INDIANA COMMERCIAL COURT

STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	) SS:	
COUNTY OF MARION	)	CAUSE NO. 49D01-2004-PL-013294

SIMON PROPERTY GROUP, L.P. on behalf of itself and its affiliated landlord entities,	)	
Plaintiff,	)	FILED May 18, 2020 Myla A. Eldridge CLERK OF THE COURT MARION COUNTY SW
v.	)	
ABERCROMBIE & FITCH STORES, INC.,	)	
Defendant.	)	

CONSOLIDATED ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND DENYING DEFENDANT'S MOTION TO STRIKE

This matter comes before the Court on Plaintiff's, Simon Property Group, L.P., on behalf of itself and its affiliated landlord entities, ("Simon"), Motion for Preliminary Injunction, to enjoin Defendant, Abercrombie & Fitch Stores, Inc. ("A&F Stores") from closing or vacating any of the 53[1] locations which have leases with Simon-affiliated landlord entities. The Court had previously issued an emergency Temporary Restraining Order enjoining A&F Stores on May 1, 2020.

Simon filed its Motion for Preliminary Injunction on April 27, 2020. A&F Stores filed a Response in Opposition to the Motion for Preliminary Injunction on May 7, 2020. By agreement, both parties submitted affidavit testimony in support of their positions to the Court. A hearing on the matter was held on May 8, 2020 at 9:00 A.M. All parties appeared telephonically by agreement to provide argument.

[1] There were 54 locations in Simon malls between the parties, but only 53 of the leases are at issue in this motion.

A&F Stores also filed a Motion to Strike a Ratification filed by Simon on May 7, 2020, which the Court heard argument on at the May 8 hearing. The Court took both matters under advisement and requested that the parties provide proposed findings of fact and conclusions of law by May 11, 2020. Both parties did so.

The Court, being duly advised, hereby GRANTS Simon's Motion for Preliminary Injunction and DENIES A&F Stores' Motion to Strike. Pursuant Ind. Trial Rules 65 (D) & 52, the Court has included the below specific Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

A. Parties and background

1. Simon is a Delaware limited partnership with its principal place of business in Indianapolis, Indiana that operates shopping centers across the United States.

2. A&F Stores is registered in Indiana as foreign corporation, formed under Ohio law, with its principal office in New Albany, Ohio. Its registered Indiana agent is in Marion County, Indiana.

3. A&F Stores operates retail stores in Simon shopping centers throughout the country, selling a broad assortment of apparel, personal care products and accessories for men, women, and kids under the "Hollister," "Abercrombie & Fitch," and "Abercrombie kids" brands.

4. In February 2019, Simon and A&F Stores began negotiating the essential terms of one new and 53 amended leases for stores in Simon retail properties as well as a settlement concerning A&F Stores' calculation of gross sales and a corresponding payment of "percentage rent" A&F Stores owed to Simon. (Bearden Aff. ¶¶ 5, 7). These discussions were part of an overall "Package Agreement."

5. Most leases from the 2019 Package Agreement were about to expire or had already expired, and the parties were negotiating lease amendments for 1-2 year extensions. Based on the timing, David Leino of A&F Stores and Pervis Bearden of Simon were working on negotiations through the winter holiday and into early January 2020. (Leino Affidavit ¶ 8).

6. Johnny Ciotola, A&F Stores' Director—Global Real Estate, had primary responsibility for negotiating with Simon. (Ciotola Aff. ¶5). Ciotola reports to A&F Stores' Global Vice President of Real Estate, Jay Lessard. (Lessard Aff. ¶4, Leino Aff. ¶7). Both Ciotola and Lessard report to David Leino, A&F Stores' Senior Vice President, Global Real Estate, Construction and Store Design. (Leino Aff. ¶¶2, 7).

7. Simon's Pervis Bearden and Daniel Seabaugh had primary responsibility for negotiating with A&F Stores. (Bearden Aff. ¶2; Seabaugh Aff. ¶2).

B. January 2020 discussions

8. In a January 14, 2020 email to Mr. Bearden and Mr. Seabaugh, Mr. Ciotola set forth major points of the parties' ongoing discussions to which A&F Stores could agree. (This email is attached to the Complaint as Exhibit 1 and is also attached and incorporated by reference as Exhibit A-1; See also Ciotola Affidavit ¶ 11; Lessard Affidavit ¶ 8; Leino Affidavit ¶ 12).

9. Less than an hour later, Mr. Bearden responded to Mr. Ciotola's email as follows: "We will review and revert." (Ciotola Affidavit ¶ 13; See also A&F Stores' Exhibit A-2).

10. Mr. Bearden's January 14, 2020 email message contained the following language:

> This email may be part of an ongoing preliminary negotiation and does not create rights or obligations for or against either party. This email is nonbinding and constitutes neither a final agreement of terms nor a promise or commitment to enter into a final agreement until such time as the terms are reviewed and approved by the Simon Property Group Real Estate Committee. To be enforceable by or against a party, a final agreement between the parties must also be written and signed by both parties.

(Exhibit A-2) (emphasis added).

11. On January 15, 2020, Mr. Seabaugh responded on behalf of Simon and stated, "We are reviewing you[r] email today please do the same to the terms attached, …." (Exhibit A-1 at p. 2). In other words, Simon was proposing new terms for certain stores in the package regarding A&F Stores' rights to pay lesser rent or terminate the lease agreement in the event of mall vacancies (a "co-tenancy failure"). (Ciotola Affidavit ¶ 14).

12. Mr. Seabaugh followed up again with changes to the terms set forth in my January 14, 2020 email. He wrote: "See revised attached. We had the incorrect escalation rate on Woodland. Since the charges are broken out (BMR, CAM, etc.) the BMR will be 3% not 3.5% and CAM Promo and Media will be 4%." "BMR" refers to base minimum rent and "CAM" refers to common area maintenance. These percentages refer to the "escalation rate" or the annual increases of cost. (Exhibit A-1 at p. 2).

13. Mr. Seabaugh's January 15, 2020 email to Mr. Ciotola—and every other email Mr. Seabaugh sent to A&F Stores' representatives—Simon's emails contain language disclaiming that any binding contract can be established by email, recognizing that is the case for both sides of the communication:

> The preceding email message (including any attachments) contains information that may be confidential, proprietary, privileged or constitute non-public

> information and may be part of an ongoing preliminary negotiation that does not create rights of obligations for or against either party until final agreement between the parties is written and signed by both parties.

(Ciotola Affidavit ¶ 16; See e.g., A&F Stores Exhibit A-2)

14. Later in the afternoon of January 15, Mr. Ciotola responded on behalf of A&F Stores with additional changes to the terms described in the January 14, 2020, email consistent with the parties' ongoing negotiation of these global terms. (Ciotola Aff. ¶ 178; See also Exhibit A-1).

