at 58:1 to 59:14; Herring Dep. at 99:13-23,102:4-14,103:6-16; Acoca Dep. at 80:20 to 81:4).).

26. Starbucks made a business decision that it was willing to assume the financial and business risks inherent in assuming the obligations under the Leases for the Teavana stores, as well as in the Leases signed after the acquisition, including the Continuous Operations Covenants and agreed specific performance remedies in the Leases. (Kerns Dep. 61:8 to 63:3; Herring Dep. 97:25 to 98:5).

III. Starbucks Publicly Announces Its Intent to Close the Teavana Stores.

27. For nearly the past four years, Teavana consistently experienced a negative variance between its actual operating income and the AOP operating income forecast. (Tr. 467:12-469:11; Ex. 316). For example, while the Fiscal Year 2016 AOP projected an annual loss of $5.9 million, the actual operating loss was $40 million. (*Id*). Similarly, the Fiscal Year 2017 AOP projected an annual loss of $7.3 million, while the actual loss was $50 million. (*Id)*.

28. Beginning in 2014, the Teavana Business Unit made major investments designed to stem losses and make the Teavana retail stores profitable. In 2015, Teavana also undertook a project to refresh the appearance of some stores, which cost around $30,000 per store and included upgraded paint, casework, lighting, music, signs, equipment fixtures, and finishes. (Ex. 344 ¶ 12).

29. In 2016, Teavana also undertook a series of strategic initiatives to drive more store traffic, including adding merchandise at more accessible price points, offering smaller more affordable packages of tea and increased discounts, and investing millions of dollars on in-store sampling activities. (*Id.* ¶ 13).

30. In 2016, as part of Teavana's efforts to revitalize the brand and improve business, Teavana piloted "New Concept" stores at 12 locations across the country. (Ex. 344 ¶ 14). The new concept stores updated and redesigned store appearance and layout to make the shopping experience more experiential and personalized. (*Id.*; Ex. 303). Teavana invested considerable time, energy and work on the re-design of the stores, and brought in members of its leadership team to personally train the staff and teach them how to make the sales process more experiential. (Ex. 344 ¶ 14).

31. Following the perceived failure of the "New Concept" stores and other failures, Teavana had a group of executives, called the "Project Autumn Team," who were responsible for evaluating and addressing the unprofitable retail stores in the Teavana portfolio. (Tr. 491:2-4). Over the course of 2017, the team's financial reporting—monitored on a daily basis and month to month—determined that the Teavana retail store business model was not viable because the New Concept stores still declined, (Ex. 344 ¶ 17), year-to-year sales were shrinking at an accelerating rate, (Ex. 316), and the number of unprofitable stores were increasing. (Tr. 493:14-494:9; Ex. 4).

32. On July 27, 2017, Starbucks publicly announced that it decided to close all its Teavana-branded retail stores, including 78 Teavana-branded stores located in Simon's Malls, prior to lease expiration. (Complaint, Ex. 1 at page 2; Ex. 207 [Affidavit of Bruce Tobin] ¶ 6).

***6** 33. Prior to the announcement, Starbucks had evaluated whether it could close its Teavana-branded stores in accordance with the applicable leases. (Kerns. Dep. at 78:3 to 79:1, 81:11 to 83:2, 83:16 to 84:7; Hrg. Tr. at 527:17 to 529:20, 573:9 to 575:6; Exs. 21, 23 and 24).

34. Starbucks testified that when it made the public announcement, valid, enforceable Leases were in place for all 77 Teavana stores and that those Leases required Starbucks to keep those stores open and operating during the entire term of each Lease. (Kerns Dep. at 44:17-25; Acoca Dep. at 79:12-18).

35. Starbucks has also stated that it believed when it announced it was closing its Teavana stores located in Simon Malls prior to the expiration of the Leases would constitute breaches of the Leases. (Kerns Dep. at 45:1-16; Acoca Dep. at 84:12 to 85:16).

36. Starbucks understood that when it made the announcement that Simon could choose to enforce the Lease terms, including the Continuous Operations Covenants. (Kerns Dep. at 46:18 to 47:1). Starbucks also understood that the Leases contained provisions pursuant to which Starbucks had agreed to specific performance of the Continuous Operations Covenants as a remedy for any violation or threatened violation of the Continuous Operations Covenant. (Kerns Dep. at 47:17-25).

37. Starbucks also testified that its premature closure of the Teavana stores in Simon's Malls would be a breach of the Leases. (Hrg. Tr. at 575:7 to 576:6, 583:9-16 ("As I said earlier, I'm not contesting the breach of the lease.")

38. Since the time of the announcement, Starbucks has taken affirmative steps to begin closing the stores. Starbucks has started "moving to a minimum workforce" at its Teavana distribution center (Herring Dep. at 91:7-25). Starbucks also has stopped purchasing inventory and has begun reassigning employees. (Acoca Dep. at 15:10 to 16:1; Hrg. Tr. at 483:14-18, 519:8-15, 521:8-23, 567:18-25).

39. At the hearing, Starbucks stated it currently plans to close all its Teavana-branded stores by the end of January 2018. (Hrg. Tr. at 563:5-22, 575:7-14; Acoca Dep. at 10:10-13). Starbucks already has begun implementing "inventory mitigation strategies" to reduce its inventory for its Teavana-branded stores between now and the planned closure date. (Acoca Dep. at 15:10 to 16:1; Hrg. Tr. at 483:14-18, 519:8-15). It also has begun to look for possible replacement positions for employees who will be affected by the closures and has begun to reassign employees away from responsibility related to the Teavana-branded stores in Simon's Malls. (Acoca Dep. at 15:10 to 16:1; Hrg. Tr. at 521:8-23).

40. Mr. Acoca testified that he "couldn't say specifically that we have an action plan in place for [Starbucks to continue operating its Teavana stores in compliance with the Continuing Operating Covenants]." (Hrg. Tr. at 570:18-19).

41. As difficult as Starbucks contended it would be for it to simply comply with an order from this Court to honor its continuous operations obligations, Starbucks stated that if it is allowed to actually close its Teavana stores, it would be a "monumental task" to reopen them. (Herring Dep. at 92:20-93:2; Hrg. Tr. at 521:24 to 522:8, 569:22 to 571:25). Starbucks agrees that it would be "extremely expensive" to try to reopen the stores, (*id.* at 94:2-7; 95:4-22), and that it does not know how long it would take to reopen the stores if it closed them—if it could be done at all. (*Id.* at 96:24-97:11).

IV. Starbucks' Financial Health

***7** 42. Starbucks has a market capitalization of over $80 billion and has announced an intention to create 240,000 new jobs globally and 68,000 new jobs in the United States in the next five years. (Complaint, Ex. 1).

43. For the first quarter of Starbucks' fiscal year 2017 (which runs from October 2016 to September 2017), Starbucks reported a consolidated operating income of $1.1 billion, and record net revenues of $5.7 billion. (Herring Dep. at 55:12-18; Ex. 5).

44. In the second quarter of fiscal year 2017, Starbucks had consolidated operating income of $953 million and consolidated net revenues of $5.3 billion. (*Id.* at 61:8-20; Ex. 6).

45. For the third quarter of fiscal year 2017, Starbucks' net revenue was at $5.7 billion, with operating income of more than $1 billion for the quarter. (*Id.* at 64:3-14; Ex. 7).

46. Starbucks' ultimate operating income at the end of fiscal year 2017 is more than $4 billion, with an estimated more than $21 billion in revenues. (Herring Dep. at 64:15 to 65:65:2).

47. At the end of fiscal year 2016, Starbucks had cash and cash equivalents on hand of more than $2.1 billion, which was an increase of $600 million from the prior year end. (Herring Dep. at 72:4-12; Ex. 8). As of the third quarter of fiscal year 2017 (end of July 2017), Starbucks had cash and cash equivalents on hand of more than $2.7 billion. (*Id.* at 72:17-23; Ex. 9).

V. Simon's Financial Health

48. Simon is the largest real estate investment trust (REIT) and shopping mall operator in the United States. As of December 31, 2016, Simon owned or held an interest in 206 income-producing properties in the United States, which include 108 malls. (Ex. 205, at 5).

49. In 2016, Simon had annual revenues of $5.44 billion. (Tr. 620:6-13). On August 1, 2017, Simon announced that its leasing spreads—the measure of the difference between rent per square foot on a new lease compared to the rent that was previously paid for the same space— was $8.13, an increase of 12.9%. (Ex. 66). On a net operating (NOI) basis, the increase in leasing spreads was even higher, 14.1%. (Ex. 63 at 3). In August 2017, after Starbucks announced the closure of the Teavana stores, Simon announced a second increase of its dividend in 2017 alone to $1.80/share, which was a 9.1% increase year-over-year. (*Id.* at 4)

50. Simon's portfolio notes that Teavana has one store that is 2099-square feet, 23 stores between 1002-1567-square feet, and 54 stores between 586-999-square feet. (Ex. 346).

VI. Simon's Curation of the Tenant Mix in Its Malls

51. Simon curates a mix of full-price and generally well-known tenants in its malls. Simon curated this mix of tenants in the 77 malls at issue in this case. (Rulli Dep. at 16:18-18:10; Hrg. Tr. at 104:3 to 105:15, 203:16 to 208:16). According to Simon's witnesses, a mall is not a random collection of stores, but rather is a co-dependent ecosystem that derives its success from the curation of a particular tenant mix, commonalities, externalities and cross-promotion. (Ex. 208 [Affidavit of John S. Talbott] ¶ 6; Verified Complaint ¶ 26; Hrg. Tr. at 197:24 to 199:25).

52. Simon curates the tenant mix at its malls on a property-by-property basis depending on a number of factors, such as the geographic area, the positioning of the property in the marketplace, and trade area demographics.

