PREPARED BY THE COURT

MILLBURN MALL HOLDINGS, LLC, Plaintiff, v. WALGREENS EASTERN CO., INC., Defendant.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION GENERAL EQUITY PART UNION COUNTY Docket No. UNN-C-148-19 CIVIL ACTION OPINION

This matter comes before the Chancery Division by way of Plaintiff's, Millburn Mall Holding, Co. ("Millburn Mall"), Order to Show Cause seeking to preliminarily enjoin Defendant, Walgreens Eastern Co., Inc. ("Walgreens"), from (a) closing its store at the Millburn Mall, located at 2933 Vauxhall Road, Millburn, NJ (hereinafter "Shopping Center"); (b) violating Section 6.02 of the Lease Agreement; (c) failing to operate its store at the Shopping Center in the same manner in which it has been generally operated during 2019; and (d) from advertising, marketing, or publicly stating that its store at the Shopping Center is closing.

On November 1, 2019, by way of Consent Order, Judge Dupuis ordered Walgreens "shall not take any further action in connection with the closing of the Store until December 31, 2019 or the date on which the court issues an Order adjudicating the motion, whichever is earlier." See Consent Order, November 1, 2019 ("Consent Order"). On November 13, 2019, the court ordered that "Walgreens has until November 18, 2019 to stock the store with 85% of its usual merchandise." See November 13, 2019 Order. On December 23, 2019, Hon. Michael Vazquez, U.S.D.J. executed a Consent Order through which Walgreens remained obligated to continue to operate the Walgreens store until the determination of Millburn Mall's request for preliminary injunctive relief. See Certification of Mark E. Duckstein ("Duckstein Cert.") at ¶5.

In September 1996, Saul Cantor and Mabel Cantor, as landlord, and Community Distributors, Inc., as tenant, entered into an Indenture of Lease ("Lease"), dated September 4, 1996, affecting the property located at 2933 Vauxhall Road, Tenant Space Number 10, Vauxhall, NJ (the "Shopping Center"). See Complaint, Exhibit A. In July 2007, Brownmill, LLC ("Brownmill"),

as landlord, and Community Distributors, Inc. (which later became known as Drug Fair Group, Inc. ("Drug Fair")), as tenant entered into a "First Amendment of Lease," dated July 23, 2007. See Certification of Michael M. Yi ("Yi Cert.) at ¶4; see also Complaint, Exhibit B. In September 2015, Millburn Mall became the new landlord of the Property. See Complaint at ¶3.

On March 18, 2009, Drug Fair filed for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware under Case No. 09-10897 (the "Bankruptcy Case"). See Yi Cert. at ¶6. On March 17, 2009, Drug Fair, as seller, and Walgreens, as buyer, entered into an Asset Purchase Agreement (the "Asset Purchase Agreement") through which Walgreens acquired all thirty-one (31) of Drug Fair's store leases, including the Lease in Issue. See Complaint, Exhibit C; see also Yi Cert. at ¶9. The Asset Purchase Agreement stated, "Seller has advised Buyer that Seller intends to dispose of certain of its assets and liabilities through a sale or sales to be effected under supervision of the Bankruptcy Court in the Chapter 11 Cases under the Bankruptcy Code." See Complaint, Exhibit C. Further, "[o]n the Closing Date, Seller shall . . . assign such Assigned Contract to Buyer pursuant to an order of the Bankruptcy Court." On March 19, 2009, Drug Fair filed a motion for an Order (a) Authorizing and Approving [the Asset Purchase Agreement]; (b) Approving the Sale of Certain of Debtors' Assets Pursuant to Section 363 of the Bankruptcy Code; (c) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Pursuant to Section 365 of the Bankruptcy Code; and (d) Authorizing the Debtors to Consummate Transaction Related to the Above. See Yi Cert. at ¶12. On April 27, 2009, the United States Bankruptcy Court for the District of Delaware issued an order approving Walgreens' assumption and assignment of 31 Drug Fair store leases—including the Lease which governs the Subject Property. See Complaint at ¶10. The Order provided:

> 23. The Debtors are hereby authorized and directed in accordance with Sections 105(a) and 365 of the Bankruptcy Code to (a) assume and assign to the Buyer, effective upon the Closing of the Sale, the Designated Contracts free and clear of all Liens and Encumbrances of any kind or nature whatsoever. . . .
> 24. with respect to the Designated Contracts: (a) each Designated Contract is an executory contract of unexpired lease under Section 365 of the Bankruptcy Code; (b) the Debtors may assume each of the Designated Contracts in accordance with Section 365 of the Bankruptcy Code, and any provisions in any Designated Contract that prohibit or condition the assignment of such Designated Contract or allow the party to such Designated Contract