15. Elizabeth Young, Simon Senior Staff Attorney-Legal Leasing, was responsible for preparing the first draft of the lease documentation. (Young Aff. ¶4).

16. On January 15, 2020, the day after Ciotola's email, Young received word that Simon and A&F Stores had reached agreement on the key terms of the Package Agreement. (Young Aff. ¶ 3). Upon learning that information, Young reached out to her counterpart at A&F, Jennifer Mason. (*Id.* ¶ 3, Ex. 1).

17. Mason, A&F Stores Director—Global Real Estate, has oversight of A&F Stores' negotiations of agreements relating to real estate, including leases and lease amendments. (Mason Aff. ¶2). Both Mason and Ciotola's supervisor, Lessard, confirmed that Ciotola's January 14, 2020 email contained the "major points" of the parties' negotiation. (*Id.* ¶4; Lessard Aff. ¶8).

18. The process of Simon and A&F Stores reaching a Package Agreement on multiple store locations, with her subsequently preparing the associated lease documentation, was one that Simon's Young had followed in previous years. (Young Aff. ¶¶5–6). In the ordinary course, Young receives the parties' agreed-upon terms then works with her counterpart at A&F Stores, Mason in this case, to complete the

associated lease documentation. (*Id.* ¶ 5). When doing so, Young and her A&F Stores counterpart work from standard templates. (*Id.*; see also *Id.* at Ex. 1 ("I will be using the same form of amendment that we have used for extensions the past couple of years, so no surprises there.")).

19. On January 23, 2020, A&F Stores' Mason acknowledged her receipt of the draft lease documentation from Young. (Young Aff. ¶7, Ex. 2). Mason also confirmed A&F Stores' understanding that there had been an "agreement reached between A&F Stores and Simon and documented in a 1/14/2020 email from Johnny Ciotola to Pervis Bearden." (*Id.* at Ex. 2).

20. Mason attached two other documents to her January 23, 2020 email: the first draft of the percentage rent settlement document as well as what she referred to as a "Renewal Rents Letter." (*Id.).* In the Renewal Rents Letter, A&F Stores stated that "Landlord and Tenant have completed negotiations and are currently preparing documents memorializing the renewal and/or extension of such Leases." (*Id.).*

21. The Renewal Rents Letter also stated A&F Stores' intention to begin paying new rent amounts immediately, rather than awaiting preparation of the final lease documents. (*Id.)* Under the terms of the Package Agreement, A&F Stores would benefit by paying Simon approximately $450,000 less per month in combined rent for the 53 stores. (Seabaugh Aff. ¶12).

22. Simon did not sign the Renewal Rents Letter, and initially balked at A&F Stores' stated intention to begin paying the new rent amounts immediately. (Mason Aff. ¶6, Ex. D-1).

C. A&F Stores begin performing terms settled in the January discussions

23. A&F Stores nevertheless paid, and Simon accepted, lower rent amounts beginning February 1, 2020-before the lease documentation was finalized. (Seabaugh Aff. ¶12).

24. A&F Stores began paying new rent amounts contemplated by the Package Agreement on February 1, 2020, saving approximately $450,000 per month. (*Id.* ¶12). The parties also executed a new lease for the Hollister store at Burlington Mall, relocating that store to a newly remodeled space, as contemplated by the Package Agreement. (Leino Aff. ¶21, fn.1).

25. The parties also closed five of the stores contemplated by the Package Agreement: The Abercrombie & Fitch stores at Fashion Center at Pentagon City, West Town Mall, Woodland Hills Mall, Wolfchase Galleria, and Oxford Valley Mall. (Seabaugh Aff. ¶13). The sixth closure contemplated by the Package Agreement—an Abercrombie kids at Town Center at Cobb—is scheduled for the end of May 2020. (*Id.).*

D. Ongoing negotiations following the January discussions

26. Simon and A&F Stores continued to revise terms for individual leases and the overall 2019 Package Negotiation through early March 2020. (Mason Affidavit ¶ 7; See also A&F Stores Exhibit D-2).

27. Each time a Simon attorney sent a new proposed amendment to A&F Stores, they prefaced the attached document by stating in their email:

> If the amendment is in acceptable form, please have two (2) clean, legal sized copies of the amendment executed and return both copies to my attention at your earliest convenience, and I will thereafter return a fully-executed original for your files.

(See e.g., January 21, 2020 email from Elizabeth Young and March 10, 2020 email from Parker Blessing submitted as A&F Stores Exhibit E and Exhibit F) (emphasis in originals).

28. At the beginning of March 2020, Young and Mason finalized the lease documentation for every store in the Package Agreement. (Young Aff. ¶9). Mason encouraged Young to get all the documents signed "as quickly as possible." (*Id.* ¶9, Ex. 3, *Id.* ¶¶10–12, Exs. 4–5).

29. With respect to the percentage-rent settlement, after her January 23, 2020 email, Mason exchanged drafts with Simon in-house attorney Nathan Patterson. (Patterson Aff. ¶¶ 3–4). On March 13, 2020, Patterson informed Mason that Simon had accepted A&F Stores' final, proposed language. (*Id.* ¶5, Ex. 1). With that message, Patterson also provided Mason an execution-ready version of the settlement document. *Id.* The final draft of the settlement document contains no material deviation from the terms of settlement set forth in Ciotola's January 14, 2020 email. (*Id.).*

30. On March 13, 2020, A&F Stores sent Simon (via FedEx) executed lease amendments with A&F Stores' original handwritten signatures in three separate packages for 42 of the 54 different stores over which the parties were negotiating in early 2020: Abercrombie (21 stores), Hollister (13 stores), and Abercrombie kids (8 stores). (Mason Affidavit ¶ 8) (See A&F Stores Exhibit D-3, Exhibit D-4, and Exhibit D-5). A&F Stores never sent the remaining lease amendments to Simon.

31. Notably, and in accordance with Simon's and A&F Stores' historical course of dealings, each of the three cover letters stated:

> Each of the documents have been originally signed by Tenant. Upon counter-execution by Landlord, please return one (1) fully executed original copy of each to my attention.

32. (A&F Stores Exhibit D-3, Exhibit D-4, and Exhibit D-5) (emphasis added) (See also Mason Affidavit ¶ 9).

33. After A&F Stores sent three packages of signed leases and amendments on Friday, March 13, 2020, A&F Stores made the decision to close all of its stores effective Monday, March 16, 2020. (Leino Affidavit ¶ 15).

34. A&F Stores has not provided Simon executed copies of the remaining 11 lease documents, or the settlement document, contemplated by the Package Agreement. (Bearden Aff. ¶13). None of those documents contains any material deviation from the terms of the Package Agreement. *Id.*

E. A&F Stores revokes their approval of the Package Agreement leases

35. On March 18, 2020, Mr. Leino sent a letter via FedEx (as required by Section 10 of the form lease) formally retracting A&F Stores' signature on 42 leases and amendments. (Leino Affidavit ¶ 16; See also Exhibit C-1, attached and incorporated by reference).

