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JUDGE MARY E. ROBERTS

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

BELLEVUE SQUARE, LLC, a Washington
limited liability company,

Plaintiff,

vs.

WHOLE FOODS MARKET PACIFIC
NORTHWEST, INC., a Delaware
corporation; WHOLE FOODS MARKET,
INC., a Texas corporation,

Defendants.

NO. 17-2-27617-1 SEA

ORDER GRANTING BELLEVUE SQUARE'S
MOTION FOR PRELIMINARY INJUNCTION

ORDER SETTING BOND AMOUNT

This matter came before the court on Plaintiff's Motion for Preliminary Injunction and
Order Setting Bond Amount. The court has reviewed and considered the following:

1. Plaintiff's Motion;
2. The First Declaration of Kevin Schreck, the Sealed Declaration of Kevin Schreck, and
the Declarations of Robert Dallain, Jim Melby, John Talbott, and Dr. Jarrad Harford;
3. Defendants' Response;

ORDER GRANTING PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION- 1

JUDGE MARY E. ROBERTS
King County Superior Court
Courtroom W905
516 Third Avenue
Seattle, WA 98104
206.477.1348

- 1 4. The Declarations of Robert Sulkin, Paul Hilliard, Jeff Turnas, the Sealed Declaration of
2 Jeff Turnas, and William Partin;
3 5. Plaintiff's Reply, with the Reply Declarations of David Nold and Jim Melby; and
4 6. The oral arguments on December 6, 2017, by David A. Nold on behalf of the plaintiff,
5 and by Robert M. Sulkin on behalf of the defendants.
6

7 The court finds that there are reasonable grounds for the granting the relief requested by the
8 plaintiff, and that reasonable notice under the circumstances was provided to the defendants as set
9 forth below. Based on the foregoing, the court makes the following:

10 **FINDINGS OF FACT**

11 1. Bellevue Square, LLC ("Bellevue Square") and Whole Foods Pacific Northwest,
12 Inc. ("Whole Foods") are parties in interest to a written lease executed July 23, 2015 ("Lease").
13

14 2. The Lease concerns retail space at Bellevue Square Shopping Center commonly
15 known as 10200 NE 4th Street, Bellevue, Washington ("Leased Premises").

16 3. The Leased Premises are comprised of approximately 34,000 square feet in
17 Bellevue Square.

18 4. The Lease contains the following express "Operating Covenant":

19 Tenant covenants to conduct and carry on Tenant's business in the Demised
20 Premises without interruption (excluding any temporary period during which
21 Tenant is closed for rebuilding or repairs following a casualty or condemnation or
22 by reason of any Force Majeure Events) for the first ten (10) Lease Years of the
23 Demised Term ("Tenant's Operating Covenant") and, for so long as Tenant's
24 Operating Covenant is in effect, shall keep the Demised Premises open for business
at a minimum during the days and hours designated from time to time by Landlord,
which at the time of the execution of this Lease Landlord designates to be as
follows:

1 Monday through Saturday 8:00 a.m. to 9:30 p.m.

2 Sunday 9:00 a.m. to 7:00 p.m.

3
4 5. The Lease also imposes a duty on Whole Foods to be open and operational for at
5 least the first 10 years of the 20-year Lease term.

6 6. The Lease contains a provision permitting assignment or sublease, with the express
7 written approval of Bellevue Square. Whole Foods has not requested that Bellevue Square consent
8 to an assignment or sublease.

9 7. The Lease contains a waiver of Bellevue Square's right to receive compensation for
10 various components of consequential damages otherwise available at law.

11 8. After Whole Foods opened its "365 by Whole Foods" store in September 2016 at
12 the Leased Premises, sales did not meet projections.

13 9. Whole Foods generates billions of dollars in profit each year.

14 10. On October 12, 2017, Whole Foods informed its customers via email that it
15 intended to vacate the Leased Premises on October 14, 2017. This is how Bellevue Square learned
16 of the closure.

17 11. Whole Foods' counsel admitted at oral argument that Whole Foods is in breach of
18 the Lease.

19 12. Bellevue Square was told by Whole Foods of the closure 15 minutes before the start
20 of the "Store Closing" sale. Whole Foods slashed its prices for what it held out to the public as its
21 final days of operation.
22
23
24

1 13. Whole Foods publicly asserted that issues with the Leased Premises caused its
2 decision, as reported in various outlets – including the Seattle Times. It did not cite financial
3 hardship as a reason for its closure, but blamed the “site”.

