

# SOMETHING BIG IS HAPPENING



**COUNSEL'S CORNER**

Details so far are sketchy, but here is what I have learned.

Recently Starbucks announced that it was closing all 379 Teavana locations by the end of 2017. Simon Property Group – the nation's largest shopping center owner / manager, was displeased.

Simon's concern, besides the obvious loss of income, is the secondary effect that store closings have on other retailers who may also be struggling. Retailers in vibrant, energetic, busy shopping centers enjoy better revenues than vendors in malls with vacancies.

Happy customers yield happy retailers. Happy retailers yield happy mall owners and operators, which increase shopping center values proportionately.

Simon asserted litigation in Indianapolis against Teavana, to prevent the coffee company's store closing. Simon claimed that Starbucks (Teavana's parent) was not financially stressed, unlike other retailers who had departed before the lease term had officially ended. Simon concluded that Teavana could well afford to continue operating the 77 Teavana stores in malls owned or operated by Simon.

Starbucks offered testimony that it would cost Starbucks approximately \$15 million to continue to operate 77 Teavana stores over a five-month period. And that Simon had adequately protected itself with lease covenants, requiring Starbucks to compensate Simon for its losses should Teavana close its stores.

Simon requested a temporary restraining order and injunction, *to force Teavana to continue in operations*. The court agreed, forcing Teavana to remain open – at least until the next hearing.

Understand this is a radical shift in legal thinking and judicial reasoning. TROs and injunctions are typically issued to show that the plaintiff will be irreparably harmed if

the status quo isn't frozen. And that a money award would not adequately compensate the plaintiff for its damages.

Courts are reluctant to issue TROs and injunctions that require continuous oversight. Judicial resources are scarce and it is impractical for courts to oversee a business. Judges, magistrates and other court functionaries do not have the time, nor the expertise, nor the bandwidth to inspect shopping centers and its tenants, or to receive these arguments at the next hearing:

*Simon:* Your Honor, Teavana is not following your instructions. Yes it's true that they are open the required hours and days, but there's only one employee inside. Not only could s/he not work the cash register, but s/he could not properly make my holiday skinny flat white with cinnamon, nutmeg and a hint of ginger.

*Teavana:* Untrue. Our second employee was on break at the time, and although our barista-employee may have struggled with an unusual seasonal beverage, s/he was and remains capable of making CocoCaramel Sea Salt Tea and Caramel Chai, our best sellers.

*Simon:* We have photos.

*Teavana:* We brought lattes.

And on it goes when courts are involved in forcing businesses to stay open. Or forcing anyone to do, well, anything. Anything short of sign here. Attend this class within 120 days. Present yourself to the title agent (or jail, prison or penitentiary) tomorrow at 10 a.m.

Pay \$84,392 plus court costs. Remove yourself from the building within five days.

Those orders are innately different than directing a business to continually operate. At what standard – what inventory – how many employees – what days and hours – what price points – what level of continuing marketing and advertising – what level of continuing employee training – which menus – using which suppliers - and all the minute daily decisions every business owner and manager makes every day.

Now to the legal component. Experts believed that parties to a contract (landlords and tenants, buyers and sellers, etc.) had the right to breach the contract and walk away. And that is why lawyers spend so much time drafting and negotiating default, notice and opportunity to cure defaults, and remedy provisions in contracts.

And particularly, “*go dark*” clauses in commercial leases.

It seems that this court may not be willing to allow the tenant to breach its contract and bail. Instead, if this court doesn't reverse its course at the next hearing,

Teavana may be required to remain open for business. Failure of Teavana to do so might result in contempt orders.

I'll report back when I have more intel. But at this moment, all commercial tenants have cause to be nervous.

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