> to terminate, recapture, impose any penalty, condition renewal or extension, or modify and term or condition upon the assignment of such Designated Contract, constitute unenforceable anti-assignment provisions which are void and of no force and effect . . .
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> 41. This Sale Order is a final, appealable order, which shall be effective immediately upon entry pursuant to Rules 7062 and 9015 of the Federal Rules of Bankruptcy Procedure . . .
>
> 4[2][1] Any provisions in the Designated Contracts which:
>
> (f) provide for so-called "operating covenants" (i.e. lease provisions which require the tenant to continuously operate a business within the premises under the Designated Contracts or which provide that the vacation or desertion of said premises under the Designated Contracts constitutes a default of the subject lease(s) constitutes impermissible restrictions on assignment of the Designated Contracts and are hereby unenforceable pursuant to Section 365(f) of the Bankruptcy Code.

See Yi Cert. at ¶15. On May 8, 2009, Walgreens executed an Instrument of Assignment and Assumption (the "Assignment"), through which it acquired the tenant's interests pursuant to the Lease. See Complaint at ¶10, Exhibit D.

Plaintiff acquired title to the Shopping Center, and therefore the landlord's interests in the Lease to Walgreens on September 21, 2015. See Complaint at ¶11. The term of the Lease expires on July 31, 2027. See Complaint at ¶13. Under the Lease, Walgreens is obligated to pay rent, a portion of the property taxes assessed against the Property, and a portion of the expenses incurred by the Plaintiff to maintain the common areas of the Shopping Center. See Complaint at ¶14. Section 27.05 of the Lease is an Exclusive Use Clause which states,

> The Landlord covenants and agrees with Tenant that during the term of the within lease the Landlord will not lease a store at the Shopping Center for the operation of any other registered pharmacy in the Shopping Center of which the demised premises is a part. Nor shall Landlord lease to stores whose majority of sales shall be health or beauty products in the said Shopping Center during the said period, except for renewals or extensions of existing leases.

See Complaint at ¶15; Exhibit A. Section 6.02 of the Lease is a continuous operations clause, which provides,

> Tenant shall **operate one hundred percent (100%) of the leased**

[1] Because of an apparent typographical error in the Bankruptcy Order, paragraph 42 of the Order is numbered incorrectly as "40," even though it follows paragraphs 40 and 41 of the Order.

> **premises during the entire term of this lease** with due diligence and efficiency so as to produce all of the gross sales which may be produced by such manner of operation, unless prevented from doing so by causes beyond Tenant's control. Subject to inability by reason of strikes or labor disputes, Tenant shall carry at all times in said premises a stock merchandise of such size, character, and quality as shall be reasonably designed to produce the maximum return. Tenant shall conduct its business in the leased premises during the regular customary days and hours for such type of business in the City or trade area in which the Shopping Center is located, and will keep the leased premises open for business during the same days, nights and hours as the majority of the claims and department stores located in the Shopping Center, or during the days, nights and hours agreed upon by a majority of the members of the Merchants Association provided for in Section 18.03 hereof. Tenant shall install and maintain at all times displays of merchandise in the display windows of any of the leased premises. Tenant shall keep the display windows and signs, if any, in the leased premises well lighted during the hours from sundown to closing unless prevented by causes beyond the control of Tenant. Nothing shall be construed to limiting the Tenant to remaining open more. However, the Landlord's obligations for parking lot lighting is required only during the time the shopping center is open, not to exceed 10 p.m.

See Complaint at ¶16, Exhibit A (emphasis added). Section 15.05 of the Lease states, "Landlord shall be entitled as an alternative remedy for any lease covenant breach by Tenant to injunctive relief enjoining the violation and Tenant agrees, upon such election by Landlord and Landlord's remedies at law on account of this breach are inadequate." See Complaint at ¶17.

The Shopping Center currently contains two "anchor stores," fourteen smaller first-floor retail stores, a free-standing pad site building for retail use, and fifteen office spaces (some of which are used by retail tenants). See Complaint at ¶19-29. Walgreens and Staples are the two "anchor stores." See Complaint at ¶20. The Walgreens has the most prominent location in the Shopping Center for motorists and passengers traveling on Vauxhall Road. See Complaint at ¶24.