36. Simon had already electronically signed and emailed 24 of those documents back to A&F Stores on March 17, 2020. Simon did the same with six more lease documents on March 18, two more on March 19, seven more on March 24, and three more on March 26. (Bearden Aff. ¶ 12).

37. By March 26, 2020, A&F Stores received a total of 42 electronically signed copies of the leases and/or amendments, via Docusign, (Mason Affidavit, ¶ 11).

38. On March 27, 2020, Mr. Leino sent notices of termination to landlords of locations where A&F Stores' leases had expired on or before January 31, 2020 and considered the leases to be month-to-month tenancies at this point. (Leino Affidavit ¶ 19; See also Exhibit C-2, attached and incorporated by reference).

F. Current status of the parties and potential costs of injunction

39. By March 20, 2020, A&F Stores also had paid its second month of rent at the lower rate under the Package Agreement, saving approximately $900,000 compared to what A&F Stores would have had to pay had the parties still been operating under prior lease terms. (*Id.* ¶16).

40. A&F Stores has paid rent for the stores in the Package Agreement that was due April 1 or May 1, 2020, totaling approximately $3.5 million. (Seabaugh Aff. ¶ 16).

41. If A&F Stores are forced to operate the 53 stores that are the subject of Simon's requested preliminary injunction, A&F Stores would suffer an estimated $500,000.00 weekly in losses. This represents the difference between projected revenues and projected costs including, but not limited to, rent and charges, payroll, and supplies. (Leino Affidavit ¶ 21).

42. Additionally, A&F Stores' estimated current retail value of its inventory in the 53 stores from the 2019 Package Negotiations is approximately $21,800,000.00. Such merchandise can be used in various ways including to fulfill online orders submitted by customers through A&F Stores' websites (www.abercrombie.com; www.hollisterco.com).

43. In addition, as A&F Stores' that are not subject to this dispute begin to reopen, these A&F Stores can sell that inventory from those stores. The estimated current retail value of this inventory is approximately $21,800,000.00 and it may lose retail value as time passes. (Leino Affidavit ¶ 22).

II. CONCLUSIONS OF LAW

A. Standards on a preliminary injunction

43. "[A] preliminary injunction is an extraordinary remedy that should be used sparingly." *Crossmann Communities, Inc. v. Dean*, 767 N.E.2d 1035, 1040 (Ind. Ct. App. 2002).

44. The grant or denial of a request for a preliminary injunction rests within the sound discretion of the trial court. *Robert's Hair Designers, Inc. v. Pearson*, 780 N.E.2d 858, 863 (Ind. Ct. App. 2002).

45. The purpose of a preliminary injunction is to maintain and preserve the status quo. *AGS Capital Corp. v. Prod. Action Int'l, LLC*, 884 N.E.2d 294, 314 (Ind. Ct. App. 2008), *trans. denied*.

46. To obtain a preliminary injunction, a party must make a showing of four elements: (1) there exists a reasonable likelihood of success at trial; (2) the remedies at law are inadequate, thus causing irreparable harm pending resolution of the substantive action; (3) the threatened injury to the moving party outweighs the potential harm to the nonmoving party from the granting of an injunction; and (4) the public interest would not be disserved by granting the requested injunction. *State v. Econ. Freedom Fund*, 959 N.E.2d 794, 803 (Ind. 2011).

47. Furthermore, a court may not issue a preliminary injunction unless the movant tenders a bond or security in an amount deemed 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." T.R. 65(C).

B. Whether this matter is a prohibitory or mandatory injunction

48. Throughout the briefing on this matter, the parties have disputed whether Simon's request for injunctive relief constitutes either a mandatory or a prohibitory injunction.

49. "[P]rinciples upon which mandatory and prohibitory injunctions are granted do not materially differ…." *Crossmann Cmtys., Inc. v. Dean*, 767 N.E.2d 1035, 1040 (Ind. Ct. App. 2002) (quoting *Schwartz v. Holycross*, 83 Ind. App. 658, 149 N.E. 699, 701-02 (1925). Mandatory injunctions, however, are considered the more extraordinary equitable remedy, requiring the movant to demonstrate "injury which is certain and irreparable if the injunction is denied." *Dible v. City of Lafayette*, 713 N.E.2d 269, 272 (Ind. 1999). Courts, therefore, are more reluctant to grant mandatory injunctions. *City of Gary v. Majestic Star Casino, LLC*, 905 N.E.2d 1076, 1082 (Ind. Ct. App. 2009) (citations omitted).

50. A&F Stores argues that Simon seeks a mandatory preliminary injunction because the relief sought would compel A&F Stores to reopen their locations following their closures.

51. Simon argues that this Motion should be considered a prohibitory injunction because Simon's motion seeks only to require that A&F Stores continue to operate their locations as they had been prior to A&F Stores' decision to close them.

52. While Indiana case law recognizes a distinction between mandatory and prohibitory injunctions, there is relatively little advice when to consider an injunction mandatory or prohibitory when that issue is disputed.

53. *City of Gary v. Majestic Star Casino, LLC,* from 2008, is one of the more recent published decisions to analyze the distinction between mandatory and prohibitory injunctions in-depth; however, the *Majestic Star* Court did not need to assess what factors to consider determining which type of injunction is being sought because it was not an issue for the appellate court to determine on review. 905 N.E.2d 1076,1082 (Ind. Ct. App. 2008). The *Majestic Star* Court started its analysis at the point where the City of Gary was indisputably seeking a "mandatory injunction," *Id.* at 1080, and defines "mandatory injunction" in a footnote as "[a]n injunction that orders an affirmative act or mandates a specified course of conduct." *Id.* at 1082 n.6 (quoting BLACK'S LAW DICTIONARY 800 (8th ed. 2004)).

54. Though the opinion discusses the difference between the types of injunctions, it is not clear what impact the mandatory/prohibitory distinction ultimately had on the outcome of the holding in *Majestic Star*. The *Majestic Star* Court upheld the denial of the preliminary injunction on the basis that the City of Gary had sought monetary damages that could be resolved through a legal remedy. *Id.* at 1084. Because establishing irreparable harm is an essential element to obtain an injunction, the City of Gary could not have been awarded injunctive relief under either standard. *Id.*

55. Strictly applying the definition from Black's Law Dictionary used in *Majestic Star* to Simon's Motion for Preliminary Injunction does not satisfactorily resolve the issue because whether the motion is seeking an "affirmative act" or "specific course of

conduct" is a matter of perspective. From Simon's point of view, the injunction is intended to prevent A&F Stores from taking any actions to permanently close their locations prior to the expiration of their leases. From A&F Stores' perspective, Simon's injunction would mandate A&F Stores undertake specific courses of action to reopen their locations.