4 14. The Lease has a default provision that includes the following language:

5
6 In the event of any such default or breach by Tenant, Landlord may at any time
7 after any applicable cure period, with or without notice or demand and without
8 limiting Landlord in the exercise of a right or remedy which Landlord may have by
9 reason of such default or breach:

10 * * *

11 Maintain Tenant's right to possession, in which case this Lease shall continue in
12 effect whether or not Tenant has vacated or abandoned the Demised Premises. In
13 such event Landlord shall be entitled to enforce all Landlord's rights and remedies
14 under this Lease, including the right to recover the Rent, damages from Tenant's
15 default or breach, and any other payments as they may become due hereunder, and
16 **to specifically enforce Tenant's obligations hereunder and obtain injunctive
17 relief[.]**

18 * * *

19 Pursue any other remedy now or hereafter available to Landlord under the laws or
20 judicial decisions of the State of Washington.

21 15. Bellevue Square is experiencing the following harms as a result of Whole Foods'
22 closure: (1) increased unpredictability; (2) adverse impact on the leased premises; (3) impact on
23 lease negotiations with other tenants; (4) impact of concessions offered to Whole Foods; (5)
24 inability to recover percentage rent; (5) increased costs for remaining tenants; (6) negative impact
25 on relationship with lenders; (7) reduction in the reputation of Bellevue Square; (8) harm to
residents and the public. Many of these are consequential and indirect damages under law, for

1 which, pursuant to the Lease, Bellevue Square has waived the right to compensation. However,
2 these remain “harms” for purposes of determining the appropriateness of injunctive relief.

3 16. Each of the foregoing harms experienced by Bellevue Square is difficult to quantify
4 with reasonable certainty and impossible to quantify when such harms are aggregated.
5

6 17. Whole Foods has established only financial harm as a result of being compelled to
7 operate pursuant to the Lease. Whole Foods accepted the risk of operating at the Leased Premises
8 for a period of 10 years; the Lease contains no provision for a right to vacate if operation is
9 financially disadvantageous.

10 18. The Parties stipulated to the hearing date and to an agreed briefing schedule. As
11 such, ample notice was provided to the Parties.

12 19. A bond of \$2,000,000 satisfies the purposes of RCW 7.40.080.

13 Based on the above findings of fact, the court makes the following:
14

15 **CONCLUSIONS OF LAW**

16 1. Bellevue Square has satisfied each of the elements of a preliminary injunction
17 pursuant to *Tyler Pipe Indus., Inc. v. State Dep't. of Revenue*, 96 Wn.2d 785, 638 P.2d 1213
18 (1982):

19 a. It has a clear legal and equitable right to performance of the Lease.
20 Bellevue Square is likely to prevail on the merits of its claim for breach of the unambiguous Lease
21 with an express Operating Covenant.
22
23
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1 b. As the interim harm factor is beyond dispute and the enforceability of the
2 Operating Covenant at issue in this case is a purely legal question, this court may resolve this issue
3 on the merits.

4 c. Whole Foods' closure has given rise to a well-grounded fear of immediate
5 invasion of Bellevue Square's rights established herein.

6 d. Bellevue Square has demonstrated that Whole Foods' premature closure is
7 resulting in actual and substantial injury to it, including many forms of harm that cannot be
8 quantified with reasonable certainty.

9 e. Bellevue Square has demonstrated that the damages caused by Whole
10 Foods' breach of the Lease cannot be established with reasonable certainty. Money damages
11 cannot adequately compensate Bellevue Square. No plain, complete, speedy, and adequate remedy
12 at law exists to equally compensate Bellevue Square for Whole Foods' breach of the Lease. Thus,
13 any remedy at law would be inadequate and injunctive relief is appropriate.

14 2. Bellevue Square is entitled to specific performance of the Lease pursuant to *Crafts*
15 *v. Pitts*, 161 Wn.2d 15, 162 P.3d 382 (2007), as it has established the following with clear and
16 unequivocal evidence:

17 a. Bellevue Square's contract with Whole Foods is valid and binding;

18 b. Whole Foods has committed a breach of its contractual duty to comply with
19 the Operating Covenant, whereas Bellevue Square is not in breach of its obligations;

20 c. The Lease has definite and certain terms, including all essential terms as
21 well as an express right to specific performance;

1 d. The Lease is free from unfairness, fraud, and overreaching;
2 e. No adequate remedy at law exists to compensate Bellevue Square; and
3 f. Enforcement of the Lease will not be oppressive, unconscionable or result in
4 undue hardship to any party involved.