Walgreens opened at the Shopping Center in May 2009, upon the execution of the Assignment. See Complaint at ¶27. Plaintiff Millburn Mall claims Walgreens has opened three additional stores in close proximity to the Shopping Center. See Complaint at ¶27. A store at 1633 Springfield Ave, Maplewood, NJ was opened in November 2011. See Complaint at ¶28. A store at 125 Morris Ave, Springfield, NJ was opened in September 2013. See Complaint at ¶29. A store was opened at 587 Millburn Ave, Short Hills, NJ was opened in October 2016. See

Complaint at ¶30.

In October 2019, a flier at the Walgreens' pharmacy was found, stating Walgreens would be closing its store at the Shopping Center on November 4, 2019. See Complaint at ¶32. As a result, Plaintiff filed an Order to Show Cause with Temporary Restraints and a one-count complaint for breach of contract seeking to enjoin Walgreens from closing its store in the Shopping Center and comply with the Lease's use and continuous operations clause. See Complaint at ¶39-67.

On November 19, 2019, Walgreens removed this matter to the United States District Court for the District of New Jersey based on federal question jurisdiction and bankruptcy related jurisdiction. See Duckstein Cert. at ¶4. On January 24, 2020, Plaintiff Millburn Mall filed a motion in federal court to remand this matter back to this court. See Duckstein Cert. at ¶6.

On March 24, 2020, Judge Vazquez granted Millburn Mall's motion to remand this matter to this court. See Duckstein Cert. at ¶9. The District Court also examined whether the Bankruptcy Order temporarily suspended the continuous operations clause for the purpose of the assignment or permanently voided the continuous operations clause for the balance of the lease. Judge Vazquez stated,

> Pursuant to Section 365(f), the Bankruptcy Court held the Operating Covenant unenforceable as an **impermissible restriction on assignment**. However, **no "substantive right" was conferred to Walgreens**. Instead, the ruling conferred a right to the bankruptcy trustee to assign leases irrespective of anti-assignment clauses within those leases. **Walgreens' rights in the lease are separate from the assignment of those rights under Section 365.** Further, the interpretation of the Bankruptcy Order and its effects on the Lease goes to the merits of the case. . . Though Walgreens contends the Bankruptcy Order "permanently modif[ied]" its rights in the Lease . . . its rights are contained in the Lease . . . and not in the Bankruptcy Code.

See District Court Opinion and Order, March 24, 2020 (emphasis added).

Since being remanded back to this court, the COVID-19 pandemic has struck, thereby adding further complications for both Walgreens and Millburn Mall. Walgreens certified it has experienced significant disruptions to inventory, including at times nationwide shortages, in multiple departments, including household cleaners, soap, sanitizer, disposable paper products, and bottled water. See Certification of Keith Miller ("Miller Cert.") at ¶7. Daily operating expenses have increased due to increased sanitary and safety precautions and increases in labor

costs. See Miller Cert. at ¶4. Walgreens' pharmacy has experienced a thirty percent (30%) decline in revenue in April 2002, and almost forty percent (40%) decline in May 2020. See Miller Cert at ¶5. "With three months left in the current fiscal year, the pharmacy's revenue is projected to result in an annual drop of 30%. Meanwhile revenue for the rest of the Store for the current fiscal year is projected to remain about the same." See Miller Cert. at ¶6.

Millburn Mall's daily operations have likewise been complicated. Many major tenants have been fully or partially shut down due to governmental orders. See Certification of Jeffrey Dash ("Dash Cert.") at ¶11. Walgreens, as an essential service, has remained open. See Dash Cert. at ¶11. As of June 1, 2020, eight tenants of the Shopping Center have been allowed to continue with full or partial operations, and seven tenants have closed to COVID-19 restrictions. See Dash Cert. at ¶12. The two anchor stores are in full operation, and six of the thirteen smaller tenants are open with restrictions. See Dash Cert. at ¶12.

On May 21, 2020, Walgreens' counsel sent a letter to Plaintiff's counsel with an executed copy of a letter of intent concerning a proposed sublease of the entire store premises by Dollar Tree Stores, Inc. See Yi Cert. at ¶26.

I. APPLICATION FOR INJUNCTIVE RELIEF

An application for injunctive relief is generally governed by the standards set forth in Crowe v. De Gioia, 90 N.J. 126, 132-5 (1981). The New Jersey Supreme Court has held that, to obtain injunctive relief, a party must show:

1) absent a preliminary injunction, the party will suffer irreparable harm;
2) the claim is based upon a settled legal right;
3) the party has a reasonable probability of ultimate success on the merits; and
4) the party will suffer the greater hardship if injunctive relief is denied than the opponent will if it is granted.