56. To resolve whether this Motion for Preliminary Injunction seeks A&F Stores to undertake a "specific course of action" for the purposes of considering mandatory or prohibitory injunctive relief, the Court will look to what extent the injunctive relief request requires A&F Stores to deviate from the status quo of their pre-litigation relationship with Simon since ultimately the purpose of a preliminary injunction is to maintain and preserve the status quo. *AGS Capital Corp.*, 884 N.E.2d at 314.

57. The status quo, for preliminary injunction purposes, is not measured as of the time suit is filed, but rather as of the last, actual, peaceful, and non-contested status which preceded the pending controversy. *Hannum Wagle & Cline Eng'g, Inc. v. Am. Consulting, Inc.*, 64 N.E.3d 863, 883 (Ind. Ct. App. 2016), *See also*, *Kozuch v. CRA-MAR Video Ctr., Inc.*, 478 N.E.2d 110, 115 (Ind. Ct. App. 1985).

58. Both parties provided briefing regarding their positions on the status quo.[2]

59. Simon argues that status quo should be considered the time period around early March 2020 when A&F Stores were operated their locations under the prior leases and but paying the newly-agreed rent rates prior A&F Stores' repudiation of their leases.

[2] Both parties' respective counsels provided the Court with excellent briefing on this entire matter, but the Court wishes to commend the attorneys on this issue in particular as the argument and briefing greatly assisted the Court with coming to its decision.

60. A&F Stores argue that the status quo was the period just prior to Simon's filing of suit when A&F Stores were closed and A&F Stores' leadership had elected to shut down all locations as a result of the COVID-19 emergency.

61. The Court agrees with Simon and finds that the status quo between the parties should be considered from the period prior to A&F Stores' March 16 decision to close all locations as that decision led to the present dispute. This time period constitutes the last non-contested status because Simon has challenged A&F Stores' decision to close their stores permanently. While A&F Stores' locations were closed at the time of the decision, those closures were largely the result of emergency stay-at-home orders enacted at all levels of government in response to the COVID-19 emergency. Those emergency orders were highly unprecedented actions that impacted nearly all businesses in addition to these parties, and A&F Stores decision to close the locations permanently occurred only days after the issuance of the stay-at-home orders. In comparison, A&F Stores had been operating their locations in Simon malls for a much longer period of time, for years in most cases, and under new the new rent rates for over two months by the time the COVID-19 emergency orders were issued. Because of the relatively greater length of time the A&F Stores operated their locations in Simon malls under the new rent terms compared to the days the COVID-19 emergency conditions were present prior to filing this suit, the Court finds that status quo should be measured from the parties' relationship as of February and March of this year prior to the execution of the COVID-19 emergency orders.

62. Having established the status quo, the Court will now determine whether Simon's requested relief is mandatory or prohibitory based on the degree which the

injunction would require A&F Stores to undertake specific courses of conduct outside of the pre-litigation status quo.

63. As both parties have noted, this Court has assessed a number of similar requests for preliminary injunctions concerning mall tenants in Simon malls. In each case, the Court has relied on the specific facts and judgment to guide its decision.

64. Simon is seeking to enjoin A&F Stores from closing their locations which had previously been open in February and March. Because these relief does not compel A&F Stores to take any specific action outside of what they were doing during the status quo period, this Court finds that Simon's request is for a prohibitory injunction.

65. There are aspects of Simon's requested injunction that would mandate A&F Stores to preform specific action, such as paying rent to the landlord entities. The Court believes that this is incidental to the larger relief requested, which is to prohibit A&F Stores from closing its locations in Simon malls until a full trial on the merits can be conducted.

66. In addition, Simon's requested relief allows A&F Stores to close locations whose previous lease was not extended under any agreement, so the injunctive relief would not be forcing A&F Stores to keep locations open beyond the terms of the leases that were in place as of the status quo dates.

67. Because Simon's Motion for Preliminary Injunction largely seeks to prohibit A&F Stores from taking affirmative steps to close their locations, the Court will assess Simon's requested relief as a prohibitory injunction.

C. A&F Stores' initial objections to Simon's Motion for Preliminary Injunction

i. Whether Simon has the legal basis to bring action to enjoin A&F Stores

68. A&F Stores has challenged Simon's Motion for Preliminary Injunction on several grounds. Among their arguments, A&F Stores contend that Simon lacks standing and is not the real party in interest to adjudicate claims under the 53 leases at issue under the Package Agreement.

a. Whether Simon has standing

69. "Standing refers to the question of whether a party has an actual demonstrable injury for purposes of a lawsuit." *Hammes v. Brumley*, 659 N.E.2d 1021, 1029 (Ind. 1995).

70. In general, a party who suffers from an alleged breach of contract has standing to bring a claim for such breach. *Cook v. Evansville*, 178 Ind. App. 20, 21, 381 N.E.2d 493, 494 (1978).

71. The Court finds that Simon has standing to bring this action arising from A&F Stores closure of locations whose leases were extended as part of the terms of the Package Agreement because Simon would suffer damage from a breach of the Package Agreement.

72. Simon and A&F Stores negotiated the Package Agreement directly with each other to address disputes between them over both A&F Stores' past-due rent as well as the extension of the leases for the 53 stores.

73. While Simon's right to seek specific performance of the leases is heavily disputed, the undisputed evidence shows that Simon would, at the very least be harmed in some manner by A&F Stores vacating these 53 stores prior to the expiration of their leases due to lost rent and other alleged damages to Simon's business.

74. The Court finds that, at the very least, Simon has standing to bring this action based on the alleged harms it would suffer due to any breach of the Package Agreement.

75. Because Simon has standing, Simon can seek to enjoin A&F Stores as a remedy against further breach of the Package Agreement.

b. Whether Simon is the real party in interest to seek any injunction & A&F Stores' Motion to Strike

76. Similarly, A&F Stores contends that Simon is not the real party in interest to seek A&F Stores' specific performance of the 53 leases because Simon is not the landlord on any of the leases.

77. Pursuant to Ind. Trial Rule 17(A), "Every action shall be prosecuted in the name of the real party in interest."

78. "A real party in interest … is the person who is the true owner of the right sought to be enforced." *Hammes*, 659 N.E.2d at 1030.

79. "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time after objection has been allowed for the real party in interest to ratify the action, or to be joined or substituted in the action. T.R. 17(A).

80. A&F Stores first raised this argument at the April 29 hearing on Simon's Motion for Temporary Restraining Order, noting that Simon had not obtained any permission from the landlord entities to bring the action from any landlord entity.