***8** 53. The tenant mix is important to Simon, to the consumer, and to other tenants. (Rulli Dep. at 16:18-18:10; 24:11-26:21; Polonia Dep. at 45:15-25; Hrg. Tr. at 221:16 to 224:1). Retailers have certain categories and types of tenants they want as co-tenants and whose stores they want to be near in one of Simon's malls and expect that those tenants will remain open and operating during the terms of their leases. (*Id.*). Every mall has its own particular tenant mix depending on the demographic, positioning of the mall in the marketplace, and other factors. (*Id.*).

54. The ultimate success of a mall depends upon the synergy created by the particular mix of tenants and the experiences offered by those tenants and by the mall itself. (Rulli Dep. 40:20-41:24; Talbott Aff. ¶ 8; Complaint ¶ 27). Each of Simon's tenants relies upon the others to attract a broad range of customers, which culminates in a successful retail project. (Talbott Aff. ¶ 9; Complaint ¶27).

55. A prospective retail tenant may visit the mall several times. (*Id.*). Retailers evaluate the other tenants around any open space and generally desire a symbiotic relationship with those other tenants. (Hrg. Tr. at 101:21 to 103:15).

56. Starbucks' corporate representatives admitted that tenant mix is an important factor to Starbucks. Lisa Kerns testified when Starbucks selected sites for its Teavana-branded stores in malls, Starbucks analyzed the other tenants in the mall and the tenant mix as a whole to understand what kind of customers are likely to be shopping in the mall. (Kerns Dep. at 12:23 to 13:21, 14:2-17, 27:20 to 29:7; see also Acoca Dep. at 137:9 to 138:20).

57. Bernard Acoca also testified to these same considerations in terms of the importance of the tenant mix in deciding where and whether to enter into lease agreements. (Acoca Dep. at 145:15 to 146:10; Hrg. Tr. 577:6 to 579:17).

VII. The Continuous Operation Clauses

58. Shopping center leases establish and reflect the co-dependencies between the landlord and tenant and among the various tenants. (Talbott Aff. ¶ 7; Hrg. Tr. at 209:9 to 211:20). The Continuous Operation Covenant provides assurance to the landlord and to other tenants that the tenant will occupy and remain open and operating in the shopping center during the term of its lease. (*Id.*; Hrg. Tr. at 86:13-24, 245:2 to 246:5). Simon testified that it and its tenants rely upon the fact that all tenants make these commitments and are obligated to honor them. (Complaint at ¶¶1, 28, 32; Hrg. Tr. at 208:9 to 211:20).

59. Mr. Rulli likewise testified that Continuous Operation Covenants are in almost all of Simon's leases with only very rare exceptions. (Hrg. Tr. at 211:23 to 212:22).

60. Tenants depend on one another being open in order to draw customers for the benefit of all, and it is Simon's role to ensure that tenants keep their promise to do so. (*Id.* ¶¶ 8-10; Ex. 206 [Affidavit of Melissa Palencia] ¶ 3).

61. Similarly, mall leases contain so-called “co-tenancy” provisions that permit a tenant to pay reduced rent or to vacate the mall if a certain percentage of the other tenants are not open and operating. (Rulli Dep. at 18:18-19:3; Hrg. Tr. 88:24 to 90:2).

62. Starbucks prefers other tenants stores located near its Teavana stores to remain open and operating during the terms of their leases. (Kerns Dep. at 19:8-14). For example, Ms. Kerns testified that if Starbucks were looking at locating a Teavana store in a shopping center that had Apple and Sephora as tenants, but knew that those tenants could leave any day and potentially be replaced with less preferred tenants like Forever 21 or Hollister, it would impact its view of whether Starbucks wanted to lease space in that center. (*Id.* at 24:3-14, 92:8-19).

***9** 63. Mr. Acoca testified that he had recently overseen a substantial investment in building a new concept Teavana store in the new “high end” portion of Simon's King of Prussia Mall in Pennsylvania. Mr. Acoca testified that the other tenants in that portion of the Mall were part of the reason it was attractive to be located there. (Acoca Dep. at 144:3 to 144:2; Hrg. Tr. at 579:11-15). It was part of his assumption when making the decision to locate there that these tenants would honor their commitments to be open and operating during the terms of their leases. (Hrg. Tr. at 579:16 to 580:10). When asked whether Starbucks would have made that investment if all of the other high-end tenants surrounding them were able to terminate their leases and vacate their stores at any time, he stated: “I don't think we would have opened that store thinking that we would ever find ourselves in a situation where a significant number of brands would decide to shut down their stores surrounding us all at one time where we would be negatively impacted by a situation like that,” (Acoca Dep.at 145:23 to 146:3). Mr. Acoca said he could not even envision a scenario in which a shopping center would operate without leases containing continuing operations covenants. (*Id.* at 146:11 to 149:22; Hrg. Tr. at 583:2-17). While Starbucks considers the King of Prussia Teavana store to be a failure, (Ex. 344 ¶ 14, p. 10), Starbucks' intentions behind placing a Teavana store in the King of Prussia mall remain relevant for this Court's analysis.

VIII. Alleged Harms Caused by Breaches of The Continuous Operations Covenants

64. Leasing space at Simon's Malls is a complex and time-consuming matter that takes place on a mall-by-mall, space-by-space basis. (Rulli Dep. at 16:18-18:10; 24:11-26:21; Polonia Dep. at 45:15-25). Simon's leasing personnel lease space in Simon's Malls based on leases that are known to be expiring and tenants who may be in financial distress and/or who have approached Simon about closing or relocating certain stores. (Hrg. Tr. at 113:14 to 115:12).

65. As Mr. Rulli explained, it typically takes 12 to 36 months to fill unexpected vacancies in shopping centers due to retailers' "open to buy" period when they make commitments to lease space in shopping centers. (Hrg. Tr. at 231:10 to 232:20; see also 114:14 to 116:21). Thus, Simon must work well in advance to fill vacancies it knows will exist in the future, and it is difficult for Simon to fill unexpectedly vacant space with a tenant who fits the desired mix for a particular Mall. (Hrg. Tr. at 114:14 to 116:21, 231:10 to 232:20).

66. Additionally, it is more difficult to lease space in one of Simon's Malls after a tenant has vacated than when a tenant is still occupying the space. (Hrg. Tr. at 101:21 to 104:2, 212:23 to 215:5, 230:16 to 231:9).

67. Because a desirable replacement tenant is not available, Simon may be forced to fill unexpected vacancies with a less creditworthy tenant, a tenant who does not fit the desired tenant mix, or a tenant who will only agree to less desirable lease terms, and/or a shorter-term lease. (Hrg. Tr. at 212:23 to 218:6, 230:16 to 231:9, 239:16 to 240:2). Mr. Rulli gave the example of tenants who would complain or seek to move or vacate their spaces in Simon malls if a less desirable tenant was placed adjacent to their stores. (Rulli Dep. at 124:19 to 127:4; Hrg. Tr. at 215:6 to 216:6).

68. Vacant space in Simon's malls reduces the image of the mall to consumers. (Rulli Dep. at 130:13-18). It also causes problems with existing tenants, who counted on their co-tenants to remain open and operating in the mall. (*Id.* at 131:18-132:13; Hrg. Tr. at 243:22 to 245:1).

69. Simon's Melissa Palencia testified by affidavit that, when a tenant prematurely closes in violation of its Continuous Operations Covenant, Simon's malls also incur various unbudgeted costs. These include costs to inspect space, inventory and store anything left behind, as well as to clean, repair, and prepare the space for another occupant. (Palencia Aff. ¶ 4).

70. Ms. Polonia testified that the current leasing environment is the most challenging since the "Great Recession" in 2008-09. (Hrg. Tr. at 108:1-13). Retailers are citing bankruptcies and announced store closures, including the Starbucks' Teavana announcement, and asking Simon what it is doing to defuse the situation. (Hrg. Tr. at 108:14 to 109:4, 113:1-13).

71. Simon has asked this Court to consider the harm from Starbucks' plan to prematurely close its Teavana-branded stores in the context of the massive number of announced store closures by tenants who, unlike Starbucks, are under financial distress. Within the last two years, an increasing number of retailers facing financial distress have decided to curtail or end their shopping center operations. (Complaint ¶¶ 8, 30). Mr. Rulli testified that Simon currently has over 2 million square feet of vacant space due to bankruptcies on top of 500,000 square feet of vacant space due to natural lease expirations. (Hrg. Tr. at 229:24 to 230:14). Ms. Polonia testified about the "enormous amount of inventory" of current vacant space due to tenants that are prematurely returning space. (Hrg. Tr. at 138:24 to 141:21). Occupancy rates are down year over year, and 5% is filled by short-term tenants filling space that could be occupied by longer term tenants. (Hrg. Tr. at 232:21 to 234:9).

***10** 72. Simon has struggled to fill much of the space vacated by these tenants who have closed their stores or who are planning on closing stores due to bankruptcy or financial distress. (Exhibit 61; Hrg. Tr. at 229:24 to 230:14).

73. The evidence showed substantial vacancies also exist in the mall platform. Only 16 of 72 stores closed as a result of The Limited bankruptcy have new tenants open and operating in them. (Exhibit 61; Hrg. Tr. at 229:24 to 230:14). This situation is affecting the vacancy rate at Simon's Malls. (Hrg. Tr. at 229:24 to 230:14; Polonia Dep. at 73:8-15).

74. Mr. Tobin, Simon's Senior Executive Vice President – Leasing, testified by affidavit that the number of tenants who are financially struggling, have declared bankruptcy, or have approached Simon for relief from certain lease obligations has accelerated and accumulated in 2017 to an unprecedented level. He testified that there are more pending and potential closures this year than at the height of the "Great Recession" that began in 2008. (*Id.* ¶ 9).

75. Mr. Tobin testified that the premature closure of the Teavana stores would cause harm to Simon's relationship with other tenants because those tenants rely on their co-tenants for their own success and also because his experience tells him that many other tenants will consider following Starbucks' lead and attempting to repudiate their own continuous operations covenants. Each premature closure is viewed by the tenants as an indication of a larger possible problem with the mall retail environment and emboldens other tenants to approach Simon and ask to close some or all of their stores. (Tobin Aff. ¶ 10).