Ibid.; Parks v. Commerce Bank, 377 N.J. Super. 378, 387 (App. Div. 2005). Each of these factors must be clearly and convincingly demonstrated. Waste Mgmt. of New Jersey, Inc. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Irreparable Harm

Millburn Mall seeks the imposition of a preliminary injunction because without such it will suffer irreparable harm. Millburn Mall states that Walgreens is one of only two anchor tenants in the Shopping Center. See Dash Cert. at ¶12. Anchor tenants, particularly higher quality anchor tenants, allow a landlord to maximize smaller store rents, to leases smaller store vacancies, and to retain smaller store tenants when their leases are up for renewal. See Dash Cert. at ¶12. Anchor tenants such as Walgreens hold a very high value because it sells necessities "which helps to ensure a consistent flow of customer traffic." See Dash Cert. at ¶8. Millburn Mall contends Walgreens' strength as a commercial tenant is particularly valuable during the COVID-19 pandemic. See Dash Cert. at ¶8. As an essential service, Walgreens has remained in full operation and "continues to be the major draw of shoppers to the Mall." See Dash Cert at ¶11. Millburn Mall claims that Walgreen's abandonment of the store will result in a "domino effect of adverse consequences to the smaller stores in the Shopping Center and ultimately to Millburn Mall. See Millburn Mall Bf. in Support at 19. Millburn Mall argues that the dependent, smaller stores may eventually go out of business, choose not to renew their leases, or demand rent or other financial concessions from Millburn Mall. See Millburn Mall Bf. in Support at 19. Further, Millburn Mall contends it will face tremendous difficulty attempting to fill vacant smaller stores at market rent or even at all. Id. Millburn Mall states that such harm is irreparable as it will be impossible to make Millburn Mall whole with any degree of certainty. See Millburn Mall Reply Bf. at 21. Without a preliminary injunction, Millburn Mall contends the loss of Walgreens is an act which could destroy its business.

In support of their argument, Millburn Mall relies upon Dover Shopping Center, Inc. v. Cushman's Sons, Inc., 63 N.J. Super. 384 (App. Div. 1960). Millburn Mall argues under Dover, the New Jersey Superior Court, Appellate Division recognized violations of a continuous operations clause could result in irreparable injury and granted a preliminary injunction to prevent same from happening. Millburn Mall argues Dover recognized that shopping centers are designed as a cooperative enterprise, and each store's success depends upon the continuous operation of other stores. Due to the dependency of the stores, Millburn Mall argues the economic harm of one tenant's departure is more difficult to measure than the departing tenant's percentage rent obligation.

Millburn Mall further relies upon Ingannamorte v. Kings Supermarket Inc, 55 N.J. 223 (1970). Millburn Mall contends Ingannamorte also provides injunctive relief is limited to

situations where there are inter-dependent economic units and the landlord has an interest in the continued active operation of the lease premises far beyond the payment of fixed monthly rent. See Ingannamorte, 55 N.J. at 227. Millburn Mall argues this is such a situation.

Furthermore, Millburn Mall contends Walgreens, under Section 15.05 of Lease Agreement, has agreed to be subjected to injunctive relief in order to prevent the violation of any covenant imposed by the Lease. Section 15.05 of the Lease Agreement states,

> All remedies of the Landlord in this lease are cumulative and not exclusive. Landlord shall be entitled as an alternative remedy for any lease covenant breach by Tenant to injunctive relief enjoining the violation and Tenant agrees, upon such election by Landlord, that Landlord's remedies at law on account of the breach are inadequate. This clause is not intended to diminish or interfere with rights or remedies extended elsewhere herein to the Tenant.

Walgreens contends Millburn Mall will not suffer any irreparable harm because damages can be calculated. Walgreens argues any harm would be variations of lost rent, which can be calculated through "a matter of multiplication." See Walgreens Bf. in Opp. at 4-5. Under the Lease, Walgreens pays a fixed monthly amount as set forth under the agreed-upon rent schedule. See Complaint, Exhibit A, Section 2.01. Further, Walgreens argues any consequential damages related to other tenants would be no harder to calculate.