81. Following the hearing on the TRO, Simon provided the Court a Verified Ratification of Action ("Ratification") signed by Steven E. Fivel, General Counsel for Simon Property Group, Inc., confirming that Simon could bring this action on behalf of

the affected landlord entities. (Fivel Ratification, ¶ 5). Fivel has provided sworn testimony under the penalty of perjury that the Board of Directors of Simon Property Group, Inc. has authorized him to act on behalf of the landlord entities in this action. (*Id.* ¶ 4).

82. A&F Stores subsequently filed their Motion to Strike the Ratification on the basis that it is an impermissible strategic maneuver disfavored under T.R. 17(A). *See, e.g., Metal Forming Technologies, Inc. v. Marsh & McClennan Co*., 224 F.R.D. 431 (S.D. Ind. 2004) (disallowing an assignee of a claim from proceeding against a defendant under the names of the assignors pursuant to Fed. R. Civ. P. 17(a)).

83. A&F Stores also argue the Ratification should be stricken because Fivel's statements are hearsay and insufficient to show that the landlord entities actually ratified Simon's action.

84. Addressing A&F Stores' Motion to Strike, the Court finds the Ratification proper and deems it duly admitted. Fivel has established with his verified testimony that he has authority by virtue of his position with Simon Property Group, Inc. to act on behalf of the landlord entities in this matter. Using this authority, he has expressly ratified Simon's actions in this matter. The Court finds the Ratification is sufficient to permit Simon to proceed on behalf of the landlord entitles.

85. The Court does not find the Ratification contains hearsay because Fivel does not base his authority to act on out-of-court statements from each of the 53 landlords expressly telling him that he could ratify this action; he is acting pursuant to the authority of his position with Simon Property Group, Inc., which has ownership

interests in the landlord entitles that allow Simon Property Group, Inc. to ratify actions on their behalf.

86. Finally, the Court finds this present matter differs from *Metal Forming Technologies* because Simon is proceeding in its own name, and not under the names of each of the landlords at issue, and Simon was never fully assigned the claims from the 53 landlords at issue. The landlords could still potentially join as co-plaintiffs in this matter. Based on the Ratification, however, the Court finds that Simon may pursue specific performance of the 53 leases at issue without further involvement from the individual landlord entities.

87. For these reasons, A&F Stores' Motion to Strike is DENIED.

88. Regardless of the Ratification, the Court would still find Simon to be a real party in interest to this action. Simon's claim arises out of the alleged breach of the Package Agreement, of which the 53 lease extensions were terms. It is undisputed that Simon and A&F Stores negotiated the Package Agreement directly; therefore, Simon owns the right to seek remedy for any breach of the Package Agreement by A&F Stores directly as a party in interest, including breaches involving the 53 leases extended as part of the Package Agreement.

ii. Whether this Court is the proper forum to seek injunctive relief

89. A&F Stores has also argued that this Court is not the proper forum to adjudicate this claim since all but one of the 53 leases at issue are for stores located in locations outside of Indiana.

90. Each lease contains a choice of law provision stating that the lease will be governed by the substantive law of the state in which the store is located.

91. A&F Stores contends that, since any remedy for specific performance ordered by this Court may not be honored under the law of many of these states, Simon's Motion for Preliminary Injunction should be denied outright.

92. In response, Simon argues that choice-of-law provisions, unlike forum-selection clauses, do not prevent this Court from adjudicating disputes over leases subject to them. *See Oswald v. Shehadeh,* 108 N.E.3d 911, 915 (Ind. Ct. App. 2018). Without any other basis to reject this Court's jurisdiction over the matter, Simon contends that A&F Stores has failed to show this Court to be an improper forum to resolve this matter.

93. The Court agrees with Simon. The choice-of-law provisions in the leases are not sufficient to remove this case from the Court absent any further showing that this Court lacks jurisdiction over the matter.

94. A&F Stores' argument that other states may not possibly enforce any injunction entered by this Court does not concern matters of jurisdiction and therefore does not show that this Court is an improper forum to resolve the present action.

D. Analysis of the four preliminary injunction factors

i. Simon's likelihood of success on the merits

95. 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), *trans. denied.*

96. The likelihood of success element is met if the party seeking injunctive relief shows that it has a "better than negligible" chance of succeeding on the merits. *IHSAA v. Martin*, 731 N.E.2d 1, 7 (Ind. Ct. App. 2000).

97. "Better than negligible" has been understood to mean the party can satisfy this factor "by establishing a prima facie case." *Coates v. Heat Wagons, Inc.*, 942 N.E.2d 905, 911 (Ind. Ct. App. 2011).

a. Whether Simon has established the existence of an enforceable agreement

98. The issue before this Court is whether there was sufficient agreement on terms between the parties such that the Court could find a reasonable likelihood of success for Simon's claim for specific performance of the 53 leases that were part of the Package Agreement discussions.

99. Both parties acknowledge that they had been negotiating extensions of the then-53 leases as part of the Package Agreement since early 2019.

100. Both parties also admit that there was never a final, fully executed copies of all 53 leases at issue, signed in ink.

101. Simon maintains that A&F Stores' established and agreed to essential terms of the Package Agreement through Ciotola's January 14 email.

102. Simon relies on the Indiana Supreme Court's opinion in the case *Wolvos v. Meyer*, 668 N.E.2d 671 (Ind. 1996), which held that contracts that contemplate subsequent final writings on the same subject can be held enforceable prior to the execution of that final writing. In *Wolvos*, Meyer sought specific performance of an option agreement he entered with Wolvos for the purchase of real estate. *Id.* at 672.

The agreement provided that if Meyer exercised the option, the parties would enter into "a written purchase agreement on forms typically used by realtors and brokers in St. Joseph County" and conduct a closing within 30 days of the completion of environmental remediation to be performed by Wolvos. *Id.* at 673. After Meyer timely exercised the option, Wolvos argued the agreement was an unenforceable "agreement to agree" and sought to negotiate different terms regarding the environmental remediation. *Id.*

103. On review, the Indiana Supreme Court found that the option agreement the parties entered to be "no mere agreement to agree, but a binding contract that the trial court properly enforced." *Wolvos,* 668 N.E.2d at 678.

104. The *Wolvos* Court maintained that an agreement contemplating a final, express form could still be deemed enforceable even if the parties never executed the subsequent document as long as the parties expressed a) an agreement on the essential terms of their deal and b) both had a mutual intent to be bound. *Wolvos,* 668 N.E.2d at 678.

105. Simon maintains that the January 14 email establishes the essential terms of the Package Agreement, namely the extension of the 53 leases at issue and A&F Stores' new financial obligations under the renewed leases. While agreeing that other terms of the Package Agreement continued to be negotiated after January 14, Simon contends that the terms of the January 14 email provide the essential terms of the Package Agreement, namely extensions to the leases and the new rent rate. Pursuant to *Wolvos,* Simon argues that it can seek specific performance of these essential terms regardless of whether a final version of the agreement was subsequently executed.