5 3. Upon an examination of the foregoing factors in light of the equities, and balancing
6 the relative interests of and harms to Bellevue Square, Whole Foods, and the public, the court
7 makes an equitable determination that injunctive relief in favor of Bellevue Square and specific
8 performance of the Lease by Whole Foods is appropriate.

9 4. This court concludes that any burden on the court as a result of enjoining Whole
10 Foods' breach of the Operating Covenant in the Lease will be minimal and will not require
11 continued supervision or intervention of the court.

12 5. The assignment provision of the Lease does not undermine any of the foregoing;
13 indeed, it supports it. Although Whole Foods has the right to assign the Lease, it may do so only
14 with Bellevue Square's written consent. Whole Foods has not requested to assign the Lease.
15 Therefore, Bellevue Square retains the right to ensure that a grocer is operating within the Leased
16 Premises for at least the ten years of the Operating Covenant, which is wholly consistent with the
17 Lease.

18 6. The court does not reach the question of whether Tenant is an "anchor". Assuming
19 *arguendo* that it is not, due in part to and in recognition of its size relative to admitted anchors
20 Macy's and Nordstrom, the court concludes that a smaller tenant can clearly have a broad impact
21 worthy of specific performance. Bellevue Square has established that impact in this case.

1 7. Whole Foods urges that foreign cases do not support the entry of the relief
2 requested, and argues strenuously that all prior cases granting this relief are distinguishable. As
3 none of these cases binds this court, such analysis is not dispositive. However, the court notes that
4 the foreign authority on point overwhelmingly directs a case-by-case analysis of the relevant
5 factors, as does Washington authority governing the relief requested.
6

7 8. Whole Foods is not at risk of insolvency if ordered to operate in the Leased
8 Premises.

9 9. Whole Foods admits that it is in breach of the Lease. This concession is at odds
10 with its argument that payment of rent satisfies all its obligations under the Lease.

11 10. Whole Foods' interpretation of the Lease would render its Operating Covenant
12 wholly superfluous.

13 11. Whole Foods argues that Bellevue Square's duty under the Lease to mitigate its
14 damages is inconsistent with the relief sought. It is not. This section only applies to Bellevue
15 Square if it terminates the Lease; rather than continue it, as it also has the right to do and has done.
16 The Lease has not been terminated. Furthermore, the duty to mitigate is a duty imposed by law,
17 and thus its inclusion or exclusion from the Lease would not bear on the issues before this court.
18

19 12. The court rules, as a matter of law, that Whole Foods' Operating Covenant is an
20 express covenant to operate in the Leased Premises for the first ten years of the Lease term. The
21 remedy of specific performance was specifically bargained for in the Lease. The waiver of
22 consequential damages does not obviate the clear and irreparable harms to Bellevue Square which
23 are requisites of the relief requested. Indeed, the absence of that remedy at law, when read with
24

1 the remainder of the Lease, strengthens the legal and equitable arguments in favor of enforcing
2 Whole Foods' Operating Covenant.

3 13. Declining to grant this relief would, in effect, shift the burden of profitability to
4 Bellevue Square. The Lease did not shift to Bellevue Square the burden of Whole Foods' willful
5 abandonment of the Leased Premises within the first ten years of the Lease term.

6
7 Based on the above findings of fact and conclusions of law, the court makes the following:

8 **ORDER**

9 Based on the foregoing findings of fact and conclusions of law, it is hereby ORDERED
10 that:

- 11 1. Plaintiff's Motion is GRANTED. Specifically,
12
13 2. Effective fourteen (14) days from the date of this Order, Defendant is ENJOINED from
14 breaching the Operating Covenant in Section 7.2 of the Lease, and is ordered by then to
15 reopen for business and work in good faith with Bellevue Square to fulfill the purposes
16 of the Lease.
17 3. This injunctive relief is conditioned on Plaintiff's posting of a bond with the registry of
18 the Court in the amount of \$2,000,000.


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21 See digital signature
22 JUDGE MARY E. ROBERTS

King County Superior Court
Judicial Electronic Signature Page

Case Number: 17-2-27617-1
Case Title: BELLEVUE SQUARE VS WHOLE FOODS MARKET ET ANO

Document Title: ORDER GRANTING INJUNCTION

Signed by: Mary Roberts
Date: 12/7/2017 9:00:00 AM

A rectangular box containing a handwritten signature in cursive script, which appears to be "Mary".

Judge/Commissioner: Mary Roberts

This document is signed in accordance with the provisions in GR 30.

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