Walgreens contends Millburn Mall has misapplied Dover and Ingannamorte, and aforementioned cases do not support Millburn Mall's argument. Walgreens argues under Dover while the court affirmed a mandatory injunction for the tenant to continue operations, it did so because the landlord waived the need for judicial supervision of the business. In contrast, Walgreens contends Millburn Mall has done the opposite as it sought judicial intervention weeks after the initial consent order. Walgreens claims Dover warns against issuing mandatory injunctions which require ongoing judicial oversight as it would "amount to a state-run business." Walgreens continued, citing multiple out-of-jurisdiction cases which denied preliminary injunctions as such would require detailed supervision of the defendant's business. See CBL & Assoc., Inc. v. McCrory Corp., 761 F.Supp. 807, 811 (M.D. Ga. 1991); see also New Park Forest Assoc. II v. Rogers Enters., Inc., 195 Ill. App. 3d 757, 765 (Ill. App. Ct. 1990).

Further, Walgreens contends Ingannamorte does not support Millburn Mall's argument because the circumstances were different. Walgreens argues the landlord in Ingannamorte sought to enforce a "going dark" lease provision, which concerned the use of the rented space, either by

the tenant or landlord upon repossession. Walgreens claims "this is what Walgreens now seeks—to leave, rather than stay in a mutually sub-optimal arrangement." See Walgreens Bf. in Opp. at 7. Walgreens argues proper application of Ingannamorte would permit Walgreens thirty (30) days to decide whether to vacate the premises.

The first Crowe factor provides a preliminary injunction should not issue except when necessary to prevent irreparable harm. Crowe, 90 N.J. at 132. Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages. Id. at 133. Acts destroying a complainant's business, reputation, custom and profits irreparably injure and authorize the issue of a preliminary injunction. Cmty. Hosp. Grp., Inc. v. Blume Goldfaden Berkowitz Donnelly Fried & Forte, P.C., 384 N.J. Super. 251, 255 (App. Div. 2006) (citing Ferraiuolo v. Manno, 1 N.J. 105, 108 (1948)). The power to grant corporate entities injunctive relief to protect their business, custom and profits is firmly established and not dependent on pre-existing express agreements with the individuals against whom the restraints are sought. Id. However, "equity will not ordinarily order specific performance where the duty to be enforced continues over a long period of time and is difficult of supervision." Dover, 63 N.J. Super. at 394.

In support of their arguments, the parties debated the applicability of Dover and Ingannamorte. In Dover, the defendant, a retail bakery business, appealed from a mandatory injunction entered by the New Jersey Superior Court, Chancery Division ordering it to reopen and remain open during the hours and on the days required under the lease. 63 N.J. Super. at 387. The parties entered into a written lease for one of a group of stores in plaintiff's shopping center in which defendant operated its retail bakery business. Id. Among other arguments not relevant to the present matter, defendant claimed plaintiff's relief should have been denied because "money damages would be adequate, and even if that were not so, a court of equity should not direct the performance of detailed provisions of a lease . . . because of the necessity of continued superintendence." Id. at 393. Plaintiff argued damages were not readily measurable because the shopping center operated as a "cooperative enterprise, with each store's success dependent on the continued operation of the other stores." Id. Plaintiff stated the remedy is particularly feasible because plaintiff waived judicial superintendence and was relying upon defendant's self-interest in continuing to preserve its good reputation by operating its business in good faith. Id.

The Dover court affirmed the Chancery Division's mandatory injunction and held the harm to the shopping center was irreparable. Specifically, it stated,

> But the gravamen of the complaint here is not only the possible loss of additional income by way of a percentage of defendant's increased gross sales, but the difficulty in measuring the harm that would come from the withdrawal of one of the members of a semi-cooperative enterprise like a shopping center. Plaintiff's damages cannot therefore be accurately ascertained, and remedy by way of damages at law would be impractical and unsatisfactory.

Id. at 394. Furthermore, the court found the injunctive relief will not necessitate continued supervision by the court. The court pointed out the mandatory injunction "does no more than require defendant to reopen and resume its retail bakery business, to display the [bakery's name] on the outside of the premises, to keep the store open as required [under the lease], and to maintain a manager or salesperson in charge." Id. Thus, the judgment was not deemed "so difficult of enforcement that it can be said the difficulties of supervision outweigh the importance of granting specific performance because of the inadequacy of the remedy of damages at law." Id. at 395.