76. Simon's expert witness Mr. Talbott also opined that allowing tenants to ignore continuous operations covenants can "lead to a rapid deterioration of the controlling ecosystem" of a shopping center. If one tenant is allowed to abdicate its continuous operations covenant, other tenants likely will reassess that requirement and desire the same treatment. (Talbott Aff. ¶ 12).

77. Mr. Rulli further explained why the harm caused by a premature closure is difficult to measure financially:

> That's hard to measure, right. So – so, there is the risk of other people closing. There's the singular issue, when Teavana closes at Keystone, or at Fashion Valley, or wherever, we have a vacant storefront with a board up and nobody coming soon. That diminishes the value of the real estate.... Number two is most of the brands you're going to want to put in those spaces are not the quality brands that belong amidst the mix that you've curated for that particular property. And so that begins to create another issue because then you get retailers saying: Well, I don't want to be next to this person or that person.... So, singularly, what appears to be a small space with an important brand in it, becomes not just about that space, it becomes about the space and the spaces adjacent to it.

(Rulli Dep. 124:24 to 126:14).

78. Mr. Talbott agreed that Continuous Operations Covenants give Simon and other landlords necessary time to adjust to changes in the retail environment. Simon has made millions of dollars in investments in its shopping centers, and Continuous Operations Covenants give assurances to Simon and its creditors to support and service those investments. (Talbott Aff. ¶\15).

IX. Potential Harm to Starbucks In Continuing to Operate the Teavana Stores Until the Court issues a Judgment Following a Trial.

***11** 79. Starbucks provided evidence at the hearing that if it continued to operate its Teavana-branded stores in Simon's Malls during the period of a preliminary injunction, it would suffer a loss. Starbucks testified that if it continued to operate those stores for another year at the same level of performance in fiscal year 2017, Starbucks would experience a four-wall-cash-flow loss of between $1.7 to $2 million. (Hrg. Tr. 505:16 to 506:21). Cash flow measurement compares the cash the company has at the end of the year to the amount it had at the beginning of the year. (Hrg. Tr. at 505:23 to 506:5). A $2 million cash flow loss would be only hundredths of a percent of Starbucks' cash on hand ($2.7 billion as of July 2017) or its annual operating income (more than $4 billion for 2017). (Hrg. Tr. 505:16 to 506:21, 507:10-14).

80. At the preliminary injunction hearing, Starbucks called expert witness Todd Menenberg to testify. He projected that Starbucks would sustain a loss of $15 million if it was required to continue operating the Teavana stores in Simon Malls between February 1, 2018 (the last date by which Starbucks intends to close its Teavana-branded stores) and October 2018 (his assumed period of a preliminary injunction). (Hrg. Tr. 651:7 to 658:10).

81. However, the Court notes discrepancies in Mr. Menenberg's testimony. First, Mr. Menenberg's opinion did not account for November and December 2017. As Mr. Acoca testified, Starbucks earns 40% of its annual revenue and 100% of its annual profit during the holiday season. (Acoca Dep. at 33:8-24; Hrg. Tr. at 509:8-14, 664:23 to 666:10).

82. In the first quarter of fiscal year 2017 (October through December), Starbucks had positive cash flow of $2,284,093. (Ex. 103). Based on the monthly cash flow analysis of Starbucks' performance in Exhibit 315, Starbucks did not reach a negative cash flow until May of 2017. (Ex. 315). If Starbucks' Teavana stores achieved the same level of performance in fiscal year 2018, it would have a positive cash flow from the operations of the Teavana stores for 5-6 months after an injunction is entered. (Hrg. Tr. at 665:5 to 667:8).

83. Mr. Menenberg included in his calculations significant costs for “regional overhead” and “G&A” expenses, and a large allocation of nearly $7 million for costs related to the Teavana distribution center. (Hrg. Tr. 657:10 to 658:6). But Mr. Menenberg simply used amounts given to him by Starbucks' Robert Herring. (Hrg. Tr. at 667:11 to 668:14). Mr. Herring testified at the deposition and at the hearing that these amounts were his estimates at the deposition with no analysis. Starbucks had not analyzed these costs or determined that they would all be incurred or whether they could be reduced. (Herring Dep. at 78:14-80:6).

84. Mr. Herring testified at the hearing that Starbucks could distribute the Teavana merchandise through the existing Starbucks distribution system for an investment of approximately $2 million, but Mr. Menenberg included a more than $6 million charge for distribution center costs in his $15 million estimate. (Hrg. Tr. at 481:24 to 483:8, 656:22 to 657:9). For these reasons, the Court finds Mr. Menenberg's opinion that Starbucks would sustain a loss of $15 million in operating Teavana stores between February 1, 2018 and October 2018, is an inflated estimate, and therefore lacks credibility.

85. Starbucks contends that issuing an injunction would cause logistical issues associated with monitoring compliance with or enforcing the injunction, However, the evidence at the hearing, demonstrated that Simon had never had any problems with Starbucks properly operating its stores under the Teavana brand or the Starbucks brand. (Hrg. Tr. at 218:7 to 221:15). No evidence was presented to suggest that the parties have had difficulty continuing their business relationship even after this lawsuit was filed. In fact, evidence was presented showing that Starbucks and Simon have a good relationship and that Starbucks continues to operate many Starbucks-branded stores in Simon malls, and that Simon is proceeding with plans to open a Starbucks store in its Indianapolis headquarters. (Hrg. Tr. at 218:16 to 221:15). Simon's sophisticated national retailers like Starbucks understand how to operate their stores professionally and would be unlikely to damage their reputation and brand by failing to properly operate and support their stores. (*Id.*). Moreover, Simon has never had any issues with Starbucks' compliance with lease terms that require adequate staffing and merchandising, or other similar lease provisions. (Hrg. Tr. at 218:16 to 221:15, 348:8-16).

***12** 86. Any findings of fact, to the extent they constitute conclusions of law, are entered as conclusions of law.

CONCLUSIONS OF LAW

1. This Court has handled prior cases involving tenant obligations under Continuous Operations Covenants. *See Simon Property Group, L.P. v. Wolverine World Wide Inc., et al.*, Cause No. 49D01-1612-PL-043000; *Simon Property Group, L.P. v. Kenneth Cole Consumer Direct, LLC, et al.*, Cause No. 49D01-1612-PL-043144.

2. This Court previously has stated that a preliminary injunction ruling will be decided within the specific context of the facts of the case. When the facts and the context are similar to prior cases, prior orders can help inform the Court's analysis. But, where facts are distinguishable, the Court will rule in light of the new context. (*Wolverine*, March 24, 2017 Order Denying Plaintiff's Motion for Preliminary Injunction at p. 48).

3. In the *Kenneth Cole* and *Wolverine* cases, the Court denied entering preliminary injunctions, and the cases did not proceed to a final adjudication on the merits. The Courts' findings in both of those cases were based on the evidence presented during the preliminary injunction hearings, and its conclusions were a function of applying those findings to the preliminary injunction standards. No interlocutory appeal was sought nor any final order was entered on either the *Kenneth Cole* or *Wolverine* cases.

I. Standards for Issuing a Preliminary Injunction.

4. Under Ind. R. Trial P. 65, preliminary injunctions are "intended to provide a fair and efficient means for obtaining extraordinary equitable relief before final judgment in those cases where a proper showing has been made of the need to hold the status quo pending final resolution of the dispute." 6-65 Indiana Pleading and Practice ¶ 65.06 (2017) (LexisNexis Matthew Bender).

5. The purpose of a preliminary injunction "is to maintain and preserve the status quo until the merits of the case can be heard." 4 IND. PRAC., § 65.1 (3d ed. 2016).

6. The grant or denial of a preliminary injunction lies within the sound discretion of the trial court. The appellate court will not interfere with the exercise of that discretion unless it is shown that the trial court's action was arbitrary or constituted a clear abuse of that discretion. *Jay County Rural Elec. Mbrship. Corp. v. Wabash Valley Power Ass'n*, 692 N.E.2d 905 (Ind. App. Ct. 1998).

7. To obtain a preliminary injunction, the movant must show: "(1) a reasonable likelihood of success on the merits; (2) the remedies at law are inadequate and there will be irreparable harm during the pendency of the action; (3) the threatened injury to the movant from denying the motion outweighs the potential harm to the nonmoving from granting the motion; and (4) the public

interest would not be disserved by granting the injunction." *Vickery v. Ardagh Glass Inc.*, _____ N.E.3d_____, No. 49A02-1702-PL-330, 2017 WL 4558666, at *5 (Ind. App. Ct. Oct. 13, 2017).

8. The necessity of maintaining the status quo is to prevent harm to the moving party which could not be corrected by a final judgment. *Laux v. Chopin Land Assoc., Inc.*, 615 N.E.2d 902, 905 (Ind. Ct. App. 1993) ("Preliminary injunctions are designed to protect the property and rights of parties from any injury until the issues and equities in a case can be determined after a full examination and hearing.").

***13** 9. Starbucks refers to Simon's request as one for a "mandatory injunction" compelling it to act, and argues that Simon must meet a high threshold to obtain the requested order. Simon contends it seeks a prohibitory injunction to prevent Starbucks from altering the status quo by closing its Teavana stores. *See City of Gary v. Majestic Star Casino, LLC*, 905 N.E.2d 1076, 1082 (Ind. Ct. App. 2009). The Court agrees with Simon's contention that the injunctive relief sought is to prohibit Starbucks from taking action rather than mandating Starbucks to act in a manner which it has previously refused. *See, e.g., Ferrell v. Dunescape Beach Club Condos. Phase I*, 751 N.E.2d 702, 706 (Ind. Ct. App. 2001) (upholding a mandatory injunction requiring condominium owner to permit balcony access to contractors assigned to perform repairs and maintenance to the building).