106. Having established the lease extensions were essential terms set forth in the January 14 email, Simon argues that A&F Stores' actions following the January 14 email show a clear intent to be bound to those terms necessary to seek enforcement. After January 14, A&F Stores made rent payments under the new, lower rate in February and March 2020, relocated a Hollister store, and closed five other stores as contemplated in the Package Agreement.

107. Simon maintains that these actions by A&F Stores constitute an overt admission that a contract existed. *See Int'l Creative Mgmt., Inc. v. D & R Entm't Co.*, 670 N.E.2d 1305, 1312-1313 (Ind. Ct. App. 1996).

108. Having established essential terms and an intent to be bound, Simon argues that it can seek enforcement of these terms despite never executing a final subsequent version of the agreement.

109. In response, A&F Stores argues that the January 14 emails lacks essential terms to create any enforceable agreement and that that the parties showed no intent to be bound because they never executed a final agreement pursuant to the normal course of their dealings.

110. "An acceptance which varies the terms of the offer is considered a rejection and operates as a counteroffer, which may be then accepted by the original offeror." *Martins v. Hill*, 121 N.E.3d 1066, 1070 (Ind. Ct. App. 2019) (finding based on plain language of parties' communications they failed to agree upon a contractual settlement of the case).

111. A&F Stores notes that Simon's own employees, Beardon and Seabaugh, responded to the January 14 email by indicating that they would review the terms and

provide counteroffers, showing both that the January 14 email did not contain agreed-upon essential terms and that even Simon did not intend to be bound by the terms of the January 14 email.

112. In addition, the January 14 email was part of a series of emails between employees of Simon and employees of A&F Stores to negotiate final terms for the Package Agreement. Included on most of these emails were standard disclaimers at the bottom indicating the emails were to be treated as ongoing negotiations and were not meant to establish any obligation prior to a final written agreement.

113. Additionally, A&F Stores maintains that the practice of the parties was to memorialize agreed terms in a formal written copy signed by duly-authorized agents of both parties. (Leino Affidavit, ¶ 10). The terms of the January 14 email were never memorialized in such a way. A preliminary Renewal Rents Letter that included certain terms from the January 14 email was drafted by A&F Stores and offered to Simon on January 23, 2020 to execute, but Simon never signed the Rents Renewal Letter.

114. Believing that no terms were in place until a final agreement was signed, A&F Stores characterizes its choice to pay the February and March 2020 rents as a "unilateral decision" to continue the stores as month-to-month tenancies.

115. Because there was no fully ratified agreement, A&F Stores contends that it timely revoked its signature on the 42 leases with the new rent terms.

116. A&F Stores claims that at the very best, Simon can claim that month-to-month lease agreements began based on A&F Stores making rent payments beginning February 1, 2020. When April ends, the leases will expire naturally upon A&F Stores' nonpayment of rent.

117. Upon review of the evidence and argument, the Court finds that Simon and A&F Stores did enter into essential terms of the Package Agreement as indicated in the January 14 email and manifested an intent to be bound by those essential terms through the actions taken by the parties. Simon has therefore shown a reasonable likelihood of success on the merits of its breach of contract claim with respect to seeking enforcement of these specific, essential terms.

118. The essential terms for the purpose of this action are present in the January 14 email. Simon and A&F Stores both agreed to the extension of 53 existing leases in exchange for new rent terms. While other terms were certainly being finalized in anticipation of a final written agreement, these terms were settled.

119. Had there been no other action with respect to these terms, the Court would be inclined to find the disclaimer language at the bottom of the email communications between the parties would show that the parties never intended to follow those terms until a fully executed written instrument was produced.

120. A&F Stores, however, paid the February and March 2020 rents at the new rates set by the terms of the January 14 email, and Simon accepted. In doing this, the parties clearly manifested an intent to be bound to extensions of the existing leases under the new rent arrangements. A&F Stores agreed to pay the rent despite no fully executed lease agreement in place, and Simon agreed to accept the rent at the new amount, which was $900,000 lower than under the previous terms.

121. As far as the other outstanding terms being negotiated by the parties after January 14, the terms of the previous leases were already in place. By agreeing to extend those leases in exchange for the new rent rate, the parties agreed to be further

bound by those terms during the extension period until they negotiated alternative terms.

122. The Court finds this present arrangement to be highly analogous to the agreement in *Wolvos* where the parties agreed to certain enforceable terms of an arrangement with the expectation that they would execute a full agreement in the future. Even though Simon and A&F Stores have never executed such an agreement to this point, the parties remain bound by the terms to which they already agreed: the extension of the 53 leases under the existing terms of those leases in exchange for lower rent. However, 42 of the leases were signed by A&F Stores and sent to Simon on March 13, 2020. Simon had electronically signed 24 of the leases on March 17, 2020, had electronically signed 6 on March 18, 2020, had electronically signed 2 on March 19, 2020, had electronically signed 7 on March 24, 2020. On March 16, 2020, A&F send via FedEx notice they were retracting their signature on 42 leases but there is no evidence if or when Simon received that document. On March 26, 2020, A&F received the 42 leases fully executed. On March 27, 2020 A&F Stores send notices of terminations of the 42 leases. Many states issued mandatory stay-at-home orders in the last week of March 2020.

123. The Court understands A&F Stores' arguments regarding the unenforceability of the January 14 email terms based on the non-mirrored offer and acceptance as well as the lack of execution of any final agreement. The Court finds that the Supreme Court's guidance in *Wolvos* more accurately applies to this situation as "mere reference to a more formalized contract does not void the presently existing agreement." *Wolvos*, 668 N.E.2d at 675. Here, leases were already in place between

Simon and A&F Stores, and by January 14, 2020, they had agreed to extend those leases pursuant to new rent amounts.

124. In light of the evidence presented, the Court finds that the parties intended and agreed to be bound to terms regarding renewals of the identified A&F Stores' leases as well as the newly-negotiated rent amounts.

125. Based on these agreed terms, Simon has shown that A&F Stores' intention to close their locations prior to the end of their leases extended under the Package Agreement and failure to make the agreed rent payments in the future would constitute a breach of their agreement.

126. The Court finds that Simon has shown a greater than negligible chance of succeeding and thus has satisfied the likelihood of success element for the limited purpose of this preliminary injunction.

b. Whether Simon is barred from seeking specific performance of the 53 leases

127. A&F Stores argued at the hearing that Simon is not entitled to specific performance absent a provision in any agreement or lease expressly permitting such a remedy.

128. "The decision whether to grant specific performance is a matter within the sound discretion of the trial court. The judgment of the trial court is given deference because an action to compel specific performance sounds in equity." *Metro Holdings One, LLC v. Flynn Creek Partner, LLC*, 25 N.E.3d 141, 161 (Ind. Ct. App. 2014).