In Ingannamorte, defendant, a grocery store chain, appealed from a New Jersey Superior Court, Law Division judgment for possession being entered in favor of the plaintiffs, owners of a small shopping center. In 1957, plaintiffs leased the supermarket portion of the shopping center to Valley Fair for a term of ten years with a five-year renewal option. Ingannamorte, 55 N.J. at 224. The lease provided the space was only to be used as a shopping center. Id. at 224-25. In 1961, Valley Fair assigned the lease to defendant with plaintiff's consent. Id. at 225. In 1966, defendant ceased operation of the grocery store, closed its doors, and removed exterior signs from the leased premises. Id. However, defendant continued to pay rent. Id. In 1967, after written notice, plaintiffs refused to accept tender of rent and instituted an action for possession; defendant also notified plaintiffs it was renewing the lease for an additional five years. Id. at 226. The New Jersey Superior Court, Law Division found defendant by ceasing to actively operate as a supermarket at the leased premises had violated the **restrictive and mandatory continued use and occupancy clause of the lease.** Id. (emphasis added).

Defendant contended the Law Division erred because the use and occupancy clause should be construed as restrictive but not mandatory. Id. at 227. The New Jersey Supreme Court found the lease between plaintiffs and Valley Fair "contained enough on its face to imply an operating mandate." Id. at 229. Specifically, the New Jersey Supreme Court noted the lease disclosed the purpose was for a supermarket in the landlord's shopping center, and it provided the premises were to be "used and occupied" only for a supermarket. Id. at 230. "When these lease provisions are

viewed in the light of the physical and geographic circumstances there would appear to remain little reason to question that the parties contemplated that the supermarket would continue to be operated as such." Id. Thus, "the mere payment of rent for an 'idle store building' would not satisfy the purposes of the center or the landlord's execution of the lease." Id.

In the present matter, the court finds Millburn Mall is likely to suffer irreparable harm without the imposition of a preliminary injunction. As set forth in Cmty. Hosp. Grp., Inc., acts destroying a complainant's business, reputation, custom and profits constitute irreparable injury and warrant the issue of a preliminary injunction. 384 N.J. Super. At 255. Further, the court finds Dover particularly convincing due to the similarity of their circumstances and the perceived irreparable harm. Both Dover and the present matter involve situations in which a plaintiff shopping center seeks injunctive relief to require a defendant tenant to perform under the terms of their respective lease agreements. In each, plaintiff shopping centers operate as cooperative enterprises wherein each store's success is dependent upon the continued operation of other stores. This is exacerbated in the present matter as Walgreens, an anchor tenant, is the primary draw of nearby travelers.

Without the imposition of a preliminary injunction, Walgreens will leave the Shopping Center without one of its two anchor stores. Walgreens elected to set up three new stores within approximately two miles of the Shopping Center. Walgreens further opened these stores knowing the current lease was in effect. Permitting violations of the lease agreement and allowing Walgreens to close its store will limit the number of shoppers to the Shopping Center thereby negatively impacting Millburn Mall's customer traffic. At this stage in the litigation, the harm to Millburn Mall's viability, ability to attract and retain tenants, and business and profits is difficult to calculate. Notwithstanding same, experts will need to be retained to calculate any economic damages stemming from a Walgreens breach.

Moreover, Walgreens' argument concerning Plaintiff's need for judicial supervision is misplaced. Millburn Mall previously sought judicial intervention after the filing of the Consent Order because Walgreens removed a substantial amount of its inventory from the store, in violation of the continued operations clause in the Lease Agreement, and in contrast to the purposes of the Consent Order's temporary restraints. Moreover, the court does not anticipate further judicial oversight. The previous court orders will remain in effect, including but not limited to the court's order requiring Walgreens to stock eighty-five percent (85%) of its inventory. Also, unlike Dover,

the present motion comes before the court not on a mandatory injunction for the remainder of the lease term, but rather on a preliminary injunction for the duration of this litigation. This court does not find difficulties of supervision outweigh the importance of issuing a preliminary injunction. The first Crowe factor is satisfied.

Law is Well-Settled

A second Crowe factor requires temporary relief should be withheld when the legal right underlying plaintiff's claim is unsettled. Crowe, 90 N.J. at 133. To establish a breach of contract claim, our law imposes on a plaintiff the burden to prove four elements: first, that "[t]he parties entered into a contract containing certain terms"; second, that "plaintiff did what the contract required [it] to do"; third, that "defendant[s] did not do what the contract required [them] to do[,]" defined as a "breach of the contract"; and fourth, that "defendant[s'] breach, or failure to do what the contract required, caused a loss to the plaintiff[s]." Globe Motor Co. v. Igdalev, 225 N.J. 469, 482 (2016). The law regarding breach of contract is well-settled, and the second Crowe factor is satisfied.

