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Simon says “Don’t Close Your Stores in My Shopping Centers”

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Simon Property Group is at it again. Two years ago, Simon took the shopping center world by storm when it obtained an injunction preventing Starbucks Corporation from shuttering 77 of its Teavana stores in Simon malls across the United States. While the *Simon Property Group L.P. v. Starbucks Corporatio*n decision gave shopping centers owners a moment of hope that they could prevent retailers from closing stores during the retail apocalypse, many shopping center professionals soon concluded that the court’s decision probably has little impact beyond the specific facts of that case. We analyzed that decision in our January 2018 article *“Decaffeinated: Simon Property Group L.P. v. Starbucks Corporation Is Not a Fix for the Retail Apocalypse”*. Undeterred by the narrow application of the *Starbucks* decision, Simon has once again taken aim at a retailer looking to close its stores in Simon malls.

In the recent decision *Abercrombie and Fitch Stores, Inc. v. Simon Property Group, LP*, Simon forced national retailer Abercrombie and Fitch to keep its doors open. In February 2019, Simon and Abercrombie began negotiating terms to renew 54 leases in Simon malls and to resolve a rent dispute. Most of the existing Abercrombie leases had expired or were set to expire soon. Simon and Abercrombie exchanged emails confirming the final deal terms for each location and agreeing that the parties would draft conforming documents. In the meantime, Abercrombie continued to operate in the leased spaces and it paid the rents due under the yet-to-be-drafted lease documents. Two months later – and only days before the COVID-19 pandemic stopped the world from spinning – Abercrombie sent Simon the Abercrombie-signed versions of the lease documents and encouraged Simon to have them executed “as quickly as possible.” Days later, Abercrombie closed all of its stores because of the COVID-19 pandemic, and Simon began sending its signed copies of the lease documents to Abercrombie in piecemeal. One day later, Simon closed all of its malls across the country due to the pandemic. That same day, Abercrombie attempted to retract its signatures on 42 of the lease documents citing “the current uncertainty regarding the impact of COVID-19.”

Simon promptly commenced suit seeking a declaratory judgment that the lease documents were valid and also seeking money damages and specific performance. Three weeks later, Abercrombie made clear its intent to permanently close its stores subject to the Simon agreements. Simon responded by seeking a temporary restraining order to prevent Abercrombie from permanently

closing these locations. The trial court agreed with Simon, and Abercrombie appealed.

The purpose of a temporary restraining order is to maintain the *status quo*. One compelling fact in the *Starbucks* decision was that each of the Teavana stores was open and operating at the time the court entered its injunction preventing any closures, such that the *status quo* was maintained. In the *Abercrombie* decision, however, Abercrombie had closed its stores before Simon sought an injunction. Abercrombie argued that compelling it to reopen these stores was an "improper mandatory injunction" and would make Abercrombie take action and engage in conduct that it was not already doing (i.e. re-open and operate in nearly 50 Simon malls). The court disagreed, explaining that the parties had been performing under the pending agreements for nearly two months before COVID-19 *temporarily* shut down Simon's malls; yet, Abercrombie decided to close its stores *permanently*. The injunction did not compel Abercrombie to re-open its stores in defiance of temporary closure orders imposed by state or local governments; the injunction merely prohibited Abercrombie from closing its stores permanently. While this explanation focuses on a distinction without a difference – Abercrombie's stores were closed, whether because of the COVID-19 pandemic or an Abercrombie business decision – the court reasoned that the *status quo* is determined as of "last, actual, peaceful, and non-contested status which preceded the pending controversy." The last, actual, peaceful, and non-contested status between Simon and Abercrombie existed *before* the COVID-19 pandemic forced Simon to close its malls, when Abercrombie was still operating in Simon's malls.

Although many shopping centers have seen tenants try to use the COVID-19 pandemic as a shield against their lease obligations, the *Abercrombie* decision is one of the few instances where the pandemic has actually benefitted a shopping center owner. The court did not say whether Simon would have been denied an injunction in the absence of COVID-19, but the court's distinction between a temporary closure and a permanent one and the timing of determining the *status quo* hints that the result might have been different Abercrombie had closed its stores before COVID-19 plagued the United States.

The *Abercrombie* decision is important for another reason as well. In each of its transmittals to Abercrombie, Simon's correspondence stated, "to be enforceable by or against a party, a final agreement between the parties must also be written and signed by both parties." Attorneys use this type of language in negotiations all the time, seeking to avoid being bound to a deal until the ink is dry. Abercrombie seems to have argued that it was not bound to any lease document that Simon had not countersigned by the time Abercrombie retracted its signatures. The court disagreed with Abercrombie here too, explaining that "absolute certainty of all contract terms is not required for a contract to be enforceable." The parties must only agree to the essential terms. Simon and Abercrombie had confirmed all the essential terms of each lease in email correspondence and memorialized that negotiations were complete long before the leases were drafted.

Additionally – and critically – "the parties' performance under an agreement will amount to an unambiguous and overt admission by both parties that a contract existed." Abercrombie kept operating its stores and started to pay – and Simon accepted – the rent due under each of these yet-to-be-drafted leases. Abercrombie also made the settlement payment to resolve the rent dispute. Under these facts, the court concluded that Simon presented *prima facie* evidence of enforceable agreements and did not hold Simon to its self-serving language that there would be no deal until the parties actually signed the documents. The *Abercrombie* decision is a cautionary tale for practitioners and business people alike: substance will (and should) prevail over form. If the parties act like an agreement exists, a court may find that one actually does exist. Had the court enforced Simon's disclaimer, Abercrombie may very well have been free to close its stores in Simon's malls.

Just as the *Starbucks* decision is limited by the specific facts in that case, the *Abercrombie* decision is similarly narrow. It does not empower shopping center owners to force their tenants to remain open and operating under all circumstances. It is, however, another Simon-led example of how shopping center owners are pushing back against retailers. Shopping center owners and retailers alike should take note.

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