129. To enforce a contract for specific performance, the terms of the contract "need only be reasonably definite and binding as to its material terms. *Humphries v. Ables*, 789 N.E.2d 1025, 1034 (Ind. Ct. App. 2003).

130. A&F Stores argues that Simon cannot be entitled to specific performance relief because the terms of Package Agreement specifically included in the January 14 email are not sufficiently clear to bind A&F Stores to any performance. Additionally, the leases at issue do not contain specific performance clauses.

131. Additionally, A&F Stores directs the Court to multiple cases in other jurisdictions where courts have denied landlord's requests to enjoin tenants from ceasing operating in their buildings, suggesting that specific performance remedies have been rejected, including jurisdictions in which many of the A&F Stores locations at issue are located. *See, e.g., Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1003 (Pa. 2003); *Ciolfi v. Bos. Chicken*, 1997 Mass. Super. LEXIS 231, at *7 (Oct. 6, 1997); *Mayor's Jewelers v. Cal. Pub. Emples. Ret. Sys.*, 685 So. 2d 904, 904 (Fla. Dist. Ct. App. 1996); *Grossman v. Wegman's Food Mkts., Inc.*, 43 A.D.2d 813 (4th Dep't 1973).

132. The Court finds that, regardless of whether a provision in any agreement permits Simon to seek specific performance, Simon is entitled to seek specific performance as a remedy pursuant to Ind. T.R. 65.

133. With respect to the concern about other jurisdictions' substantive law, the Court notes that procedural law is governed by the rules of the forum state. *Ashley v. State*, 757 N.E.2d 1037, 1040 (Ind. Ct. App. 2001). Since injunctive relief is available under T.R. 65, Simon is entitled to seek such a remedy in this matter.

134. To the extent that courts in other jurisdictions would not grant injunctive relief to compel specific performance of mall leases, the Court finds that does not impact its present analysis of Simon's likelihood of success.

135. First, Simon's burden is to establish a greater than negligible chance of success on the merits. It is too speculative to suggest that other jurisdictions not enforce specific performances of the leases under the Package Agreement and that this would then reduce Simon's likelihood of success merits.

136. Second, the Court finds that the case law provided is not dispositive of the issue of specific performance in those jurisdictions. The Court does not seek to presume how sister courts in other jurisdictions would decide these issues based on these present facts and does not venture to guess. For example, the facts in the *Summit Towne* decision differ because that involved a smaller brand that was closing one store due to severe financial difficulties. *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 573 Pa. 637, 644, 828 A.2d 995, 999 (2003). In comparison, A&F Stores is a notable national brand seeking to immediately close 53 stores nationwide in the wake of the COVID-19 emergency. It is difficult to apply broad principles from other jurisdictions when each case is so fact-specific and the burden for Simon to satisfy at this point is lower than at a full trial on the merits of the case.

137. Additionally, while the *Summit Towne* Court reversed the lower appellate court's grant of a preliminary injunction, its holding was based on the facts that the record showed that the trial court did not abuse its discretion by initially denying the motion for preliminary injunction, not that a preliminary injunction for specific performance of a shopping mall tenant could never issue.[3] In doing so, the *Summit*

[3] This is not to say that substantive law of other jurisdictions specifically banning practices would never be considered by the Court. For example, if this case were about enforcing a non-competition agreement against a resident of California, the Court would certainly consider and apply California's statutory ban on such agreements in its analysis. *See Cal Bus & Prof Code § 16600*; *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, 946, 81 Cal. Rptr. 3d 282, 288, 189 P.3d 285, 291 (2008).

Town Court stated that the Court does not read that case to stand for the proposition that specific performance is never available for commercial leases at shopping centers.

138. As for A&F Stores' argument about the lack of specific terms to bind A&F Stores' performance, the Court finds that A&F Stores would only need to abide by the terms of their existing leases that were extended in the January 14 email.

139. The Court finds that Simon may seek specific performance as an available remedy in this action.

ii. Whether Simon would be subject to irreparable harm

140. "Irreparable harm is that harm which cannot be compensated for through damages upon resolution of the underlying action." *Coates v. Heat Wagons, Inc.*, 942 N.E.2d 905, 912 (Ind. Ct. App 2011). "The trial court should only award injunctive relief where a legal remedy will be inadequate because it provides incomplete relief or relief that is inefficient 'to the ends of justice and its prompt administration.'" *Id.*

141. "Although mere economic injury generally does not warrant the grant of an injunction, the trial court must determine whether the legal remedy is as full and adequate as the equitable remedy. *City of Gary v. Majestic Star Casino, LLC*, 905 N.E.2d 1076, 1083 (Ind. Ct. App. 2009).

142. One purpose of a preliminary injunction is to prevent harm to the moving party that could not be corrected by a final judgment." *Crossman Communities, Inc. v. Dean*, 767 N.E.2d 1035, 1042 (Ind. Ct. App. 2002).

143. Simon argues that permitting A&F Stores not to operate would cause it irreparable harm.

144. Simon has designated testimony from Pervis Beardon and expert witness John Talbott that Simon's business model succeeds only if its tenants are open and drawing customers to its retail properties. Simon depends on its tenants, and its tenants depend on one another to drive customer traffic.

145. Simon argues that a national brand that is financially solvent like A&F Stores vacating their leases early would negatively impact Simon's ability to keep customers and tenants, undermining its business model in a way that could not be adequately addressed through monetary damages alone.

146. A&F Stores dispute the testimony Simon provided to argue irreparable harm as baseless. A&F Stores note that Beardon does not relate his testimony to the language of any lease at issue in this matter. A&F Stores contend that the damages referred to by Talbott are speculative, "slippery-slope" arguments tenants believe they can unilaterally break their leases early too if A&F Stores is allowed to vacate their stores.

147. A&F Stores also note that stores have vacated Simon malls previously, including A&F Stores, and Simon has been able to maintain high profitability.

148. From 2016-2018, A&F Stores closed approximately 33 locations in Simon Malls. During that time, Simon continued to make significant profits.

149. In response, Simon contends that the prior closures of A&F Stores were negotiated as to allow time to find replacement tenants. Simon also notes there is a significant difference between closing 33 stores over the course of years as part of structured negotiations verses immediately shuttering 53 locations without notice.

150. The Court finds that the Simon satisfied the element of irreparable harm for the purposes of this Motion for Preliminary Injunction. Simon's business model relies on maintaining a mix of tenants secured through leases where the tenant agrees to be open when the malls are open. The Court finds that financially solvent tenants suddenly vacating their leases does threaten Simon's business model, especially when the tenant is a highly recognizable national tenant such as A&F Stores.

151. The Court finds this harm to be irreparable because a legal remedy would not be able to redress this harm. While A&F Stores could pay amounts remaining on these leases, it is uncertain what impact sudden closures will have on Simon's arrangements with other tenants with whom Simon has covenanted certain co-tenancy and minimum occupancy arrangements.