Success on the Merits

Millburn Mall claims it is likely to prevail on the merits under New Jersey law. Millburn Mall argues that Walgreens has publicly announced its intention to close the store, which would violate Section 6.02 of the Lease agreement requiring Walgreens "operate one hundred percent (100%) of the leased premises during the entire term of the lease." Millburn Mall states because Walgreens' lease expires on July 31, 2027, its closure is a blatant breach of the Lease.

Moreover, Millburn Mall argues that paragraph 40(f) of the Bankruptcy Court Order does not void the continuous operations clause in Section 6.02 of the Lease. Paragraph 40(f) states,

> provide for so-called "operating covenants" (i.e. lease provisions which require the tenant to continuously operate aa business within the premises under the Designated Contracts or which provide that the vacation or desertion of said premises under the Designated Contracts constitutes a default of the subject lease(s) constitutes impermissible restrictions on assignment of the Designated Contracts and are hereby unenforceable pursuant to Section 365(f) of the Bankruptcy Code.

Millburn Mall contends Walgreens' reliance on Section 365(f) is misplaced and based upon

a misunderstanding of Section 365(f). Millburn Mall argues 365(f) operates only to temporarily suspend the anti-assignment clause under Section 6.02 of the Lease Agreement to enable the assignment of the lease from the Debtor to a Third Party. Millburn Mall contends it does not permanently alter the lease provisions.

Moreover, Millburn Mall argues Section 365(f) does not provide a debtor or a debtor's assignee the authorization to re-write a contract. By assuming the contract, Millburn Mall contends Walgreens has accepted both the benefits and the burdens of the contract. Further, any ambiguities in the Bankruptcy Court's Order are inconsistent with Section 365(f) of the Bankruptcy Code.

Walgreens contends Millburn Mall is unlikely to prevail on its claim because the Bankruptcy Court's Order rendered the Operating Covenant unenforceable. Walgreens argues when applying the rules of contract construction, the terms of use defined in Paragraph 42 of the Bankruptcy Court's Order cannot be read to be temporary. Rather, Walgreens contends the Bankruptcy Court exercised its authority under Section 365 of the Bankruptcy Code to nullify any anti-assignment clauses.

The third Crowe factor necessitates that Plaintiff show a reasonable probability of success on the merits, which requires a showing that the material facts are uncontroverted. Crowe, 90 N.J. at 133. That requirement is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo. Id. (citing Naylor v. Harkins, 11 N.J. 435 (1953). In the present matter, the material facts are not in controversy. Walgreens does not contend that they seek to leave the Shopping Center. Walgreens merely seeks to cease operation but continue to pay rent on a closed pharmacy and retail store. Rather, the parties' dispute stems from interpretation of the Lease Agreement, the Bankruptcy Court's Order, and Section 365(f) of the Bankruptcy Code.

Section 365 of the Bankruptcy Code governs executory contracts and unexpired leases. See 11 U.S.C. §365. Subsection (f) provides

> (1) except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts or conditions the assignment of such contract or lease, the trustee may assign such contractor lease under paragraph (2) of this subsection
> (2) the trustee may assign an executory contract or unexpired lease

> of the debtor only if
> (A) the trustee assumes such contract or lease in accordance with the provisions of this section; and
> (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease
> (3) notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

11 U.S.C. §365(f). While the bankruptcy court has discretion to excise or waive a bargained for element of a contract, "Congress has suggested that the modification of a contracting party's rights is not to be taken lightly." In re Joshua Slocum Ltd., 922 F.2d 1081, 1091 (3d. Cir. 1990). In Joshua Slocum, the Third Circuit Court of Appeals utilized a "material and economically significant" standard in determining whether a clause in the lease agreement may be enforced. Id. at 1092. Among elements which may be excised or waived, Section 365(f)(1) expressly permits assignment of executory contracts even where contracts prohibit such assignment. 11 U.S.C. §365(f)(1); In re Flemming Cos., 499 F.3d 300, 307 (3d. Cir. 2006).

Generally, however, Section 365 requires a debtor to assume a contract subject to the benefits and burdens thereunder. Flemming, 499 F.3d at 308 (citing In re ANC Rental Corp., 277 B.R. 226, 238 (Bankr. D. Del. 2002). "The [debtor] . . . may not blow hot and cold. If he accepts the contract, he accepts it *cum onere*. Flemming, 499 F.3d at 308. The *cum onere* rule "prevents the estate from avoiding obligations that are an integral part of an assumed agreement." Id. (quoting United Air Lines, Inc. v. U.S. Bankr. Trust Nat'l Ass'n as Tr. (In re UAL Corp.), 346 B.R. 456, 468 n.11 (Bankr. N.D. Ill. 2006)).