10. The Leases apply to stores both inside and outside Indiana, and apply different states' law to issues of contract construction or interpretation. Neither party argues there is an issue of contract construction or interpretation that would require this Court to resort to another jurisdiction's substantive law. *See, e.g., GMC. v. Northrop Corp.*, 685 N.E.2d 127, 134-35 (Ind. Ct. App. 1997) (where contract was unclear as to which body of law governed, court had to determine applicable law).

11. In addition, Indiana law governs whether a preliminary injunction should be issued pursuant to Indiana R. Trial P 65. *Simon Prop. Grp., L.P. v. Acton Enters, Inc.*, 827 N.E.2d 1235, 1237 n.1 (Ind. Ct. App. 2005); *Ashley v. State*, 757 N.E.2d 1037, 1040 (Ind. Ct. App. 2001).

II. Application of Injunction Elements.

A. Likelihood of Success on The Merits

i. *"Better than Negligible" showing on prima facie case*

12. "A party seeking a preliminary injunction must establish a prima facie case at the preliminary injunction hearing. The party is not required to show that he is entitled to relief as a matter of law, nor is he required to prove and plead a case which would entitle him to relief upon the merits." *Norlund v. Faust*, 675 N.E.2d 1142, 1149 (Ind. Ct. App. 1997). The likelihood of success is met if the party seeking injunctive relief shows that it has a "better than negligible" chance of succeeding on the merits. *IHSAA*, 731 N.E.2d at 7.

13. Starbucks expressly agreed to the Continuous Operations Covenants as part of the Leases they assumed when they acquired Teavana and the Leases Starbucks has signed with Simon following the Teavana acquisition.

14. The Leases include language stating, "Tenant will occupy the Premises upon the Commencement Date and thereafter continuously operate and conduct in one hundred percent (100%) of the Premises during each hour of the entire Lease Term." (*See* Complaint Ex. 5, § 8.2; Ex. 304). This language can only be interpreted to mean that Starbucks is obligated to operate its Teavana stores during the entire length of the Lease agreement. Vacating early, then, would be a breach of this lease provision.

15. Starbucks witnesses have further admitted that they believe vacating the Teavana stores would constitute a breach of the Leases. (Tr. 575: 16-576:6). While the Court will not take notice of the substance of Starbucks' assertions as a definite legal conclusion, this testimony leads the Court to believe that Starbucks intended to act in a manner it believed would breach an obligation under the terms of its Leases.

16. The Court concludes that Simon has a "better than negligible" possibility of succeeding on the merits. Starbucks freely admits closing the stores is a breach of the Leases, and that the terms of the Leases require Starbucks to remain open and operational through the terms of the Leases.

ii. *Right to Specific Performance*

***14** 17. As a remedy to the breach of the Continuous Operations Covenant, Simon has sought the specific performance of Starbucks to remain open through the terms of the Leases.

18. When a party has agreed to specific performance as a remedy for breach, Indiana courts enforce that remedy. *Humphries v. Abies*, 789 N.E.2d 1025, 1035-36 (Ind. Ct. App. 2003); *Metro Holdings One, LLC v. Flynn Creek Partner, LLC*, 25 N.E.3d 141, 164 (Ind. Ct. App. 2014); Hacienda *Mexican Rest, of Kalamazoo Corp. v. Hacienda Franchise Grp., Inc.*, 569 N.E.2d 661, 668-69 (Ind. Ct. App. 1991).

19. "Specific performance is an equitable remedy, directing the performance of a contract according to the precise terms agreed upon, or substantially in accordance therewith." *Schuler v. Graf*, 862 N.E.2d 708, 712 (Ind. Ct. App. 2007) (citation and quotation omitted). The decision whether to grant specific performance is a matter within the sound discretion of the trial court. *Metro Holdings One*, 25 N.E.3d at 161. *See, e.g.*, *Jay Cty. Rural Elec. Mbrshp Corp.*, 692 N.E.2d at 913-14 (finding likelihood that party would prevail on claim for specific performance of utility power supply contract); *Germania v. Thermasol, Ltd.*, 569 N.E.2d 730, 732 (Ind. Ct. App. 1991) (affirming specific enforcement of settlement agreement); *Krukemeier v. Krukemeier Mack & Tool Co., Inc.*, 551 N.E.2d 885, 890 (Ind. Ct. App. 1990) (affirming trial court's order requiring specific performance of stock purchase agreement).

20. In *Humphries*, our Indiana Court of Appeals found the trial court acted within its discretion in enforcing a specific performance remedy for a vendor in a real estate transaction. 789 N.E.2d at 1036. The court reasoned, "[b]ecause the Buyers have made no claim that they did not enter into the contract freely and voluntarily, [the court would] not invalidate a remedy for which the Sellers contracted." *Id.*

21. The *Humphries* court noted the importance of the fact that the parties had "agreed that specific performance was an acceptable and valid remedy" available to the vendor when they included terms in the contract regarding the vendors' option of seeking an "equitable" remedy. 789 N.E.2d at 1035-36. *Humphries* followed the Indiana Supreme Court's opinion in *Migatz v. Stieglitz*, 77 N.E. 400 (Ind. 1906), which also held that "[t]his remedy [specific performance] is available, although the vendor may have an action at law for the purchase money." *Id.* at 401.

22. In *Metro Holdings One*, a seller sued a buyer after the buyer refused to complete purchase of property. 25 N.E.3d at 144-45. The parties' Purchase Agreement contained a provision stating that, upon the purchaser's default, the "seller may seek any remedy provided by equity or law, including the right of specific performance." *Id.* at 161-62. The trial court granted summary judgment to seller and ordered specific performance. *Id.* at 162. The Court of Appeals affirmed, following *Humphries. Id.* at 162-63. The court distinguished other cases holding that specific performance was not available where an adequate remedy at law existed on the ground those cases did not involve a specific contractual right to the remedy. *Id.* at 163-64. The court held:

***15** "[H]ere the parties' Purchase Agreement included specific language providing that [seller] had "the right" to specific performance. "'Indiana courts recognize the freedom of parties to enter into contracts and, indeed, presume that contracts represent the freely bargained agreement of the parties.'" *"[W]hen the terms of a contract are drafted in clear and unambiguous language, we will apply the plain and ordinary meaning of that language and enforce the contract according to those terms." Thus, we must apply and enforce the terms of the Purchase Agreement* to this summary judgment before us."

Id. at 164 (internal citations omitted)(*emphasis added*).

23. In all but five of the leases at issue, the parties expressly agreed that Simon would be entitled to specific performance for breach of the Continuous Operations Covenant. They state in Section 8.2: "In addition to all other remedies, Landlord shall have the right to obtain specific performance by Tenant upon Tenant's failure to comply with the provisions of this Section 8.2."

24. Starbucks unquestionably understood that these Leases contained both the Continuing Operations Covenant and the agreement to specific performance as a remedy for breach of that covenant.

25. In all of the Leases – even the five in which Starbucks did not expressly agree to specific performance as a remedy – Starbucks acknowledged and agreed that injunctive and other equitable relief were agreed remedies available to the landlords. (Ex. 202).

26. The enforcement of specific performance as an agreed remedy for breach of a contract is fully consistent with Indiana's strong policy of upholding freedom of contract. "Indiana law holds in high regard the freedom of parties to enter into contracts of their own making." *In re Stephens*, 867 N.E.2d 148, 156 (Ind. 2007).

27. Starbucks expressly agreed not only to a Continuous Operations Covenant, but also that the remedy for breach of that provision would be specific performance. When a party has agreed to specific performance as a remedy for breach, Indiana courts enforce that remedy. *Humphries*, 789 N.E.2d at 1035-36; *Metro Holdings One*, 25 N.E.3d at 164.

28. Simon, therefore, is likely to prevail on the merits of its claim for anticipatory breach of contract and for specific performance of the Continuous Operations Covenant based on the better than negligible chance of showing Starbucks breached its leases and Indiana case law supporting a litigant's right to the remedy specific performance.

iii. *Right to Injunctive relief*

29. While the facts as established present a case where there is a better than negligible chance that Starbucks breached the continuous operation provisions of the contracts or leases, ascertaining whether Simon has a right to injunctive relief requires further examination of the other three prongs of the preliminary injunction analysis.

30. The Court will leave aside any further determination of Simon's likelihood of success in this section as the other preliminary injunction prongs will be separately addressed in the foregoing parts of the Order. *See infra.*

B. Irreparable Harm.

i. *Irreparable Harm Following Closure of Starbucks' Teavana Stores in Simon Malls*

31. "Irreparable harm is that harm which cannot be compensated for through damages upon resolution of the underlying action." *Crossman Communities, Inc. v. Dean*, 767 N.E.2d 1035, 1042 (Ind. Ct. App. 2002).

***16** 32. "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." *Ind. Family & Soc. Servs. Admin, v. Walgreen Co.*, 769 N.E.2d 158, 163 n.5 (Ind. 2002).

33. "An injunction will not issue merely to allay the fears and apprehensions or to soothe the anxieties of the parties." *Ind. Pacers L.P. v. Leonard*, 436 N.E.2d 315 (Ind. Ct. App. 1982).

34. Irreparable harm in the proper sense is harm which the court could not later redress. Thus, for example, economic harm compensable in damages will ordinarily not suffice." 6-65 Indiana Pleading and Practice P 65.07 (2017) (LexisNexis Matthew Bender). "It is not necessary, however, to show that no legal remedy exists. To be adequate in the appropriate sense, the legal remedy must be plain, complete, practical, efficient—in brief, as good as or better than the injunctive relief being sought." *Id.*

35. The test for irreparable harm is not whether economic injury is caused, but "whether the legal remedy is as full and adequate as the equitable remedy." *Barlow v. Sipes*, 744 N.E.2d 1, 6 (Ind. Ct. App. 2001) (citing *Jay Cty.*, 692 N.E.2d at 909).