152. A&F Stores' status as a financially viable company further creates risk of irreparable harm. If thriving companies such as A&F Stores could vacate their leases at-will, the designated expert testimony shows that Simon would not be able to guarantee its current and future tenants the same promises regarding tenant mixture that have made the shopping centers successful.

153. The Court finds that the current issues surrounding the COVID-19 pandemic further support a finding of irreparable harm if A&F Stores immediately vacates its locations. While the legal impacts of the COVID-19 pandemic on business arrangements are being litigated in forums across the county, there remains significant uncertainty on the long-term effects COVID-19 and the various government restrictions will have on the operation of retail centers across the country.

154. A&F Stores' the stated reason for closing the locations is specifically due to effects of the COVID-19 pandemic. If a company as finically stable as A&F Stores seeks to vacate all of their locations at once simply in light of the pandemic, the Court finds Simon's testimony that other tenants would certainly be tempted to vacate or at least consider the possibility that other tenants would suddenly vacate when considering whether to renew their leases highly credible.

155. While recognizing the damages to Simon are speculative to a degree, damages are certain. The indirect effects of a mass store closing coupled with the fallout from the COVID-19 pandemic further supports granting injunctive relief until a final adjudication on the merits can occur because of the uncertainty that a legal remedy would be able to provide Simon full relief at this point.

156. Given the timing of A&F Stores' decision coupled with their financial viability, the Court finds A&F Stores' decision to unilaterally vacate their stores would present irreparable harm to Simon and that Simon has met its burden on irreparable harm for the purposes of this preliminary injunction.

iii. Whether the balance of the harms favors granting an injunction

157. The Court must also determine whether the balance of the harms between the parties' favors granting a preliminary injunction.

158. The Court has determined Simon would be subject to the irreparable harm as described previously.

159. A&F Stores have argued that imposing a preliminary injunction would likely cost A&F Stores millions of dollars during the pendency of the injunction. A&F Stores would have to locate, hire, and train new employees, make

arrangements for seasonally current inventory, and engage in all the other ancillary efforts required to operate these stores across the United States. (See Lipesky Affidavit and Leino Affidavit ¶¶ 21-31). This is in addition to the certain additional expense and risk resulting from the advent of COVID-19 and the huge task of complying with a patchwork of various government orders.

160. The Court finds the balance of harms still presently weighs in favor Simon.

161. The balance of harms can weigh in favor of a plaintiff whose damages are difficult to quantify verses a defendant whose damages are purely pecuniary. *See Jay County Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n, Inc.*, 692 N.E.2d 905, 914 (Ind. Ct. App. 1998).

162. The Court has ruled that Simon would suffer the irreparable harm if A&F Stores were permitted not to keep open their locations.

163. The Court understands A&F Stores' costs in operating while under pandemic conditions will be significant. Still, costs related to operating under COVID-19 restrictions are being felt by all businesses. Additionally, the Court finds the costs alleged by A&F Stores were costs A&F Stores were paying during the status quo period and do not outweigh the irreparable harm Simon would suffer absent an injunction.

164. As for A&F Stores' concerns about damages to inventory, Simon has not sought injunctive relief to prevent sales of the inventory, so A&F Stores are free to shift inventory as necessary as long as sufficient inventory remains to operate the stores subject to the extended leases.

iv. Whether an injunction would violate the public interest

165. "Whether a particular covenant is against public policy is a question of law for the court to determine from all the circumstances, keeping in mind that persons should not be unnecessarily restricted in their freedom to contract." *Robert's Hair Designers v. Pearson*, 780 N.E.2d 858, 868-69 (Ind. Ct. App. 2002).

166. Public policy strongly favors the enforcement of parties' contracts. *Care Grp. Heart Hosp., LLC v. Sawyer*, 93 N.E.3d 745, 749, 758 (Ind. 2018). Simon also has presented evidence of the harmful effects on local communities that flow from conduct such as that engaged in by A&F Stores.

167. A&F Stores argues that a preliminary injunction would violate public interest because the Court would be required to take over operations of A&F Stores, creating an imposition on A&F Stores' operations and taking public resources away from the operation of this Court's docket.

168. Because Simon's preliminary seeks only to enjoin A&F Stores to abide by their previous leases, the Court would not need to engage in any oversight of the day-to-day operations of the A&F Stores' locations. As long as they continue operating, the Court need not intervene in the affairs of A&F Stores' locations subject to the 53 leases at issue.

169. The Court finds that granting Simon's request for a preliminary injunction not presently violate public policy or disserve the public.

E. Bond Amount

170. Under T.R. 65(C), no preliminary injunction may issue without adequate security.

171. Simon has asked the Court to maintain the $50,000 bond previously entered by the Court.

172. A&F Stores, while objecting to the issuance of any injunctive relief, has provided testimony that it may be subject to losses of $500,000 per week if the stores are to be opened.

173. As states are loosening restrictions related to the COVID-19 pandemic, the costs to A&F Stores will likely increase. Additionally, given the indefinite length of the preliminary injunction and Simon's financial standing, the Court hereby increases the bond amount to $15,000,000.

ORDER

Based on the foregoing analysis, the Court hereby GRANTS Simon's Motion for Preliminary Injunction against A&F Stores and DENIES A&F Stores' Motion to Strike.

It is therefore ORDERED that:

A. Abercrombie & Fitch Stores, Inc., its agents, successors, parent, 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. removing all inventory, all fixtures, or all equipment from the 53 stores at issue in this action for the purpose of closing those stores; however, A&F Stores can reallocate its inventory to other stores or to reserve for online sales but must maintain sufficient amounts of inventory in each store to operate per the terms of its lease; and

ii. otherwise abandoning the 53 stores at issue in this action pursuant to A&F Stores' unilateral declaration that the leases for those stores have terminated. A&F Stores should operate per the terms of the lease documents drafted pursuant to the Package Agreement, thereby maintaining the status quo.

B. Notwithstanding the above, if any lease expires according to the terms set forth in the documentation drafted pursuant to the Package Agreement, then A&F Stores may close that store if it chooses.

C. This Order does not supersede any emergency stay-at-home order issued by a governmental entity that prevents operation of the stores at issue. Any stay-at-home order controls over the terms of this Order.

D. This Order does not limit Simon and A&F Stores' ability to negotiate other terms that would supersede or amend the leases prepared pursuant to the Package Agreement. The Court asks that the parties provide written notice to the Court regarding any negotiated resolution that would affect the status of the stores subject to this Order.

E. Simon shall tender an additional bond amount of $14,950,000.00 by close of business, May 28, 2020.

SO ORDERED, ADJUDGED AND DECREED this 18th day of May, 2020.

Heather A. Welch

Hon. Heather A. Welch, Judge
Marion Superior Court 1
Indiana Commercial Court

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