Judge Vazquez in his March 24, 2020 Opinion and Order remanding this matter back to this court stated,

> Pursuant to Section 365(f), the Bankruptcy Court held the Operating Covenant unenforceable as an **impermissible restriction on assignment**. However, **no "substantive right" was conferred to Walgreens**. Instead, the ruling conferred a right to the bankruptcy trustee to assign leases irrespective of anti-assignment clauses

> within those leases. **Walgreens' rights in the lease are separate from the assignment of those rights under Section 365.** Further, the interpretation of the Bankruptcy Order and its effects on the Lease goes to the merits of the case. . . Though Walgreens contends the Bankruptcy Order "permanently modif[ied]" its rights in the Lease . . . its rights are contained in the Lease . . . and not in the Bankruptcy Code.

(emphasis added). This court concurs with the New Jersey District Court and finds the Bankruptcy Court's order temporarily amended the Lease Agreement so as to permit the assignment of the Lease to Walgreens under Section 365(f) of the Bankruptcy Code. Moreover, this court finds the Operating Covenant is "material and economically significant" to the Lease. The Operating Covenant requires the Tenant to operate the entirety of the leased premises. Voiding this provision of the contract would afford Walgreens the right to "blow hot and cold." Voiding this provision is inconsistent with the statute and case law of Section 365 of the Bankruptcy Code. Thus, the court finds Millburn Mall has a reasonable probability of success on the merits. The third Crowe factor is satisfied.

Balance of the Hardship

The fourth Crowe factor provides that in considering the granting of a preliminary injunction the court must balance the relative hardship of the parties in granting or denying relief. Crowe, 90 N.J. at 134. Without a preliminary injunction Millburn Mall is likely to face further vacancies which could threaten its ability to operate. Further, the other businesses operating within the Shopping Center are likely to experience hardship without an anchor tenant attracting customers. Conversely, Walgreens contends they are likely to incur losses by continuing to operate the business at the Shopping Center. The court finds Millburn Mall is likely to suffer a greater hardship. Further, the court notes by choosing to assume the lease under Section 365 of the Bankruptcy Code, Walgreens agreed to be bound by the terms of the contract. The fourth Crowe factor is satisfied.

Plaintiff has satisfied each of the Crowe factors. Therefore, Plaintiff's Order to Show Cause preliminarily enjoining Walgreens from closing the store is GRANTED. Walgreens must continue to comply with the previous restrictions ordered by the court.

II. WALGREENS' REQUEST FOR THE POSTING OF A BOND

Walgreens further requests Millburn Mall be required to post bonds sufficient to cover Walgreens' losses should the court grant the preliminary injunction.

Walgreens claims by being ordered to operate, it would be forced to bear economic losses each month. To limit its economic losses, Walgreens argues Millburn Mall should be required to post a bond in the amount of $500,000 on a quarterly basis.

Millburn Mall contends Walgreens has not provided any evidence aside from a conclusory statement that the store has lost money. Notwithstanding, Millburn Mall argues by remaining open Walgreens is limiting its losses. Millburn Mall states had the Walgreens closed, it would still be liable to pay base rent and additional rent, which this year totals approximately $900,000. However, by staying open, Millburn Mall contends Walgreens would be able to limit its losses by receiving customers and revenue while the preliminary injunction remains in place. Walgreens assumed this lease from Drug Fair's Chapter 11 Bankruptcy and proceeded to open three competing Walgreens within approximately two miles of the Shopping Center. One who comes into equity must come with clean hands. A. Hollander & Son, Inc. v. Imperial Fur Blending Corp., 2 N.J. 235, 245 (1949). To claim Defendant will suffer financial hardship by keeping the present store open after Defendant has opened three stores within approximately two miles of the leased premises brings Defendant's clean hands into question.

New Jersey Court Rule 4:52-3 provides, "the court, on granting a temporary restraining order or interlocutory injunction or at any time, thereafter, may require security or impose such other equitable terms as it deems appropriate." The court does not find Millburn Mall should be required to post bonds sufficient to cover Walgreens losses. The court questions how three stores within an approximate two-mile radius of the Shopping Center is unrelated. The monetary harm is speculative at best without an expert's report.

Although Walgreens may suffer some financial hardship, such are the circumstances of businesses operating during the COVID-19 pandemic. Moreover, Walgreens has not provided a detailed accounting. Walgreens' request for the posting of a bond is DENIED.