36. "A legal remedy will not be deemed adequate merely because it exists. Injunctive relief may be granted if it is more practicable, efficient, or adequate than the remedy afforded by law." *Dean*, 767 N.E.2d at 1041-42 (citations omitted).

37. "A legal remedy is adequate only where it is as "plain, complete and adequate-or in other words, as practical and efficient to the ends of justice and its prompt administration—as the remedy in equity." *Barlow*, 744 N.E.2d at 7.

38. A preliminary injunction may still be appropriate even when damages are purely economic "due to the extreme difficulty of establishing both causation and the amount of damages." *Mass. Mut. Life Ins. Co. v. Associated Dry Goods Corp.* 786 F. Supp. 1403 (N.D. Ind. 1992).

39. Generally speaking, the Court's task is to determine whether Starbucks' actions with respect to closing its 77 Teavana retail stores constitute such irreparable harm for which no legal remedy would be adequate to compensate Simon.

40. This Court and courts in other jurisdictions across the country have had to consider whether mall landlords have any right to injunctive relief following a tenant's unexpected intention to vacate from the mall premises in previous instances. As part of the analysis, each court had to determine whether the shopping centers in each case had suffered irreparable harm.

41. In reviewing the relevant case law, each case is highly fact-sensitive, involving a wide variety of tenants, landlords, and lease terms.

42. In a frequently cited case on mall closures, the Northern District of Indiana Court in *Mass. Mut. Life Ins. Co. v. Associated Dry Goods Corp.* granted a preliminary injunction to prevent an anchor tenant from vacating prior to the end of the its lease. 786 F. Supp. 1403 (N.D. Ind. 1992). In finding irreparable harm, the Court focused on the difficulty of quantifying the damages resulting from the anchor's closure. *Id.* at 1419. Noting "[a] damages remedy is inadequate if it would come too late to save the plaintiff's business, or if the nature of the plaintiff's loss makes damages very difficult to calculate," *id.* at 1415, the *Mass. Mut.* Court concluded the evidence of harms supported the theory that the mall could "go dark" and completely shut down following the closure of the anchor tenant. *Id.* at 1416. Furthermore, the court stated that even if the mall did not close, "[the landlord] will suffer injury that is irreparable [that] is immeasurable" through lost sales, lessened rent, non-renewal of leases by other tenants, and lost opportunities with prospective tenants. *Id.* at 1417.

***17** 43. The *Mass Mut.* Court heavily cited the Court of Appeals decision in *Madison Plaza, Inc. v. Shapira Corp.*, 387 N.E.2d 483 (1979), in coming to its decision. In *Madison Plaza*, the trial court denied injunctive relief to prevent at tenant's premature closure, even though the closure would cause 1/5 of the entire shopping center to be vacant, create a negative public image of the mall, affect the mall's ability to obtain financing, and make finding new tenants more difficult, because the trial court found the store's unprofitability to be a valid reason to terminate the lease early, *Id.* at 484, and because the trial court would not take over the burden of overseeing the store's operations while the injunction was in place. *Id.* at 487.

44. The Court of Appeals, however, rejected the trial court's ruling that unprofitability is a sufficient ground for excusing the tenant from continuing to operate per the terms of its lease. *Madison Plaza*, 387 N.E.2d at 485. Noting that "[t]he general rule is that performance will not be excused simply because a contract causes hardship or proves to be unprofitable, (citing *Allied Structural Steel v. State*, 265 N.E.2d 49. (Ind. Ct. App 1970), the Court of Appeals found that the tenant was obligated under the terms of the continuing operation provision of the lease to remain in business during the term of the lease unless the shopping center consented to the tenant vacating the premises. *Id.* ("Justice Traynor explained in *Lloyd v. Murphy* (1944), 25 Cal.2d 48, 153 P.2d 47, 50, that '[t]he purpose of a contract is to place the risks of performance upon the promisor..

45. Ultimately, the Court of Appeals still upheld the denial of a preliminary injunction because it could not find that the trial court's decision to deny an injunction due to the constant supervision over a long period of time by the trial

court following a decree of specific injunctive relief was "clearly against the logic and effect of the facts." *Madison Plaza*, 387 N.E.2d at 487.

46. Other courts have also recognized that monetary damages arising from a retail tenant's breach of a Continuous Operations Covenant are both real and difficult to prove with certainty. *See, e.g., Legacy Vill. Inv'rs LLC v. Z Gallerie*, LEXIS 538, at *8-9 (Ct. Com. Pl. 2009); *W & G Seaford Assocs., L.P. v. E. Shore Markets, Inc.*, 714 F. Supp. 1336, 1348 n. 21 (D. Del. 1989) ("[T]he possibility of calculating damages appears difficult, since future percentages and the effect of nonoperation on neighboring tenants are such indefinite factors.") (quoting 2 R. Powell, POWELL ON REAL PROPERTY ¶ 257[3][b][ii] (1988)); *Landover Mall Ltd. P'ship v. Kinney Shoe Corp.*, 944 F. Supp. 443, 445 (D. Md. 1996) (determining that actual amount of damages due to a tenant's breach were "impossible to predict with any degree of accuracy" and ordering that doubling of minimum rent was an appropriate remedy).

47. On the other hand, several courts have issued rulings finding shopping center landlords to have not suffered irreparable harm following a tenant vacating its lease prematurely. *See e.g., Hamilton W. Dev., Ltd. v. Hills Stores Co.*, 959 F. Supp. 434, 440 (N.D. Ohio 1997) [5] ; ; *Ctr. Dev. Venture v. Kinney Shoe Corp.*, 757 F.Supp. 34, 36 (E.D. Wis. 1991) (finding that closure of the one store did not threaten the existence of the mall and that monetary damages of lost rent and mall traffic were an adequate legal remedy); *CBL & Assocs. v, McCrory Corp*, 761 F. Supp. 807, 810 (MD. Ga. 1991) (holding that monetary damages were an appropriate remedy and that the unprofitability of a store called into question its importance in drawing customers to the plaintiff shopping center); *Ciolfi v. Boston Chicken, Inc.*, 1997 Mass. Super. LEXIS 231 (Oct. 6, 1997) (finding that the closure of a single Boston Market store in a shopping center prior to the end of the lease would not cause such significant harms to a shopping center as to be deemed irreparable).

5 The Northern District of Ohio did specifically rule, however, that it was not imposing a bright-line rule against continuous operation covenants, only that this particular instance did not justify imposing injunctive relief. *Hamilton*, 959 F.Supp. at 439.

***18** 48. In *Fairfax Square LLC v. Hermes of Paris, Inc.*, a Virginia trial court determined that a high-end tenant was not required to remain in a shopping center where the mall had failed to adequately maintain enough "luxury" co-tenant brands per the terms of the tenant's lease. 89 Va. Cir. 406 (2015). Per the terms of the lease, the mall was to maintain at least two other "luxury" brands in addition to the tenant, but failed to do so. *Id.* at 413. The court sided with the tenant and denied injunctive relief. *Id.* at 421-22. Discussing irreparable harm, the court pointed out that the mall could not simultaneously argued that the departure of the luxury tenant would constitute irreparable harm when the mall had already allowed the departure of enough other luxury co-tenants to trigger the tenancy provision in the lease. *Id.* at 420. While this is a trial court case out of Virginia and thus not binding on this Court, it is notable because it involves closing a store of a well-regarded brand similar to Teavana.

49. The shared pattern in the cases where irreparable harm was not found is that courts rarely find the premature closure of a single store to cause such substantial harm to a shopping center as to deem that harm irreparable. *See supra.*

50. Similarly, Starbucks argues that the closure of the 77 Teavana stores does not present an instance of irreparable harm to any of the Simon malls and that Simon has an adequate legal remedy to recover remaining rent owed on each Lease. All the leases of its Teavana stores, Starbucks argues, have set terms identifying the period of time and the amount of remaining rent owed on each Lease.

51. According to Starbucks, Simon's legal remedy for the breaches of the Teavana leases would equal the cumulative amount of rent owed on each of the Leases along with other consequential damages arising from breaches.

52. Should the Court find the lost rent injuries to represent the sum-total of the damages on this matter, then such a legal remedy would be entirely appropriate.

53. Finally, Starbucks noted that no court has ever entered preliminary or permanent injunctive relief to specifically enforce a continuous operations covenant against a non-anchor tenant extending nationwide as requested by Simon here (i.e., an injunction regarding 77 lease sites in 26 U.S. states). A review of the case law suggests Starbucks appears to be correct on this matter.

54. Simon has requested this Court, however, focus on the consequences of denying a preliminary injunction against Starbucks in this particular instance and what effect that would have on subsequent enforcement of Continuous Operations Covenants in all its leases across all of its real estate platforms. Essentially, Simon claims that finding in favor of Starbucks on this matter would render any subsequent attempts to enforce the specific performance of its Continuous Operations Covenants against any of its tenants futile.

55. Simon's position has been that Starbucks has simply elected to breach the leases as a business decision, not motivated by any true threat to Starbucks' continued operation. Simon's theory is that if a financially secure organization such as Starbucks can unilaterally decide to remove itself from Simon's malls early in spite of any Continuous Operation Covenants, then any Simon tenant would be able to prematurely leave without any concern that a court may compel them to specifically perform the terms of the lease.

56. Simon has maintained that its business model is predicated on being able to maintain a certain mix of tenants across its mall platforms, depending on demographic needs of where the mall is located. Simon has argued that it uses Continuous Operation Covenants as a means to curate its tenant mix while also reducing volatility of turnover in tenants.

57. This reduction in volatility reduces risk of both Simon's and its tenants' investments. Simon can reasonably rely on maintaining its occupancy rate as tenants have agreed to remain in operation for the durations of their lease, and tenants have the benefit of relying on desirable co-tenants being in the mall during a period of their own leases. Allowing tenants to leave in violation of their leases upsets the framework as neither Simon nor other tenants will be able to rely on the occupancy of tenants that sign long-term leases.

***19** 58. Simon's arguments with regard to the impact on Teavana store closures on the Continuous Operations Covenants merit consideration. While the closure of a single Teavana store would be akin to cases where irreparable harm was not found, the number of Leases impact plus the broader implications across another Simon platforms require that the Court make its decision within this broader context.

59. Simon has provided testimony of its experience dealing with tenants who maintain an interest in which other tenants occupy a given mall. Testimony from Starbucks' corporate witness confirms that Starbucks too considers the tenant mix of a given mall as well as assurances that favored co- tenants will remain in the Simon malls long-term when deciding on entering a lease with Simon.

60. Without the ability to enforce a Continuous Operations Covenant, other tenants could consider an early departure from its own leases, determining that remaining in the mall space for the length of the lease is no longer desirable, especially if other nearby tenants could immediately vacate.

61. Such breaches do occur in the course of business, where it is more efficient for the breaching party to pay the costs of breaching an agreement rather than placing itself in a worse position by maintaining a non-viable long-term commercial relationship.

62. The Continuous Operations Covenants in the Leases seek to prevent such efficient breaches from occurring by requiring large, sophisticated retailers like Starbucks to agree to terms that will allow Simon to better anticipate the actions of its tenants and uphold its obligations to its other tenants by assuring a proper mix of retailers.

63. The Court finds that Starbucks freely and voluntarily entered into the Leases and agreed to be bound by these Continuous Operations Covenants when it assumed the previous Teavana Leases and signed new ones with Simon. As stated in Part I, ii, Indiana courts will enforce the specific terms of a contract to which parties agreed, including performance of contractual obligations.

64. Starbucks was on notice that Simon depended on Starbucks' adherence to the Continuous Operations Covenants in the Leases as evidenced by the language included in the Leases. (*See* Complaint Ex. 5, § 8.2 ("Landlord has relied upon Tenant's occupancy and operation in accordance with the foregoing provisions; because of the difficulty or impossibility of determining Landlord's damages which would result from Tenants violation of such provisions....")).

65. Having weighed the evidence presented on this matter, the Court, exercising its discretion, finds the types of damages alleged to be considered irreparable harm due to the difficulty in calculating the ultimate damages. Following the analysis framework in *Mass. Mut.* and *Madison Plaza*, the alleged potential damages arising from non-renewal of leases and loss of prospective tenants are extremely difficult to calculate with any degree of certainty.

66. Allegations alone of the possible consequences of Starbucks vacating its Teavana Leases early would be pure speculation on the part of Simon. As previously stated, mere speculative irreparable harm would not be sufficient to award injunctive relief, the evidence and testimony Simon presented in this case, however, have taken Simon's alleged harms out of the realm of speculation and into likely consequences if this Court does not enforce the Continuous Operating Covenants in Simon's Leases with the Starbucks Teavana stores.

***20** 67. Unlike in previous preliminary injunction cases before this Court involving Simon malls, Starbucks has testified that it is seeking to close the 77 Teavana stores in contravention of the Continuous Operation Covenants simply as a cost-cutting measure where the existence of the company was not at issue. The *Mass. Mut.* court similarly found that closure of an underperforming store where the company as a whole was viable could present a scenario where a mall owner would suffer irreparable harm due to the consequences of the closure. 786 F. Supp. at 1409. Despite denying a preliminary injunction, the *Madison Plaza* Court also specifically held that poor-performance of a retail store would not permit a retailer to breach its lease and vacate early. 387 N.E.2d at 487.

68. Teavana stores in many respects are far different from the anchor tenants in *Mass. Mut.* and *Madison Plaza.* The square footage of the stores is significantly smaller, there is little evidence that these stores are a major driver of foot traffic to any of the 77 Simon malls at issue, and no designated evidence suggests their closures would trigger any co-tenancy release clauses or otherwise immediately drive tenants away from Simon malls. Taken in isolation, these cases would appear more akin to other rulings where no irreparable harm was found. *See, e.g. Ciolfi v. Boston Chicken, Inc*, 1997 LEXIS 231 (Mass. Super. 1997).

69. Taking the aggregate square footage of the Teavana stores and the number of shopping centers impacted presents a much broader impact than other cases where a single small store was being closed.

70. Furthermore, the negative implications of non-enforcement of the Continuous Operation Covenants in the Leases are considerable. By Starbucks' own testimony, Starbucks considers the combination of tenants as well as other tenants' obligations to remain in operation when considering which malls to locate stores. (*e.g.*, Hrg. Tr. at 579:16 to 580:10) Starbucks watches trends of other retailers and bases its decisions in part on how other retailers act.

71. Starbucks weighed the risks and rewards of determining whether to close their stores short of their Continuous Operation Covenants and decided to close their stores, in part based on prior precedent of other retailers vacating prior to the ends of their leases. (Exhibit 30 ("Other retailers have set the precedent."); Kerns Dep. at 86:12-88:14).

72. A ruling that affects Simon's ability to enforce its Continuous Operation Covenants across all of its malls would necessarily harm Simon's long-term reliance on tenants remaining for the terms of their leases and, by extension, their ability to maintain the mix of tenants among its malls.

73. The resulting damages to Simon would derive from reduced rent, diminished reputation, and lost prospective tenants. The difficulty in calculating these types of damages led the courts in *Mass. Mut.* and *Madison Plaza* to find irreparable harm. It is possible that experts

could develop tables and studies to assist the Court in finding an exact amount, but as it stands with the evidence presented, no such testimony has been designated. A trial on the merits would provide such an opportunity to build on the testimony as presented.

74. Starbucks has argued that Simon's damages would be offset by attracting potentially better-performing tenant. Even if such did occur, the Court finds the other alleged harms as well as the risk to Simon with regards to potentially invalidating all of its Continuous Operations Covenants would still constitute irreparable harm.

75. The preliminary injunction standard does not require there to be no possible legal remedy; any potential legal remedy must be adequate to assuage Simon's claimed harms. Due to the risks that would arise from rendering Continuous Operation Covenants in all Simon leases unenforceable, as supported by evidence and testimony presented thus far, the Court finds that the legal remedy of lost rent in this instance would not be adequate.

***21** 76. While the Court could award Simon the remaining rent owed for each of the 77 leases for Starbucks' Teavana stores, that figure would not necessarily capture the harms to Simon that would occur if a tenant that agreed to a Continuous Operation Covenant in its lease in a Simon mall could ignore that provision in exchange for paying down the rest of its remaining rent. These concerns are in addition to Simon having to contend with its sudden influx of unoccupied retail space and its damaged bargaining position in being able to negotiate rental rates without being able to hold a potential tenant accountable to remain in operation or being able to guarantee a potential tenant a desired mix of tenant properties.

77. Based on the evidence, there remains little doubt that these harms will occur in the absence of an injunction. There is no dispute that Starbucks intends to proceed with closing the Teavana stores even though it acknowledges that doing so violates its Leases, and even though Simon has not consented to the premature closures of these stores. Starbucks plans to close Teavana stores no later than January 31, 2018, regardless of the actual expiration date of those Leases and regardless of whether any agreement has been reached with Simon or the landlord entities. Starbucks already has begun implementing "inventory mitigation strategies" to reduce its inventory between now and the planned January 2018 closure date. It also has begun to look for possible positions of employment for employees who will be affected by the closures.

78. The award of equitable injunctive relief is extraordinary and should be employed sparingly by trial courts. This Court has been consistent in maintaining a steadfast approach to assess each case before it on the merits and not to rely on cases that are not analogous or otherwise have differing fact patterns when coming to a decision.

79. This Court finds that the evidence sufficiently shows that Simon would suffer an irreparable harm and would not be made whole through a legal remedy to satisfy the requirements of the preliminary injunction standard.

80. To echo earlier opinions, however, the Court maintains that this determination is based on the evidence presented in the preliminary injunction hearing. A final adjudication on the merits of this case could result in a different opinion once the Court has had more evidence to consider following a trial on the merits.

81. For these reasons, the Court finds the irreparable harm prong to be satisfied for the purposes of granting preliminary injunctive relief.

ii. ***The Existence of a Liquidated Damages Clause in the Leases Does Not Preclude a Finding of Irreparable Harm.***

82. Starbucks has argued that the presence of a liquidated damages clause in the Leases present Simon with an adequate remedy at law. This contention is contrary to Indiana law as set forth in *Pinnacle Healthcare, LLC v. Sheets*, 17 N.E.3d 947 (Ind. Ct. App. 2014), and *Washel v. Bryant.* 770 N.E.2d 902, 906 (Ind. Ct. App. 2002).

83. The court in *Pinnacle* explained that the presence of a liquidated damages clause does not create an either/or choice between liquidated damages and injunctive relief, especially when the contract does not make liquidated damages the exclusive remedy. 17 N.E.3d at 955.

84. In *Washel v. Bryant*, the Court of Appeals noted that liquidated damages and injunctive relief clauses can co-exist in contracts, noting:
'In this case, *the parties' agreement both provided for liquidated damages and*, as we have noted, *contemplated an injunction.* The trial court concluded that the liquidated damages clause provides Washel with an adequate remedy, but money damages and injunctive relief serve different purposes....Thus, we agree with Washel that, "*the [liquidated] damage clause was intended to operate in tandem with an injunction not instead of it."*

***22** 770 N.E.2d 902, 906 (Ind. Ct. App. 2002) (*emphasis* added).

85. Here, the Leases expressly provide Simon the right to seek injunctive relief to prevent a breach of the covenants and further state that Simon's remedies under the Leases are not exclusive. The same clause that provides for liquidated damages "if [Simon] elects to pursue such remedy," says that "[i]n addition to all other remedies, [Simon] shall have the right to obtain specific performance[.]" (Complaint, Ex. 5, (para) 8.2).

86. The Court will "not displace the contractually specified rights and remedies but must leave to the individual parties the right to make the terms of their agreements as they deem fit and proper, and enforce them as agreed upon." *State v. IBM*, 51 N.E.3d 150, 160 (Ind. 2016).

C. Balance of Harms.

87. "A court may issue injunctive relief only when the threatened injury to the moving party … outweighs the potential harm to the nonmoving party … resulting from the granting of a preliminary injunction." *Cent. Ind. Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 733 (Ind. 2008).

88. In balancing the threatened injury to Simon against the potential harm to Starbucks, the Court finds both companies are large, viable, and able to withstand a financially adverse decision in this matter.

89. Simon argues Starbucks' premature closure of its Teavana stores before a trial on the merits are substantial. Simon claims increased vacancies may be difficult to fill with appropriate tenants, which in turn may reduce Simon's ability to lease space in its Malls, diminish the image of Simon's Malls, and harm Simon's reputation with other tenants and consumers.

90. Starbucks claims it will suffer "a far greater harm [than Simon] if it is forced to continue operating Teavana retail stores that are losing millions of dollars each year." (Starbucks Pre-Hrg Br. at 13). Specifically, Starbucks provided

testimony it will lose over an estimated $15 million if it is forced, by a permanent injunction, to stay open past January 2018 until October 2018.

91. At the hearing, Starbucks also pointed to operational challenges it faces including but not limited to: Starbucks having ceased purchasing inventory, Starbucks having scaled-down operations at the Teavana distribution center, and Starbucks' difficulty getting adequate staff to work because store managers and employees have been leaving Teavana stores since the July 27, 2017 announcement was made. At the hearing, Bernard Acoca testified Teavana pre-purchased inventory to fill the 2017 Holiday season (through December 2017), but that inventory will be depleted by January 2018. Starbucks claims it would have to "reestablish relationships" with vendors in order to resupply the Teavana stores, (Hrg. Tr. at 483:18-484:4), and incur costs to "air freight" up to five times the current cost. (*Id.* at 484:10).

92. In *Mass. Mut. Life Ins. Co. v. Associated Dry Goods Corp.*, 786 F. Supp. 1403 (N.D. Ind. 1992), the court held the threatened harm to Mass Mutual Insurance Co. ("MassMutual"), the mall owner, if denied the relief of a preliminary injunction, outweighed any potential harm to the mall tenant, Associated Dry Goods ("ADG"), if the preliminary injunction were granted, forcing ADG to keep its store open. F. Supp. 1403 at 1419. In so holding, while the court noted ADG may indeed incur costs of millions of dollars in keeping its store open during the pendency of the litigation, the court reasoned ADG's potential harms were "purely pecuniary" and "readily quantifiable" compared to the "immeasurable injuries" MassMutual would suffer if denied a preliminary injunction. *Id.* Among the immeasurable injuries the court found were the mall's damaged image and uncertainty in replacing the tenant. *Id.* at 1418. The court reasoned, a showing of "expenditures of millions of dollars" did not affect whether a preliminary injunction should issue, but instead, "affect[ed] only the amount of the bond as a precondition for the injunction." *Id.* at 1419.

***23** 93. Similarly, in *Jay County Rural Elec. Mbrshp. Corp.*, our Indiana Court of Appeals agreed with a trial court's reasoning that the threatened injury to a plaintiff was greater than the potential harm to the defendant when the defendant's potential hardship was strictly pecuniary, and that the plaintiff's harms were difficult to quantify and may affect other members of a similar class as the defendant. 692 N.E.2d 905, 914. There, Jay County Rural Electric Membership Corporation ("Jay County") was in the business of purchasing wholesale electricity and distributing it at retail to customers. *Id.* at 907. Wabash County Power Association ("WVPA"), an electric generation and transmission cooperative, sold wholesale electricity to a group of twenty-four members. *Id.* In 1977, Jay County became a member of WVPA by signing an "all requirements wholesale power supply contract" ("all-requirements contract") with WVPA. *Id.* at 908. The all-requirements contract required Jay County to purchase all of its power and energy requirements for its systems from WVPA. *Id.*

94. In 1996, Jay County gave WVPA notice it was withdrawing its membership in WVPA and terminating the all-requirements contract with WVPA because Jay County found a better price for electricity from Cinergy. *Id.* Jay County filed a complaint against WVPA asking the trial court to declare its termination of the contract valid. *Id.* Jay County also negotiated a contract with Cinergy that guaranteed better prices for electricity. WVPA moved for a TRO and a preliminary injunction to require Jay County to purchase its wholesale electricity exclusively from WVPA during the pendency of the litigation. The trial court granted the preliminary injunction. *Id.* The Court of Appeals affirmed. *Id.* at 907.

95. Under the balance of harms prong of the analysis, the Court of Appeals found the trial court was within its discretion in finding:
"WVPA would be harmed "significantly and irreparably" if Jay County were allowed to breach its supply contract and buy its power requirements elsewhere because (1) WVPA's damages from Jay County's breach [were] difficult to quantify; … (3) WVPA's ability to effectively plan and operate as a power supplier would be hindered if Jay County or other members [were] able to stop buying power at will; and (4) WVPA's ability to operate would be hindered as other members, after having Jay County's share of fixed costs transferred to them, would likely follow Jay County's lead and avoid their contracts."

Id. at 914. Furthermore, the court found Jay County's potential harm could easily be covered by a bond. Thus, the court found the balance of hardship weighed in favor of WVPA. *Id.*

96. The Court finds the *Mass Mut.* and *Jay County* cases applicable here. While *Jay County* dealt with an electricity cooperative and member of that cooperative, and here we are dealing with a mall and mall tenant, the considerations are nevertheless the same. Like in *Jay County*, where Jay County was incentivized to abandon its contract with WVPA merely because it found it more profitable to buy energy from Cinergy, Starbucks has opted to discontinue a business model (e.g., operating the Teavana stores) because Starbucks deems it would be more profitable without it. Furthermore, just like Jay County was one member of a larger class (*i.e.*, other members of the cooperative), Starbucks here is member of a bigger class—other mall tenants. Thus, just like the court in *Jay County* took into consideration how other members of the cooperative may react if Jay County were allowed to abandon its contract with WVPA, here, other mall tenants' reaction to Starbucks' departure must be taken into account in balancing harm, as other tenants may very well follow Starbuck's lead and dishonor their obligations, substantially harming Simon's ability to effectively plan and operate its malls.

97. The evidence at the hearing showed if Starbucks is able to walk away from its Lease obligations to continuously operate its stores, it may increase the risk other tenants will seek to do so. (Hrg. Tr, at 245:2 to 250:18; Talbott Aff. ¶ 12), Retail tenants whose stores are in malls closely watch what happens with other tenants and act accordingly. Mr. Rulli described this as a "herd mentality." (*Id.* at 134:1 -4; Hrg. Tr. at 243:22 to 245:1). This, in turn, would substantially increase the likelihood of co-tenancy violations, exercise of "kick-out" rights, decreased consumer confidence, and other harms. (*Id*). Indeed, the evidence showed that the fact other stores were closing in malls was a driving factor behind Starbucks' announcement that it was closing its Teavana stores. (Exhibit 30 ("Other retailers have set the precedent."); Kerns Dep. at 86:12-88:14).

***24** 98. Here, the Court finds, if it were to deny the granting of a preliminary injunction, and Starbucks closed its Teavana stores in January 2018 as it plans, the threatened injuries to Simon would be:
i. The harms resulting from increased store vacancies, which include:

a. difficulty replacing the vacancies with appropriate tenants;

b. a diminished image of Simon's malls; and

c. harm to Simon's reputation with its other tenants and consumers;

ii. Simon's long-term ability to effectively plan and operate its malls would be hindered if other tenants were able to close their stores at will, upsetting Continuous Operations Covenants in their leases, as well as co-tenancy and kick-out provisions;

iii. Simon's short-term ability operate its malls would be hindered because there is a strong possibility other tenants will follow Starbucks' lead, dishonor their obligations under their leases, and attempt to close their stores if they feel their business is unprofitable or if they can find a better deal elsewhere;

iv. Simon's impaired ability to enforce, after a trial on the merits, the specific performance remedy negotiated in the Teavana store Leases, because the Teavana stores would no longer be in existence.

99. On the other hand, a preliminary injunction forcing Starbucks to keep open and operate its Teavana stores during the pendency of this litigation would potentially cause the following harms to Starbucks:

i. No more than $15 million [6] in operating costs to stay open past January 2018 to October 2018;

[6] The Court reiterates its findings that Mr. Menenberg's estimate of $15 million in operating costs is likely an inflated estimate, as he did not factor in the amount of revenue Starbucks will earn during the 2017 Holiday season. Nevertheless, in an abundance of caution, the Court uses the $15 million figure as the threatened harm to Starbucks because, as explained below, the balance of harms weighs in favor of Simon.

ii. Operational challenges, including:

a. re-establishing relationships with vendors in order to enter into new supply agreements to resupply stores, because although Starbucks pre-purchased inventory to fill the 2017 Holiday season, that inventory will be depleted by January 2018;

b. prohibitive costs to "air freight" said inventory to each of its stores up to five times the current cost;

c. difficulty getting adequate staff to work, as store managers and employees have begun leaving Teavana stores since Starbucks' July 27, 2017 announcement it planned to close all Teavana stores; and

d. the need to work closely with Simon, the same company it has been actively involved in litigation with.

100. As noted above, Simon's total revenue in 2016 was $5.44 billion. For the first quarter of Starbucks' fiscal year 2017, Starbucks reported a record consolidated operating income of $1.1 billion, and record net revenues of $5.7 billion. In the second quarter of 2017, Starbucks reported a record consolidated operating income of $1.1 billion, and record net revenues of $5.7 billion. Finally, in the third quarter of 2017, Starbucks' net revenue was again $5.7 billion, with an operating income of $1 billion. Thus, while the Teavana business unit within Starbucks is not performing as well as Starbucks would like, it is clear, Starbucks, as a whole, is financially successful.

***25** 101. Likewise, while Starbucks presented financial data regarding the historic and future-performance of its Teavana-branded stores in Simon Malls, Starbucks presented no evidence of Starbucks' financial performance at all of its stores in those Simon Malls, including its Starbucks-branded stores, and it did not present any evidence that the performance of all of its stores in Simon malls was unprofitable. Starbucks' evidence demonstrates the only harm it would likely incur if forced to keep its Teavana stores open is pecuniary: the $15 million Mr. Menenberg estimated it would cost to operate the Teavana stores.

102. Furthermore, while the Court acknowledges Starbucks may incur monetary and operational challenges in keeping the Teavana stores open until the disposition of this lawsuit, the Court also notes each and every one of these hardships is self-imposed by Starbucks. Starbucks made a business decision to acquire Teavana in 2013. Starbucks voluntarily entered into and assumed lease agreements—regardless of the financial success of Teavana—with Simon for each of the stores at issue and agreed to continuous operation covenants Starbucks unilaterally made the decision to announce the closing of its Teavana brand stores in 2017, and subsequently begin winding down its operations without communicating with Simon. The Court therefore gives less weight to the hardship to Starbucks in balancing its hardship against Simon's hardship. *See Vickery*, _____N.E.3d_____, No. 49A02-1702-PL-330, 2017 WL 4558666, at *10 (affirming trial court's conclusion that in balancing hardship between two parties, hardship to movant was greater where nonmovant's harm was self-imposed).

103. While Starbucks contends "Simon has offered no proof of direct harm it will suffer," the fact that Simon's harms are difficult to ascertain with specificity actually further weighs in favor of granting a preliminary injunction because the harm to Simon is difficult to predict. *See Barlow v. Sipes*, 744 N.E.2d 1, 12 (Ind. Ct. App. 2001) ("if the plaintiff could

point to a specific dollar amount of losses then a remedy at law would be sufficient"). On the other hand, the fact that Starbuck's has offered evidence of the pecuniary harm it would incur, $15 million dollars persuades the Court this harm may be easily mitigated by Simon's posting of bond in that amount.

104. The Court thus concludes, because the threatened injury to Simon may manifest itself in many forms that are difficult to quantify, whereas the harm to Starbucks is straight-forward and pecuniary, the threatened injury to Simon outweighs the potential harm to Starbucks. *See Mass. Mut.*, 786 F. Supp. at 1419 (balance of harms weighs heavily in favor of MassMutual where ADG's harms were pecuniary and could be insured against by appropriate bond and MassMutual's harms were not readily quantifiable).

D. The Public Interest.

105. Finally, the Court concludes a preliminary injunction requiring Teavana to keep open and operate its stores in Simon malls would not disserve the public interest.

106. The Court is unpersuaded by Starbucks's argument the public would be disserved if the Court were forced to allocate resources to continuously monitor Starbucks' compliance with the Court's order. This Court previously rejected this argument in *Simon Property Group, L.P. v. Wolverine World Wide, Inc., et al.*, No. 49D01-1612-PL-043000 (Motion, Ex. B).

107. Additionally, there is no evidence suggesting the Court will be required to engage in any level of monitoring compliance to enforce a preliminary injunction. Starbucks is currently occupying and operating its Teavana stores. Simon presented evidence at the hearing that Simon never had any problems with Starbucks properly operating its stores under the Teavana brand or the Starbucks brand.

***26** 108. The Court also notes to the extent any monitoring compliance is required, Indiana courts have approved of a court's monitoring a shopping center tenant's compliance with an injunction to continuously operate. *See Mass Mut. Life Ins. Co. v. Associated Dry Goods Corp.*, 786 F. Supp. 1403, 1426 (N.D. Ind. 1992). In the event a need to monitor compliance does arise, the Indiana Commercial Court Interim Rule 5 provides for the appointment of a Commercial Court Master, if agreed on by the parties, that could supervise compliance of this Court's order. The parties would then bear the cost of monitoring, and not the public.

109. Moreover, of much greater concern here than any potential costs of monitoring compliance is this State's strong public policy in favor of enforcing parties' contracts. *See, e.g., IBM*, 51 N.E.3d at 160 ("Applying the specific terms agreed to by the parties … is consistent with Indiana contract law principles."). "Indiana courts recognize the freedom of parties to enter into contracts and, indeed, presume that contracts represent the freely bargained agreement of the parties." *Fresh Cut v. Fazli*, 650 N.E.2d 1126, 1129 (Ind. 1995). "This reflects the principle that it is in the best interest of the public not to restrict unnecessarily persons' freedom of contract." *Id.*

110. Relieving a party of its obligations under a contract merely because the contract is burdensome, unprofitable, or causes hardship goes against the public policy of this State. *See Weaver v. American Oil Co.*, 276 N.E.2d 144, 146 (Ind. 1971) ("It is not the policy of the law to restrict business dealings or to relieve a party of his own mistakes of judgment[.]") (citing *Stiefler v. McCullough*, 174 N.E. 823 (Ind. 1933), *reh'g denied*); *see also* 6 Ind. Law Encyc. Contracts § 122 ("[A] contractor is not relieved from his or her obligations under the contract by unexpected difficulties in performance, by his or her mere inability to perform, or by the fact that the contract is burdensome or unprofitable or causes hardship.") (cited by *Allied Structural Steel Co. v. State*, 148 Ind. App. 283, 292 (1970)).

111. While an order denying a preliminary injunction is not a judgment on the merits, the practical effect of that order would be that Starbucks would prematurely close its Teavana stores in Simon's malls, violating the Continuous

Operation Covenants in the Leases, and thus breaching the Leases with Simon. Starbucks is a sophisticated, successful retail giant. It made a sophisticated business decision that it was willing to assume the financial and business risks inherent in assuming the obligations under the Leases for the Teavana stores, as well as in the Leases signed after the acquisition, including the Continuous Operations Covenants and agreed to specific performance remedies in the Leases. If the Court were to allow Starbucks to close down its stores, abandoning these obligations in the lease agreements, the Court would be relieving Starbucks of the failed risk it took, merely because Teavana has now proven to be unprofitable to Starbucks. To allow a company such as Starbucks to do so would have grave implications on the public's confidence in entering into future contracts. It would also signal to Simon's remaining tenants that the Continuing Operating Covenants will likely never be enforced, eliminating the equitable remedy of specific performance which the parties freely agreed to in these leases. Given these considerations, the Court concludes it is not contrary to the public interest to issue a preliminary injunction here, rather it is in the public's interest.

III. Security.

***27** 112. Under Indiana Rule of Trial Procedure 65(C),

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

113. "The fixing of the amount of the security bond is a discretionary function of the trial court and is reversible only for an abuse of discretion." *Kennedy v. Kennedy*, 616 N.E.2d 39, 43 (Ind. Ct. App. 1993). In assessing the amount of security, this Court considers "not only the estimated damages offered by the parties but its own experience and knowledge." *Id.*

114. "Speculative and remote damages are not properly allowable nor are those which are merely consequential, the limit being such damages as flow directly from the injunction and its immediate consequence." *Hampton v. Morgan*, 654 N.E.2d 8, 9 (Ind. Ct. App. 1995) (quoting *U.S. Fid. & Guar. Co. v. State ex rel. Ogden*, 5 N.E.2d 115, 117 (Ind. Ct. App. 1936)).

115. The Court finds, although Starbucks' potential hardship is not greater than Simons, Starbucks may indeed incur significant hardship in keeping its Teavana stores open and in operating them throughout the pendency of this litigation. Starbucks provided evidence its estimated costs to operate the Teavana stores at issue in the near quarter (January 2018 to May 2018) will be roughly $15 million. Thus, based upon the evidence, the Court finds a bond in the amount of $ 15,000,000 is sufficient to serve as security should the injunction be determined, after a trial on the merits, to have been wrongfully ordered. The Court notes, in the event Starbucks is ultimately successful after a trial on the merits, Starbucks will not be limited in recovery to the amount of the security bond.

ORDER

It is therefore ORDERED that:

A. Simon's Motion for Preliminary Injunction is GRANTED. Starbucks Corporation, its agents, successors, subsidiary or affiliate companies, and all those persons and entities in active concert or participation with them are ENJOINED, in any manner, either directly or indirectly, from:
i. Failing to occupy and conduct business as usual in the leased premises for any of the Teavana stores at any Simon shopping center owned in whole or in part or managed by Simon, including any failure to be open and operating during normal business hours, as required by the Leases; and

ii. Conducting, promoting, or advertising any fire, "going out of business," or similar sale, as prohibited by any of the Leases.

B. Notwithstanding the above, if any Lease for a Teavana store at issue in this lawsuit expires by its own Lease terms prior to the expiration of this injunction or if Starbucks has an independent legal basis under the leases that gives right to a power of termination (*e.g.*, including but not limited to failure of co-tenancy provisions), Starbucks may close that store upon the conclusion of the store's Lease term.

C. Notwithstanding the above, this Order does not limit Starbucks and Simon's rights to negotiate early closure of any of the Teavana stores at issue in this case. Should the parties come to an agreement about the closure of any of the Teavana stores at issue in this action, the parties may proceed pursuant to their negotiated agreement. The Court asks that the parties provide written notice to the Court regarding any negotiated store closure that occurs between the issuance of this Order and the final adjudication of this matter.

***28** D. Starbucks and Simon reserve all their claims, defenses, and procedural rights and remedies with regards to the forthcoming trial on the merits on this matter.

E. Simon is ordered to post a security bond in the amount of $15 million within 14 days of the issuance of this Order.

F. The Court hereby schedules a Pre-Trial Conference on December 20, 2017 at 10:15 for one hour.

SO ORDERED, ADJUDGED AND DECREED this 27th day of November 2017.

<<signature>>

Hon. Heather A. Welch, Judge

Indiana Commercial Court

Marion Superior Court No. 1

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